# UNITED STATES REPORTS

## VOLUME 436

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1977

OPINIONS OF MAY 1 (CONCLUDED) THROUGH JUNE 12, 1978

ORDERS OF MAY 12 THROUGH JUNE 12, 1978

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

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

ERRATA

127 U. S. 494: The word "SAVING" in the title of the case should be "SAVINGS".

409 U. S. 492, line 23: "lease" should be "police".

423 U. S. 327, next to last line of syllabus: Delete "171 U. S. App. D. C. 66, 518 F. 2d 459,".

434 U. S. 346, line 1: "union" should be "employer".

435 U. S. LX, right-hand column, line 22: "Ianelli" should be "Iannelli".

435 U. S. 11, line 11: *"Ianelli"* should be *"Iannelli"*.

435 U. S. 619: In line 10 of paragraph 1 (b), change *"Sherbert* v. *Verner"* to *"Torcaso* v. *Watkins"*.

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

---

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

RETIRED

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

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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.

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1977

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## MEMPHIS LIGHT, GAS & WATER DIVISION ET AL. *v.* CRAFT ET AL.

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

No. 76–39. Argued November 2, 1977—Decided May 1, 1978

Because of two separate sets of gas and electric meters in their newly purchased house, respondents, for about a year after moving in, received separate monthly bills for each set of meters from a municipal utility. During this period respondents' utility service was terminated five times for nonpayment of bills. Despite respondent wife's good-faith efforts to determine the cause of the "double billing," she was unable to obtain a satisfactory explanation or any suggestion for further recourse from the utility's employees. Each bill contained a "final notice" stating that payment was overdue and that service would be discontinued if payment was not made by a certain date but did not apprise respondents of the availability of a procedure for discussing their dispute with designated personnel who were authorized to review disputed bills and to correct any errors. Respondents brought a class action in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief and damages against the utility and several of its officers and employees for terminations of utility service allegedly without due process of law. After refusing to certify the action as a class action, the District Court determined that respondents' claim of entitlement to continued

utility service did not implicate a "property" interest protected by the Fourteenth Amendment, and that, in any event, the utility's termination procedures comported with due process. While affirming the District Court's refusal to certify a class action, the Court of Appeals held that the procedures accorded to respondents did not comport with due process. *Held:*

1. Although respondents as the only remaining plaintiffs apparently no longer desire a hearing to resolve a continuing dispute over their bills, the double-billing problem having been clarified during this litigation, and do not aver that there is a present threat of termination of service, their claim for actual and punitive damages arising from the terminations of service saves their cause from the bar of mootness. Pp. 7–9.

2. Under applicable Tennessee decisional law, which draws a line between utility bills that are the subject of a bona fide dispute and those that are not, a utility may not terminate service "at will" but only "for cause," and hence respondents assert a "legitimate claim of entitlement" within the protection of the Due Process Clause of the Fourteenth Amendment. Pp. 9–12.

3. Petitioners deprived respondents of an interest in property without due process of law. Pp. 12–22.

(a) Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of an administrative procedure for protesting a threatened termination of utility services as unjustified, and since no such notice was given respondents, despite "good faith efforts" on their part, they were not accorded due notice. Pp. 13–15.

(b) Due process requires, at a minimum, the provision of an opportunity for presenting to designated personnel empowered to rectify error a customer's complaint that he is being overcharged or charged for services not rendered, and here such a procedure was not made available to respondents. The customer's interest in not having services terminated is self-evident, the risk of erroneous deprivation of services is not insubstantial, and the utility's interests are not incompatible with affording the notice and procedure described above. *Mathews* v. *Eldridge*, 424 U. S. 319. Pp. 16–19.

(c) The available common-law remedies of a pretermination injunction, a post-termination suit for damages, and a post-payment action for a refund do not suffice to cure the inadequacy in petitioner utility's procedures. The cessation of essential utility services for any appreciable time works a uniquely final deprivation, and judicial remedies are

particularly unsuited to resolve factual disputes typically involving sums too small to justify engaging counsel or bringing a lawsuit. Pp. 19–22.

534 F. 2d 684, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 22.

*Frierson M. Graves, Jr.*, argued the cause and filed a brief for petitioners.

*Thomas M. Daniel* argued the cause for respondents. With him on the brief were *Elliot Taubman* and *Bruce Mayor*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This is an action brought under 42 U. S. C. § 1983 by homeowners in Memphis, Tenn., seeking declaratory and injunctive relief and damages against a municipal utility and several of its officers and employees for termination of utility service allegedly without due process of law. The District Court determined that respondents' claim of entitlement to continued utility service did not implicate a "property" interest protected by the Fourteenth Amendment, and that, in any event, the utility's termination procedures comported with due process. The Court of Appeals reversed in part. We granted certiorari to consider this constitutional question of importance in the operation of municipal utilities throughout the Nation.

## I

Memphis Light, Gas and Water Division (MLG&W) [1] is a division of the city of Memphis which provides utility service.

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**David Sive* filed a brief for the National Council of the Churches of Christ as *amicus curiae*.

[1] Although MLG&W is listed as one of the petitioners, the District Court dismissed the action as to the utility itself because "a municipality or governmental unit standing in that capacity is not a 'person' within the meaning" of § 1983. Pet. for Cert. 43. The Court of Appeals did not

It is directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government. As a municipal utility, MLG&W enjoys a statutory exemption from regulation by the state public service commission. Tenn. Code Ann. §§ 6–1306, 6–1317 (1971).

Willie S. and Mary Craft, respondents here,[2] reside at 1019 Alaska Street in Memphis. When the Crafts moved into their residence in October 1972, they noticed that there were two separate gas and electric meters and only one water meter serving the premises. The residence had been used previously as a duplex. The Crafts assumed, on the basis of information from the seller, that the second set of meters was inoperative.

In 1973, the Crafts began receiving two bills: their regular bill, and a second bill with an account number in the name of Willie *C.* Craft, as opposed to Willie *S.* Craft. Separate monthly bills were received for each set of meters, with a city service fee [3] appearing on each bill. In October 1973, after learning from a MLG&W meter reader that both sets of meters were running in their home, the Crafts hired a private plumber and electrical contractor to combine the meters into one gas and one electric meter. Because the contractor did not consolidate the meters properly, a condition of which the Crafts were not aware, they continued to receive two bills until Jan-

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disturb that determination, and respondents have not sought review of the point in this Court. The individual petitioners, who are sued in both their official and personal capacities, are the utility's president and general manager, vice president, members of the Board of Commissioners, and two employees who have had responsibility for terminating utility services. They will be referred to throughout as either "MLG&W" or "petitioners."

[2] Of those who brought the original action, only the Crafts remain. The parties have not sought review in this Court of the rulings made below with respect to the other plaintiffs.

[3] The city service fee is a separate item on the regular utility bill, as required by municipal ordinance.

uary 1974. During this period, the Crafts' utility service was terminated five times for nonpayment.

On several occasions, Mrs. Craft missed work and went to the MLG&W offices in order to resolve the "double billing" problem. As found by the District Court, Mrs. Craft sought in good faith to determine the cause of the "double billing," but was unable to obtain a satisfactory explanation or any suggestion for further recourse from MLG&W employees. The court noted:

> "On one occasion when Mrs. Craft was attempting to avert a utilities termination, after final notice, she called the defendant's offices and explained that she had paid a bill, but was given no satisfaction. The procedure for an opportunity to talk with management was not adequately explained to Mrs. Craft, although she repeatedly tried to get some explanation for the problems of two bills and possible duplicate charges." Pet. for Cert. 38–39.

In February 1974, the Crafts and other MLG&W customers filed this action in the District Court for the Western District of Tennessee. After trial, the District Court refused to certify the plaintiffs' class and rendered judgment for the defendants. Although the court apparently was of the view that plaintiffs had no property interest in continued utility service while a disputed bill remained unpaid, it nevertheless addressed the procedural due process issue. It acknowledged that respondents had not been given adequate notice of a procedure for discussing the disputed bills with management, but concluded that "[n]one of the individual plaintiffs [was] deprived of [a] due process opportunity to be heard, nor did the circumstances indicate any substantial deprivation except in the possible instance of Mr. and Mrs. Craft." *Id.*, at 45.[4] The court

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[4] The District Court's conclusion was advanced with little explanation, other than a reference to MLG&W's credit extension program. In an earlier discussion, the opinion offered a description of the utility's pro-

expressed "hope," "whether on the principles of [pendent] jurisdiction, or on the basis of a very limited possible denial of due process to Mr. and Mrs. Craft," that credit in the amount of $35 be issued to reimburse the Crafts for "duplicate and unnecessary charges made and expenses

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cedures. First, the court listed the steps involved in a termination: (i) Approximately four days after a meter reading date, a bill is mailed to the service location or other address designated by the customer. The last day to pay the net amount would be approximately 20 days after the meter reading date. (ii) Approximately 24 days after the meters are read, a "final notice" is mailed stating that services will be disconnected within four days if no payment is received or other provision for payment is made. (iii) Electric service is then terminated by the meter reader, unless the customer assures him that payment is in the mail, shows a paid receipt, or explains that nonpayment was due to illness. If there is no communication prior to termination, the meter reader or serviceman is instructed to leave a cutoff notice giving information about restoration of service. (iv) Approximately five days after the electric service cutoff, the remaining services are terminated if the customer has not paid the bill or made other arrangements for payment. Pet. for Cert. 34–35.

The court also noted that on or about March 1, 1973, MLG&W instituted an "extended payment plan." This generous program allows customers able to demonstrate financial hardship to pay only one-half of a past due bill with the balance to be paid in equal installments over the next three bills. The plaintiffs in this action were participants in the plan. *Id.*, at 36.

Finally, the court observed that MLG&W provided a procedure for resolution of disputed bills:

"Credit counselors assist customers who have difficulty with payments or disputes concerning their bills with MLG&W. If those counselors cannot satisfy the customer, then the customer is referred to management personnel; generally the chief clerk in the department; then the supervisor in credit and collection. In addition, a dissatisfied customer may appeal to the Board of Commissioners of MLG&W as to complaints regarding bills, service, termination of service or any other matter relating to the operation of the Division. A customer may, if he so desires, be accompanied by an appropriate representative. The billing of customers, the determination as to when a final notice is sent, and the termination of service [are] governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W." *Id.*, at 36–37.

incurred by [them] with respect to terminations which should have been unnecessary had effectual relief been afforded them as requested." The court also recommended "that MLG&W in the future send a certified or registered mail notice of termination at least four days prior to termination," and that such notice "provide more specific information about customer service locations and personnel available to work out extended payment plans or adjustments of accounts in genuine hardships or appropriate situations." *Id.*, at 46–47.[5]

On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court's refusal to certify a class action, but held that the procedures accorded to the Crafts did not comport with due process. 534 F. 2d 684 (1976).

On July 12, 1976, petitioners sought a writ of certiorari in this Court to determine (i) whether the termination policies of a municipal utility constitute "state action" under the Fourteenth Amendment; (ii) if so, whether a municipal utility's termination of service for nonpayment deprives a customer of "property" within the meaning of the Due Process Clause; and (iii) assuming "state action" and a "property" interest, whether MLG&W's procedures afforded due process of law in this case.[6] On February 22, 1977, we granted certiorari. 429 U. S. 1090. We now affirm.

## II

There is, at the outset, a question of mootness. Although the parties have not addressed this question in their briefs, "they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual

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[5] In its order filed on December 30, 1974, the court acknowledged that defendants had issued the recommended credit and "instituted some new procedures which will give more definitive and adequate notice to customers of possible or impending cut-off of services." *Id.*, at 49. See n. 16, *infra*.

[6] Petitioners have abandoned their contention that "state action" is not present in this case. Brief for Petitioners 44.

'case or controversy,' *Richardson* v. *Ramirez,* 418 U. S. 24 (1974) . . . ." *Sosna* v. *Iowa,* 419 U. S. 393, 398 (1975).

As the case comes to us, the only remaining plaintiffs are respondents Willie S. and Mary Craft. Since the Court of Appeals affirmed the District Court's refusal to certify a class, the existence of a continuing "case or controversy" depends entirely on the claims of respondents. Cf. *Sosna* v. *Iowa, supra,* at 399, 402. It appears that respondents no longer desire a hearing to resolve a continuing dispute over their bills, as the double-meter problem has been clarified during this litigation.[7] Nor do respondents aver that there is a present threat of termination of service. "An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 584 (1971). Respondents insist, however, that the case is not moot because they seek damages and declaratory relief, and because the dispute that occasioned this suit is "capable of repetition, yet evading review." Tr. of Oral Arg. 45–46.

We need not decide whether this case falls within the special rule developed in *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498 (1911); see *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Roe* v. *Wade,* 410 U. S. 113, 125 (1973), to permit consideration of questions which, by their very nature, are not likely to survive the course of a normal litigation. Respondents' claim for actual and punitive damages arising from MLG&W's terminations of service saves this cause from the bar of mootness. Cf. *Powell* v. *McCormack,* 395 U. S. 486, 496–500 (1969). Although we express no opinion as to the

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[7] "Not until after the action was filed were the Crafts able to discover that they continued to receive double computer billings because MLG&W failed to combine the two accounts properly (A. 146–150), or that, as a result of the double computer billings, MLG&W had overcharged them for gas service and city service fees." Brief for Respondents 5.

validity of respondents' claim for damages,[8] that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed.

III

The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U. S. 593, 602 (1972).

The outcome of that inquiry is clear in this case. In defining a public utility's privilege to terminate for nonpayment of proper charges, Tennessee decisional law draws a line between utility bills that are the subject of a bona fide dispute and those that are not.

> "A company supplying electricity to the public has a right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot., 112 A. L. R. 237 (1938). An excep-

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[8] The District Court found that "[o]f the balance claimed by MLG&W in March, 1974, some involved possible gas overcharges and double or duplicate billings with respect to city service fees." Pet. for Cert. 39. Presumably, respondents also seek recovery for the loss of pay occasioned by Mrs. Craft's several visits to the offices of MLG&W "which should have been unnecessary had effectual relief been afforded them as requested." *Id.,* at 46.

While not urging mootness, petitioners assert that their compliance with the District Court's recommendation that a $35 credit be issued to the Crafts removes any claim for damages from this case. We do not understand the District Court's suggestion to have been an award of damages. The validity of the damages claim is a matter for initial determination by the courts below.

tion to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele* v. *Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A. L. R. 237, 241 (1938); see also 43 Am. Jur., Public Utilities and Services, Sec. 65; Annot., 28 A. L. R. 475 (1924). If the public utility discontinues service for nonpayment of a disputed amount it does so at its peril and if the public utility was wrong (e. g., customer overcharged), it is liable for damages. *Sims* v. *Alabama Water Co.*, 205 Ala. 378, 87 So. 688, 690, 28 A. L. R. 461 (1920)." *Trigg* v. *Middle Tennessee Electric Membership Corp.*, 533 S. W. 2d 730, 733 (Tenn. App. 1975), cert. denied (Tenn. Sup. Ct. Mar. 15, 1976).[9]

The *Trigg* court also rejected the utility's argument that plaintiffs had agreed to be bound by the utility's rules and regulations, which required payment whether or not a bill is received. "A public utility should not be able to coerce a customer to pay a disputed claim." *Ibid.*[10]

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[9] Tennessee's formulation of a public utility's privilege to terminate service for nonpayment of an undisputed charge is in accord with the common-law rule. See generally 64 Am. Jur. 2d, Public Utilities §§ 63–64 (1972); Annot., 112 A. L. R. 237, 241 (1938); Note, The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement, 62 Colum. L. Rev. 312, 326 (1962).

[10] Petitioners attempt to avoid the force of *Trigg* by referring to several Tennessee decisions which state the general rule that a utility may terminate service for nonpayment of undisputed charges or noncompliance with reasonable rules and regulations. These authorities, however, do not cast doubt upon the exception recognized in *Trigg* for a customer who tenders the undisputed amount, but withholds complete payment because of a bona fide dispute. See *Patterson* v. *Chattanooga*, 192 Tenn. 267, 241 S. W. 2d 291 (1951); *Farmer* v. *Nashville*, 127 Tenn. 509, 156 S. W. 189 (1913); *Jones* v. *Nashville*, 109 Tenn. 550, 72 S. W. 985 (1903); *Crumley* v. *Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058 (1897); *Watauga Water Co.* v. *Wolfe*, 99 Tenn. 429, 41 S. W. 1060 (1897).

Petitioners also rely on *Lindsey* v. *Normet*, 405 U. S. 56 (1972). There,

State law does not permit a public utility to terminate service "at will." Cf. *Bishop* v. *Wood,* 426 U. S. 341, 345–347 (1976). MLG&W and other public utilities in Tennessee are obligated to provide service "to all of the inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause," *Farmer* v. *Nashville,* 127 Tenn. 509, 515, 156 S. W. 189, 190 (1913), and may not terminate service except "for nonpayment of a just service bill," *Trigg,* 533 S. W. 2d, at 733. An aggrieved customer may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. *Ibid.* The availability of such local-law remedies is evidence of the State's recognition of a protected interest. Although the customer's right to continued service is conditioned upon payment of the charges properly due, "[t]he Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership." *Fuentes* v. *Shevin,* 407 U. S. 67, 86 (1972). Because petitioners may terminate service only "for cause," [11] respondents

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the Court upheld an Oregon statute that required a tenant seeking a continuance of an eviction hearing to post security for accruing rent during the continuance, and limited the issues triable in an eviction proceeding to the questions of physical possession, forcible withholding, and legal right to possession. This reliance is misplaced. First, the Court merely held that the Oregon procedures comported with due process, without intimating that a tenant's claim to continued possession during a rent dispute failed to implicate a "property" interest. Second, "[t]he tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a *continuance* of the hearing. . . . [T]he tenant was not deprived of his possessory interest even for one day without opportunity for a hearing." *Fuentes* v. *Shevin,* 407 U. S. 67, 85 n. 15 (1972) (emphasis in original).

[11] In *Arnett* v. *Kennedy,* 416 U. S. 134 (1974), "the Court concluded that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection." *Bishop* v. *Wood,* 426 U. S. 341, 345 n. 8 (1976). See *Arnett* v. *Kennedy, supra,* at 166 (POWELL, J., concurring in part); cf. *Board of Regents* v. *Roth,* 408 U. S. 564, 578 (1972).

assert a "legitimate claim of entitlement" within the protection of the Due Process Clause.

## IV

In determining what process is "due" in this case, the extent of our inquiry is shaped by the ruling of the Court of Appeals. We need go no further in deciding this case than to ascertain whether the Court of Appeals properly read the Due Process Clause to require (i) notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill, 534 F. 2d, at 688, and (ii) " '[an] established [procedure] for resolution of disputes' " or some specified avenue of relief for customers who "dispute the existence of the liability," *id.*, at 689.[12]

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[12] The Court of Appeals did refer to its earlier decision in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F. 2d 153 (1973), which approved a comprehensive remedy for a due process violation, including investigation of every communicated protest by a management official, provision of a hearing before such an official, and an opportunity to stay the termination upon the posting of an appropriate bond. *Id.*, at 159–160, 168–169. These procedures were fashioned in response to findings, based on uncontradicted evidence, of hostility and arrogance on the part of the collection-oriented clerical employees, *id.*, at 168. No such findings were made here, and the Court of Appeals' ruling did not purport to require a similar remedy in this case.

Respondents do request certain additional procedures: "an impartial decision maker," who may be a responsible company official; "the opportunity to present information and rebut the records presented"; and "a written decision," which apparently can be rendered after termination or payment. Tr. of Oral Arg. 28, 31; Brief for Respondents 31. As respondents have not cross-petitioned, cf. *Strunk* v. *United States*, 412 U. S. 434, 437 (1973), we do not decide whether—or under what circumstances—any of these additional procedures may be appropriate. We do note that the magnitude of the numbers of complaints of overcharge would be a relevant factor in determining the appropriateness of more formal procedures than we approve in this case. The resolution of a disputed bill normally presents a limited factual issue susceptible of informal resolution.

A

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950) (citations omitted). The issue here is whether due process requires that a municipal utility notify the customer of the availability of an avenue of redress within the organization should he wish to contest a particular charge.

The "final notice" contained in MLG&W's bills simply stated that payment was overdue and that service would be discontinued if payment was not made by a certain date. As the Court of Appeals determined, "the MLG&W notice only warn[ed] the customer to pay or face termination." 534 F. 2d, at 688–689. MLG&W also enclosed a "flyer" with the "final notice." One "flyer" was distributed to about 40% of the utility's customers, who resided in areas serviced by "credit counseling stations." It stated in part: "If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also." No mention was made of a procedure for the disposition of a disputed claim. A different "flyer" went to customers in the remaining areas. It stated: "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is any dispute concerning the amount due, bring your bill to the office at . . . , or phone . . . ." *Id.*, at 688 n. 4.

The Court of Appeals noted that "there is no assurance that the Crafts were mailed the just mentioned flyer," *ibid.*, and implicitly affirmed the District Court's finding that Mrs. Craft was never apprised of the availability of a

procedure for discussing her dispute "with management." [13] The District Court's description of Mrs. Craft's repeated efforts to obtain information about what appeared to be unjustified double billing—"good faith efforts to pay for [the Crafts'] utilities as well as to straighten out the problem"—makes clear that she was not adequately notified of the procedures asserted to have been available at the time.[14]

Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane* v. *Central Hanover Trust Co., supra,* at 314. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." [15] Notice in a case of this kind

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[13] We do not understand the District Court's reference to "an opportunity to talk with management" as implying necessarily that Mrs. Craft should have been given an opportunity to discuss her bills with corporate officers of MLG&W. Rather, the point was that Mrs. Craft was not informed of the opportunity to meet with designated personnel who were duly authorized to review disputed bills with complaining customers and to correct any errors.

[14] Pet. for Cert. 39. William T. Mullen, secretary-treasurer of MLG&W, testified that the utility processed 33,000 "high bill" complaints in 1973. App. 130. He conceded, however, that no description of a dispute resolution process was ever distributed to the utility's customers, *id.,* at 162–163, 176, and there is no indication in the record that a written account of such a procedure was accessible to customers who had complaints about their bills. Mrs. Craft's case reveals that the opportunity to invoke that procedure, if it existed at all, depended on the vagaries of "word of mouth referral," *id.,* at 163.

[15] See, *e. g., Wolff* v. *McDonnell,* 418 U. S. 539, 564 (1974); *Morrissey* v. *Brewer,* 408 U. S. 471, 486–487 (1972); *In re Gault,* 387 U. S. 1, 33 (1967); *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 171–172 (1951) (Frankfurter, J., concurring).

The dissenting opinion of MR. JUSTICE STEVENS asserts that the Court's decision "trivializes" procedural due process. *Post,* at 22. While recognizing that other information would be "helpful," the dissent would hold

does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents—despite "good faith efforts" on their part—they were deprived of the notice which was their due.[16]

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that "a homeowner surely need not be told how to complain about an error in a utility bill . . . ." *Post,* at 26. In a different context a person threatened with the deprivation of a protected interest need not be told "how to complain." But the prior decisions of this Court make clear that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* at 481; *Mathews* v. *Eldridge,* 424 U. S. 319, 334 (1976). In the particular circumstances of a threat to discontinue utility service, the homeowner should not be left in the plight described by the District Court in this case. Indeed, the dissent's view identifies the constitutional flaw in petitioners' notice procedure. The Crafts were told that unless the double bills were paid by a certain date their electricity would be cut off. But—as the Court of Appeals held—this skeletal notice did not advise them of a procedure for challenging the disputed bills. Such notice may well have been adequate under different circumstances. Here, however, the notice is given to thousands of customers of various levels of education, experience, and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly of the availability of an opportunity to present their complaint. In essence, recipients of a cutoff notice should be told where, during which hours of the day, and before whom disputed bills appropriately may be considered. The dissent's restrictive view of the process due in the context of this case would erect an artificial barrier between the notice and hearing components of the constitutional guarantee of due process.

[16] Petitioners have moved to clarify and regularize their notice procedure, and it is possible that the revised notice presently afforded may be entirely adequate. Developed in response to a suggestion made by the District Court, it lists "methods of contact" and states in part that trained "Credit Counselors are available to clear up any questions, discuss disputed bills or to make any needed adjustments. There are supervisors and other management personnel available if you are not satisfied with the answers or solutions given by the Credit Counselors." App. 193.

We also note that Tennessee law requires that the board of supervisors of each independent utility district, as opposed to a utility division of a

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This Court consistently has held that "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff* v. *McDonnell,* 418 U. S. 539, 557–558 (1974). We agree with the Court of Appeals that due process requires the provision of an opportunity for the presentation to a designated employee of a customer's complaint that he is being overcharged or charged for services not rendered.[17] Whether or not such a procedure may be available to other MLG&W customers, both courts below found that it was not made available to Mrs. Craft.[18] Petitioners have not made the requisite showing for overturning these "concurrent findings of fact by two courts below . . . ." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U. S. 271, 275 (1949).[19]

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municipality, "maintain a set of rules and regulations regarding the adjustment of all complaints which may be made to the district concerning . . . the adjustment of bills," and that such rules "be posted or otherwise available for convenient inspection by customers and members of the public in the offices of the district . . . ." Tenn. Code Ann. § 6–2618 (b) (Supp. 1977).

[17] "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U. S. 373, 386 (1908). The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a "due process hearing" in appropriate circumstances. See, *e. g., Goss* v. *Lopez,* 419 U. S. 565, 581–584 (1975). See generally Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267 (1975).

[18] In *Goss* v. *Lopez, supra,* at 568 n. 2, and 583, the Court noted that an informal disciplinary procedure obtaining at the particular high school "was not followed in this case."

[19] The dissent advances its own reading of the record in this case, but offers no justification for sidestepping the determinations made below. There is no dispute that the District Court found that the "procedure for an opportunity to talk with management was not adequately explained to Mrs. Craft." See *post,* at 24 n. 6. The trial court also expressed a measure of disquietude over the treatment accorded Mrs. Craft when it sug-

Our decision in *Mathews* v. *Eldridge,* 424 U. S. 319 (1976), provides a framework of analysis for determining the "specific dictates of due process" in this case.

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: 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 addi-

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gested a credit to reimburse respondents for "duplicate and unnecessary charges made and expenses incurred by [them] with respect to terminations which should have been unnecessary had effectual relief been afforded them as requested." The Court of Appeals was even more explicit in its criticism of MLG&W's procedures. The very notices relied upon by the dissent, *post,* at 23, were found inadequate: "[T]he MLG&W notice fails to mention 'that a dispute concerning the amount due might be resolved through discussion with representatives of the company,' " 534 F. 2d 684, 688 (1976), and "only warns the customer to pay or face termination." *Id.,* at 688–689, and n. 4. And that the Court of Appeals found an absence of a constitutional hearing is the only sound way to read its statement that the utility "provides no avenue for customers who . . . dispute the existence of the liability (Crafts)." *Id.,* at 689.

These findings are not undermined, as the dissent suggests, by Mrs. Craft's ability ultimately to glean some understanding of her billing problem after several, time-consuming trips to MLG&W's office—in the District Court's words, after "she repeatedly tried to get some explanation for the problems of two bills and possible duplicate charges." Nor are they placed in question by the fact that an employee of uncertain authority told Mrs. Craft, apparently without explanation or attempt at investigation, "[w]ell, you have to pay on the other" bill. App. 91. Fundamental fairness, not simply considerations of "courteous" treatment of customers, *post,* at 25 n. 7, informs the constitutional requirement of notice and the actual provision of a timely opportunity to meet with designated personnel who are duly authorized to review disputed bills and to correct any errors.

tional or substitute procedural requirement would entail." *Id.*, at 334–335.

Under the balancing approach outlined in *Mathews,* some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services. The customer's interest is self-evident. Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And the risk of an erroneous deprivation, given the necessary reliance on computers,[20] is not insubstantial.[21]

The utility's interests are not incompatible with affording the notice and procedure described above. Quite apart from its duty as a public service company, a utility—in its own business interests—may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury. Cf. *Goss* v. *Lopez,* 419 U. S. 565, 583 (1975). Nor should "some kind of hearing" prove burdensome. The opportunity for a meeting with a responsible employee empowered to resolve the dispute could be afforded well in advance of the scheduled date of termination.[22] And petitioners would retain the option to terminate

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[20] In recent years Congress has been concerned by the problems of computer error. See, *e. g.,* S. Rep. No. 93–278, p. 5 (1973) (billing errors in consumer credit transactions); Senate Committee on Government Operations, Problems Associated with Computer Technology in Federal Programs and Private Industry: Computer Abuses, 94th Cong., 2d Sess. (Comm. Print 1976).

[21] See, *e. g., Palmer* v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d, at 158; *Davis* v. *Weir,* 497 F. 2d 139, 142 (CA5 1974); *Bronson* v. *Consolidated Edison Co. of New York,* 350 F. Supp. 443, 448 n. 11 (SDNY 1972) (16% of the complaints investigated by New York Public Service Commission resulted in adjustments in favor of the customer).

[22] Because petitioners provide for at least a 30-day period between the mailing of the bill and the actual termination of service, Brief for Petitioners 28, it is unlikely that the informal procedure required in this case

service after affording this opportunity and concluding that the amount billed was justly due.

C

Petitioners contend that the available common-law remedies of a pretermination injunction, a post-termination suit for damages, and post-payment action for a refund are sufficient to cure any perceived inadequacy in MLG&W's procedures.[23]

Ordinarily, due process of law requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest. See *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1971). On occasion, this Court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional "advance procedural safeguards," *Ingraham* v. *Wright,* 430 U. S. 651, 680 (1977); see *Mathews* v. *Eldridge, supra,* at 339–349.[24]

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will occasion material delay in payment. The public utility enjoys a broad discretion in the scheduling and structuring of this "hearing," provided that the customer is afforded adequate time for effective presentation of his complaint prior to termination.

[23] This contention was advanced only obliquely in the Court of Appeals. Brief for Appellees in No. 75–1350 (CA6), p. 27.

[24] In *Ingraham,* the Court held that "advance procedural safeguards" were not constitutionally required in the context of disciplinary paddling in the schools because the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonable punishment, gave assurance that "the risk that a child will be paddled without cause is typically insignificant." 430 U. S., at 677–678. Similarly, in *Dixon* v. *Love,* 431 U. S. 105, 113 (1977), we held that an evidentiary hearing need not precede revocation of a driver's license based on repeated traffic offenses within the previous 10-year period, for "appellee had the opportunity for a full judicial hearing

The factors that have justified exceptions to the requirement of some prior process are not present here. Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation. Cf. *Stanley* v. *Illinois,* 405 U. S. 645, 647–648 (1972). Moreover, the probability of error in utility cutoff decisions is not so insubstantial as to warrant dispensing with all process prior to termination.[25]

The injunction remedy referred to by petitioners would not be an adequate substitute for a pretermination review of the disputed bill with a designated employee. Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of injunctive relief or recovery provisions. It was thought that such remedies were likely to be too bounded by procedural constraints and too susceptible of delay to provide an effective safeguard against an erroneous deprivation.[26] These considerations are applicable in the utility termination context.

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in connection with each of the traffic convictions on which the . . . decision was based."

[25] Petitioners assert that they are under an obligation to provide nondiscriminatory service to their customers, and that continued provision of service to a delinquent customer pending an informal hearing would involve "discriminating against the ratepayer . . . ." Tr. of Oral Arg. 5.

It is far from clear that any material delay in payment will occur from an informal conference that can be scheduled well in advance of the date of termination, see n. 22, *supra.* In any event, as is demonstrated by MLG&W's credit plan, see n. 4, *supra,* delayed payment is not nonpayment, and there are means available to MLG&W to recover at least some of the costs of a hearing, see, *e. g.,* App. 114, 117 (imposition of gross, rather than net, charges for late payment).

[26] See, *e. g., Goss* v. *Lopez,* 419 U. S., at 581–582, n. 10; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 603, 607 (1975); *Fuentes* v. *Shevin,* 407 U. S., at 85, and n. 15; *Sniadach* v. *Family Finance*

Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit.[27] An action in equity to halt an improper termination, because it is less likely to be pursued [28] and less likely to be effective, even if pursued, will not provide the same assurance of accurate decisionmaking as would an adequate administrative procedure. In these circumstances, an informal administrative

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*Corp.*, 395 U. S. 337, 343 (1969) (Harlan, J., concurring); *Bell* v. *Burson*, 402 U. S. 535, 536 (1971).

The dissent intimates that due process was satisfied in this case because "a customer can always avoid termination by the simple expedient of paying the disputed bill and claiming a refund . . . ." *Post*, at 28. This point ignores the predicament confronting many individuals who lack the means to pay additional, unanticipated utility expenses. Even under MLG&W's admirable credit procedures, the customer must make immediate payment of one-half of a disputed past due bill, with the balance to be paid in three equal installments, in addition to current charges. Contrary to the dissent's suggestion, this Court's decision in *Lindsey* v. *Normet*, 405 U. S. 56 (1972), did not uphold a procedure that conditioned a tenant's continued possession on payment of "the back rent, an obligation which he disputed." *Post*, at 29 n. 11. Under the procedure upheld in *Lindsey*, certain tenant defenses were excluded, but the landlord still had to prove nonpayment of rent due or a holding contrary to some covenant in the lease before the tenant could be deprived of possession. See 405 U. S., at 65; n. 10, *supra*.

[27] This understanding informs the common-law privilege of the utility to terminate service for nonpayment of just charges. "An obvious reason [for the privilege] is that to limit the remedy of collection of compensation for the service to actions at law would be impracticable, as leading to an infinite number of actions to collect very small bills against scattered consumers, many of them mere renters and financially irresponsible." *Steele* v. *Clinton Electric Light & Power Co.*, 123 Conn. 180, 184, 193 A. 613, 615 (1937); see *Jones* v. *Nashville*, 109 Tenn., at 560, 72 S. W., at 987.

[28] As early as 1874, the Wisconsin Supreme Court held that the State Attorney General could obtain an injunction against a public utility threatening a wrongful termination because private persons would be unlikely to take action themselves to correct "the little wrongs which go so far to make up the measure of average prosperity of life." *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425, 530–531.

remedy, along the lines suggested above, constitutes the process that is "due."

V

Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law.

The judgment of the Court of Appeals is

*Affirmed.*

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

In my judgment, the Court's holding confuses and trivializes the principle that the State may not deprive any person of life, liberty, or property without due process of law. I have no quarrel with the Court's conclusion that as a matter of Tennessee law a customer has a legitimate claim of entitlement to continued utility services as long as the undisputed portions of his utility bills are paid. For that reason, a municipality may not terminate utility service without giving the customer a fair opportunity to avoid termination either by paying the bill or questioning its accuracy. I do not agree, however, that this record discloses any constitutional defect in the termination procedures employed by the Light, Gas and Water Division of the city of Memphis (Division).

The Court focuses on two aspects of the Division's collection procedures. First, according to the Court, the Division's standard form of termination notice did not adequately inform the customer of the availability of a procedure for protesting a proposed termination of service as unjustified. *Ante,* at 15. Second, the Division did not afford its customers an adequate

opportunity to meet with an employee who had the authority to settle billing disputes. *Ante,* at 18. Whether we consider the evidence describing the unusual dispute between the Crafts and the Division, or the evidence concerning the general operation of the Division's collection procedures, I find no basis for concluding that either of the Court's criticisms is justified; its conclusion that a constitutional violation has been proved is truly extraordinary.

Although the details of the dispute between the Crafts and the Division are obscure, the record describes the Division's customary practices in some detail. Each month the Division terminates the service of about 2,000 customers.[1] Terminations are preceded by a written notice advising the customer of the date by which payment must be made to avoid a cutoff and requesting the customer to contact the credit and collections department if he is having difficulty paying the bill.[2] The notices contain a prominent legend: [3]

"PHONE 523–0711
INFORMATION CENTER"

Calls to the listed phone number are answered by 30 or 40 Division employees, all of whom are empowered to delay cutoffs for three days based on representations made by customers over the phone. These employees also direct callers to credit counselors who are authorized to resolve disputes on a more permanent basis and who can set up extended payment plans for customers in financial difficulty.[4]

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[1] During the six months from September 1973 through February 1974, there were 11,216 so-called delinquent cutoffs. App. 74.

[2] The request to contact the credit department is contained in an enclosed "flyer" which also identifies the appropriate neighborhood location to be visited for credit assistance.

[3] See 534 F. 2d 684, 688 (CA6 1976).

[4] App. 126 and 161. Information center employees may also refer customers who complain about a high bill to a special unit that sends investigators to check for possible leaks or defects in the meter. *Id.,* at 178.

The District Court did not find that the Division's notice was defective in any respect or that its regular practices were not adequate to handle the Crafts' unusual problems. The Crafts' dispute with the Division stemmed from the use of two sets of meters to measure utility consumption in different parts of the Crafts' home. *Ante*, at 4. The Crafts, believing they were being billed twice for the same utilities, did not pay on the second account. In fact, the two accounts were independent; because the Crafts refused to pay the balance on the second account, the Division terminated their service on several occasions.[5] The District Court expressly found that the Division sent a final notice before each termination.

The District Court did not find that Mrs. Craft was unable to meet with credit department personnel possessing adequate authority to make an adjustment in her bill.[6] She was successful in working out a deferred-payment arrangement but apparently was unable to have the amount of the bills reduced. The record therefore indicates that Mrs. Craft did meet with

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[5] The trial judge evidently accepted the Division's claim that it was engaged in "split billing" rather than "double billing." The judge did express the "hope," as a matter of "simple equity," that the Division would issue a credit of $35 to cover duplicate and unnecessary charges and expenses incurred with respect to termination, but the amounts challenged by the Crafts as the result of "double billing" were considerably larger than $35. The reference to duplicate charges apparently concerns the $2.50 per month city service fee which was charged on each set of meters in the duplex until after they were consolidated. The unnecessary expense reference apparently covers both the time lost from work while Mrs. Craft was trying to straighten out their billing and the cost attributable to the termination. The District Court appears to have been persuaded that those costs could have been avoided if the Crafts had been given more help in the early stages of their dispute.

[6] The District Court stated that the "procedure for an opportunity to talk with the management was not adequately explained to Mrs. Craft." The District Court was evaluating the Division's explanation of its procedures; the court's statement does not mean that Mrs. Craft never met with a responsible official able to resolve her dispute.

Division employees having adequate authority but simply failed to persuade any of them that there was any error in her bills.[7]

I

The Court's constitutional objection to the Division's notice rests entirely on the classic statement from *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

That statement identifies the two essential characteristics of adequate notice: It must inform the recipient of the impending loss; and it must be given in time to afford the recipient an opportunity to defend. These essentials must, of course, be expressed in terms which the layman can understand. The Division's notice unquestionably satisfied these two basic requirements.[8]

No doubt there may be situations in which these two essen-

[7] It is worth remembering that the Crafts' double-billing problem was eventually solved, and that the solution could only have been effected by a Division employee empowered to do so. Moreover, Mrs. Craft testified on direct examination that after being cut off she went to the Division's office with the record of her payments on one account. She was told that she had to pay on the other account as well. *Id.*, at 91. In other words, an official of the Division *did* resolve the Crafts' dispute, correctly as it turned out. See n. 5, *supra*. The Division's procedures would not be unconstitutional even if we assumed that Division employees, like federal judges, are occasionally discourteous and occasionally make mistakes. The Due Process Clause does not guarantee a correct or a courteous resolution of every dispute.

[8] It tells the customer that a cutoff is imminent and it allows the customer enough time to avoid a cutoff by paying under protest, by contacting the information center, or by beginning a legal action.

tials would not be sufficient to constitute fair notice. For example, if the notice describes a threatened loss which can only follow a prescheduled hearing, it must also inform the recipient of the time and place of the hearing. But I do not understand the Court to require municipal utilities to schedule a hearing before each termination notice is mailed. The Court seems to assume, as I do, that no hearing of any kind is necessary unless the customer has reason to believe he has been overcharged. Such a customer may protest his bill in either of two ways: He may communicate directly with the utility, or he may seek relief in court. In this case the Court finds the Division's notice constitutionally defective because it does not describe the former alternative.

The Division must "advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified." *Ante,* at 15. That advice is much less valuable to the customer than an explanation of the legal remedies that are available if a wrongful termination should occur. Yet the Court wisely avoids holding that the customer must be given that sort of legal advice. The advice the Court does require is wholly unnecessary in all but the most unusual situations. For a homeowner surely need not be told how to complain about an error in a utility bill; it is, of course, helpful to include the telephone number and office address in the termination notice, but our democratic government would cease to function if, as the Court seems to assume, our citizenry were unable to find such information on their own initiative. The Court's holding that the Division's notice was constitutionally defective rests on a paternalistic predicate that I cannot accept.

Even accepting the Court's predicate, a notice which advises customers to call the "information center" should be adequate; if not, it seems clear that advising customers to call, during normal business hours, a "dispute resolution center" manned by the same personnel would cure the constitu-

tional objection. Distinctions of this small magnitude are the appropriate concern of administrative rulemaking; they are too trivial to identify constitutional error.

## II

The Court's pronouncement "that due process requires the provision of an opportunity for the presentation to a designated employee of a customer's complaint that he is being overcharged or charged for services not rendered," *ante,* at 16, is equally divorced from the facts of this case. The Division processes more than 30,000 complaints of excess charges each year, and it has designated scores of employees to hear and investigate those complaints. Except for the Crafts' troubles, there is nothing in the record to suggest that the Division's customers are denied access to these employees, or that the employees lack the power to deal appropriately with meritorious complaints. Indeed, as already noted, there is no finding by either of the courts below that the Crafts themselves did not meet with responsible officials empowered to resolve their dispute.[9]

Although the Court's pronouncement in this case is therefore gratuitous, it cannot be dismissed as harmless. For it warns municipal utilities that unless they provide "some kind of hearing," *ibid.,* they may be acting unconstitutionally. Just what, or why, additional procedural safeguards are constitutionally required is most difficult to discern.[10]

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[9] See nn. 6 and 7, *supra.*

[10] A careful reading of the decision below and this Court's decision indicates that the Court has modified as well as affirmed the Sixth Circuit's view of procedural due process in a utility context. The Court of Appeals thought that this case was controlled by its earlier decision in *Palmer* v. *Columbia Gas of Ohio, Inc.,* 479 F. 2d 153 (1973). *Palmer* ordered that cutoff notices be delivered personally by utility servicemen or sent by certified mail, return receipt requested. *Id.,* at 159 and 166–167. The notice had to tell customers about available credit programs as well as possible dispute-resolving procedures. *Ibid.* The *Palmer* court also specified that

In deciding that more process is due, the Court relies on two quite different hypothetical considerations. First, the Court stresses the fact that disconnection of water or heating "may threaten health and safety." *Ante,* at 18. Second, the Court discounts the value of the protection afforded by the available judicial remedies because the "factual disputes typically [involve] sums of money too small to justify engaging counsel or bringing a lawsuit." *Ante,* at 21. Neither of these examples is disclosed by this record. The Crafts' dispute involved only a relatively small amount, but they did obtain counsel and thereafter they encountered no billing problems.

Although the Division's terminations number about 2,000 each month, the record does not reveal any actual case of harm to health or safety. The District Court found that the Division does not discontinue service when there is illness in a home. Since a customer can always avoid termination by the simple expedient of paying the disputed bill and claiming a refund,[11] it is not surprising that the real emergency case is

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the utility's hearing officer had to send—by certified mail—a written, individual response to every complaining customer before authorizing a cutoff. *Id.,* at 159–160, n. 9, and 167–169. Although the Division's failure to observe these procedures was the foundation of the Court of Appeals' ruling below, the Court quite clearly does not approve the lower court's view that these procedures are constitutionally mandated.

[11] If there is no constitutional objection to requiring a tenant to pay a disputed charge in order to retain possession of his home, I do not understand why there should be a more serious objection to requiring payment of a lesser charge in order to retain utility service. In *Lindsey* v. *Normet,* 405 U. S. 56, a tenant sought to defend a possessory action brought by his landlord for nonpayment of rent on the ground that the premises were uninhabitable and therefore there was no obligation to pay the rent. State law did not permit such a defense in a possessory action. In order to litigate that particular dispute, the tenant had to bring his own action against the landlord. If the tenant had not in fact paid the disputed rent, the landlord would prevail in the possessory action. Thus, in order to retain possession while litigating the dispute, the tenant not only had to pay the accruing rent (a requirement upheld in *Lindsey, supra,* at 65),

rare, if indeed it exists at all.[12] When a true emergency does present a serious threat to health or safety, the customer will have ample motivation to take the important step of consulting counsel or filing suit even if the amount of his disputed bill is small. A potential loss of utility service sufficiently grievous to qualify as a constitutional deprivation can hardly be too petty to justify invoking the aid of counsel or the judiciary. Conversely, routine billing disputes too petty for the bench or the bar can hardly merit extraordinary constitutional protection.

Even if the customer does not consult counsel in a specific case, the potential damages remedy nevertheless provides far more significant protection against an unjustified termination than does the vague requirement of "some kind of hearing." Without the threat of damages liability for mistakes, the informal procedures required today would neither qualify the utility's ultimate power to enforce collection by terminating service nor deter the exercise of that power. On the other hand, even without specific informal procedures, the danger of substantial liability will by itself ensure careful attention to genuine customer disputes. The utility's potential liability therefore provides customers with real pretermination protection even though damages may not be recovered until later.

The need for a procedural innovation is not demonstrated

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but also had to pay the back rent, an obligation which he disputed. If he did not pay the back rent, he would lose in the possessory action and therefore would lose possession while he was prosecuting his own suit against the landlord. Thus, the Court sustained a procedure which required the payment of a disputed charge in order to maintain the status quo while litigating the dispute.

[12] Even the customer who is unable to pay his bill in full may forestall termination by a partial payment. *Ante*, at 5–6, n. 4. Perhaps this Court fashions its rule for the benefit of those customers who are unable to make even a partial payment. But if such persons cannot pay current, undisputed bills, their service may be terminated despite a bona fide dispute over a past bill; for no one has a constitutional right to free utility service.

by the record in this judicial proceeding, but rather is justified on the basis of hypothetical examples, information gleaned from cases not before us, and legislative reports. See *ante*, at 18 nn. 20 and 21. These justifications suggest that the Court's new rule is the product of a policy determination rather than a traditional construction of the Constitution. As judges we have experience in appraising the fairness of legal remedies and judicial proceedings, but we have no similar ability to balance the cost of scheduling thousands of billing conferences against the benefit of providing additional protection to the occasional customer who may be unable to forestall an unjustified termination.

It is an unfortunate fact that when the State assesses taxes or operates a utility, it occasionally overcharges the citizen. It is also unfortunate that effective collection procedures sometimes require the citizen to pay an unjust charge in order to forestall a serious deprivation of property. But if the State has given the citizen fair notice and afforded him procedural redress which is entirely adequate when invoked by his lawyer, the demands of the Due Process Clause are satisfied. I do not believe the Constitution requires the State to employ procedures that are so simple that every lay person can always act effectively without the assistance of counsel.

I respectfully dissent.

# UNITED STATES *v.* JACOBS, AKA "MRS. KRAMER"

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

No. 76–1193. Argued December 7, 1977—Reargued March 20, 1978—Decided May 1, 1978

Certiorari dismissed. Reported below: 547 F. 2d 772.

*Deputy Solicitor General Frey* reargued the cause for the United States. On the brief were *Solicitor General McCree, Assistant Attorney General Civiletti, William F. Sheehan III,* and *Jerome M. Feit.*

*Irving P. Seidman* reargued the cause and filed a brief for respondent.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

# UNITED STATES *v.* CALIFORNIA

ON MOTION FOR ENTRY OF A THIRD SUPPLEMENTAL DECREE

No. 5, Orig. Argued February 27, 1978—Decided May 15, 1978

California, and not the United States, has dominion over the submerged lands and waters within the one-mile belts surrounding Santa Barbara and Anacapa Islands within the Channel Islands National Monument. When, by Presidential Proclamation in 1949, the Monument was enlarged to encompass areas within one nautical mile of the shorelines of these islands, the submerged lands and waters within the one-mile belts were under federal dominion as a result of this Court's decision two years earlier in *United States* v. *California*, 332 U. S. 19. But, assuming that the Proclamation intended to reserve such submerged lands and waters, dominion over them was subsequently transferred to California by the Submerged Lands Act, whose very purpose was to undo that decision. The § 5 (a) "claim of right" exemption from the Act's broad grant, relied on by the Government, clearly does not apply to claims based on the 1947 *California* decision. The reservation for a national monument made by the 1949 Proclamation could not enhance the Government's claim to the submerged lands and waters in dispute since the statutory authority under which such monuments are created merely authorizes land to be shifted from one federal use to another. Pp. 36–41.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, POWELL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 42. MARSHALL, J., took no part in the consideration or decision of the case.

*Allan A. Ryan, Jr.* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Bruce C. Rashkow,* and *Michael W. Reed.*

*Russell Iungerich,* Deputy Attorney General of California, argued the cause for defendant. With him on the briefs were *Evelle J. Younger,* Attorney General, and *N. Gregory Taylor,* Assistant Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case, arising under our original jurisdiction, is whether California or the United States has dominion over the submerged lands and waters within the Channel Islands National Monument, which is situated within the three-mile marginal sea off the southern California mainland.[1] For the reasons that follow, we hold that dominion lies with California and not the United States.

The Antiquities Act of 1906 authorizes the President to reserve lands "owned or controlled by the Government of the United States" for use as national monuments.[2] Pursuant to this Act, President Franklin Roosevelt in 1938 issued Presidential Proclamation No. 2281, 52 Stat. 1541. This Proclamation "reserved from all forms of appropriation under the public-land laws" most of Anacapa and Santa Barbara Is-

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[1] This case is part of ongoing litigation stemming from an action brought in this Court more than three decades ago. *United States* v. *California*, 332 U. S. 19. The first decree was entered in 1947, 332 U. S. 804; a supplemental decree was entered in 1966, 382 U. S. 448; and a second supplemental decree in 1977, 432 U. S. 40. In each instance, jurisdiction was reserved to enter further orders necessary to effectuate the decrees. California initiated the present suit under the 1966 reservation of jurisdiction:

"As to any portion of such boundary line or of any areas claimed to have been reserved under § 5 of the Submerged Lands Act as to which the parties may be unable to agree, either party may apply to the Court at any time for entry of a further supplemental decree." 382 U. S., at 453.

[2] Section 2 of the Act, 34 Stat. 225, 16 U. S. C. § 431 (1976 ed.), provides in pertinent part as follows:

"The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

lands, which were then federal lands,[3] and set them aside as the Channel Islands National Monument.[4] As the Proclamation recognized, these islands "contain fossils of Pleistocene elephants and ancient trees, and furnish noteworthy examples of ancient volcanism, deposition, and active sea erosion . . . ." *Ibid.*

The two large islands and the many smaller islets and rocks surrounding them also shelter a variety of marine life, some rare or endangered. Prompted by a desire to protect these species [5] and other "objects of geological and scientific interest," President Truman issued a Proclamation in 1949, enlarging the Monument to encompass "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands . . . ." Presidential Proclamation No. 2825, 63 Stat. 1258. It is undisputed that the islets and protruding rocks

[3] Federal title to the islands can be traced to the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, by which Mexico ceded to the United States the islands lying off the coast of California, along with the adjacent mainland. See Bowman, The Question of Sovereignty over California's Off-Shore Islands, 31 Pac. Hist. Rev. 291 (1962). While the Treaty obligated the United States to respect private property rights derived from Mexican land grants, all nongranted lands previously held by the Government of Mexico passed into the federal public domain. When California was admitted to the Union in 1850, the United States retained ownership of these public lands. See An Act for the Admission of the State of California into the Union, 9 Stat. 452.

[4] The 1938 Proclamation did not reserve as a national monument the entire land area of these two islands. Portions were exempted for continued lighthouse purposes, for which the entire islands had previously been reserved. 52 Stat. 1541.

[5] As early as 1940, Government officials recognized that enlargement of the Monument would be desirable to protect the birds, sea otters, elephant seals, and fur seals that inhabit the rocks and islets encircling the two large islands, and early drafts of the 1949 Proclamation acknowledged an intent to protect marine life. But after a representative of the Department of Justice expressed the view that the Antiquities Act did not permit establishment or enlargement of a national monument to protect plant and animal life, all references to marine life were dropped from the Proclamation.

within these one-mile belts have long belonged to the United States and, as a result of President Truman's Proclamation, are now part of the Monument.[6] It is equally clear that the tidelands of Anacapa and Santa Barbara Islands, as well as of the islets and rocks, belong to California.[7] What is disputed in this litigation is dominion over the submerged lands and waters within the one-mile belts surrounding Anacapa and Santa Barbara Islands.[8]

When President Truman issued Proclamation No. 2825 in 1949, the submerged lands and waters within these belts were under federal dominion and control, as a result of this Court's decision two years earlier in *United States* v. *California,* 332

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[6] As noted previously, the Antiquities Act authorizes the President to set aside only "lands owned or controlled by the Government of the United States . . . ." 34 Stat. 225, 16 U. S. C. § 431 (1976 ed.). Like Anacapa and Santa Barbara Islands, the islets and rocks protruding above the water within the boundaries of the extended Monument were in 1949 public lands owned by the Federal Government. See n. 3, *supra.*

[7] The term "tidelands" is "defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water . . . ." *United States* v. *California,* 382 U. S., at 452. Those tidelands in California that had not been subject to Mexican land grants entered the federal public domain in 1848, where they remained in trust until California gained statehood in 1850. At that time, they passed to the State under the "equal footing" doctrine. See *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10; *United States* v. *California,* 382 U. S. 448. Because the tidelands within the Monument were not "owned or controlled" by the United States in 1938 or in 1949, Presidents Roosevelt and Truman could not have reserved them by simply issuing proclamations pursuant to the Antiquities Act.

[8] The present controversy apparently arose when California was frustrated in carrying out its program of leases for the harvesting of kelp in these waters. Giant kelp known as *Macrocystis* grows in the water along portions of the California coast and is harvested to obtain various substances, including algin, a chemical with many commercial uses. See North, Giant Kelp, Sequoias of the Sea, National Geographic (Aug. 1972), and Zahl, Algae: the Life-givers, National Geographic (Mar. 1974).

U. S. 19. That case had held that the United States was "possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles . . . ." *United States* v. *California,* 332 U. S. 804, 805.

There can be no serious question, therefore, that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument, since they were then "controlled by the Government of the United States." [9] Thus, whether Proclamation No. 2825 did in fact reserve these submerged lands and waters, or only the islets and protruding rocks, could be, at the time of the Proclamation, a question only of Presidential intent, not of Presidential power.

In addressing the controversy now before us, the parties have devoted large parts of their briefs to canvassing this question of intent: What did the Proclamation mean by the use of the word "areas"? [10] We find it unnecessary, however,

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[9] Although the Antiquities Act refers to "lands," this Court has recognized that it also authorizes the reservation of waters located on or over federal lands. See *Cappaert* v. *United States,* 426 U. S. 128, 138–142; *United States* v. *Oregon,* 295 U. S. 1, 14.

[10] In preparation for the Proclamation, memoranda were circulated within and among Government agencies, many of which proposed adding to the Monument "all islets, rocks, and waters" within one nautical mile of Anacapa and Santa Barbara Islands. The final version of the 1949 Proclamation, however, was not so clear. It began: "WHEREAS it appears that certain *islets and rocks* situated near Anacapa and Santa Barbara Islands . . . are required for the proper care, management, and protection of the objects of geological and scientific interest located on lands within [the Channel Islands National Monument] . . ." (emphasis added). The Proclamation then went on to reserve "the areas within one nautical mile" of each of the two large islands, "as indicated on the diagram hereto attached . . . ." The diagram showed Anacapa and Santa Barbara Islands,

to decide this question. For even assuming that President Truman intended to reserve the submerged lands and waters within the one-mile belts for Monument purposes, we have concluded that the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, subsequently transferred dominion over them to California.

The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States* v. *California,* 332 U. S. 19. In enacting it, Congress "recognized, confirmed, established, and vested in and assigned to," § 6 (a), 67 Stat. 32, 43 U. S. C. § 1314 (a), the States "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources . . . ." § 3 (a), 67 Stat. 30, 43 U. S. C. § 1311 (a). The submerged lands and waters within one mile of Anacapa and Santa Barbara Islands plainly fall within this general grant.[11]

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each encircled by a broken line at a distance of one mile from the island's shoreline. At the bottom of the two maps appeared acreage figures that, according to stipulations filed by the parties, described approximately the entire surface area circumscribed by the broken lines.

[11] Section 2 (a) (2) of the Act, 67 Stat. 29, 43 U. S. C. § 1301 (a) (2), defines "lands beneath navigable waters" as "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles . . . ." The term "natural resources" is defined in § 2 (e), 43 U. S. C. § 1301 (e), to "includ[e], without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life" but not "water power, or the use of water for the production of power . . . ."

The United States contends, however, that the Submerged Lands Act did not operate to relinquish these submerged lands and waters to California because of an exception to the broad statutory grant that Congress provided in § 5 (a) of the Act.[12] The final clause of § 5 (a), upon which the United States relies, exempted from the grant "any rights the United States has in lands presently and actually occupied by the United States under claim of right." [13] The legislative history shows that this "claim of right" clause was added to preserve unperfected claims of federal title from extinction under § 3's general "conveyance or quitclaim or assignment." [14] In the words of the Acting Chairman of the Senate Committee on Interior and

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[12] Section 5 (a) of the Act, 67 Stat. 32, 43 U. S. C. § 1313 (a), provides: "There is excepted from the operation of section 3 of this Act—

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

[13] The parties have stipulated that "the United States 'presently and actually occupied' the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands for purposes of Section 5 of the Submerged Lands Act of 1953, 43 U. S. C. § 1313." Thus, the question is simply what "rights" the United States had in these submerged lands and waters in 1953.

[14] Remarks of Senator Cordon, Hearings on S. J. Res. 13 et al. before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 1322 (1953). During Committee hearings on the bill, the following exchange

Insular Affairs, the clause "neither validates the claim nor prejudices it," but merely "leaves it where we found it" for eventual adjudication.[15]

The entire purpose of the Submerged Lands Act would have been nullified, however, if the "claim of right" exemption saved claims of the United States based solely upon this Court's 1947 decision in *United States* v. *California*. Not surprisingly, therefore, the legislative history unmistakably shows that the "claim of right" must be "other than the claim arising by virtue of the decision in [that case] . . . ." [16] Thus, this exception applies to the submerged lands and waters in controversy here only if the United States' claim to them ultimately rests on some basis other than the "paramount rights" doctrine of this Court's 1947 *California* decision.

The United States has pointed to no other basis for believing that the submerged lands and waters in question were owned

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occurred between Senator Kuchel and Senator Cordon, who was Acting Chairman of the Committee:

"Senator KUCHEL. What does 'claim of right' mean?

"Senator CORDON. Well, it means that the United States is in actual occupancy and claims it has a right to the occupancy.

"Senator KUCHEL. And it permits the United States to keep the property in the absence of a title?

"Senator CORDON. No; it does not. It leaves the question of whether it is a good claim or not a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it.

"Senator KUCHEL. Why should we recognize it, Senator, any more than any other so-called color or title of claim . . . ?

"Senator CORDON. For the reason that in my opinion, Senator, this land now is not land to which the State has title and we are conveying title. We may except what we will." *Id.*, at 1321.

[15] *Id.*, at 1321, 1322.

[16] *Id.*, at 1322.

or controlled by the United States in 1949. The crucial question, then, is whether the 1949 reservation of the submerged lands and waters for Monument purposes (assuming that was the intent of the Proclamation) somehow changed the nature of the Government's claim. If it did not—if the ownership or control of these areas by the United States in 1953 existed solely by virtue of this Court's 1947 decision in *United States* v. *California*—then § 3 (a) of the Submerged Lands Act transferred "title to and ownership of" the submerged lands and waters to California, along with "the right and power to manage, administer, lease, develop, and use" them. 67 Stat. 30, 43 U. S. C. § 1311 (a).

We have concluded that the 1949 Proclamation did not and could not enhance the strength of the Government's basic claim to a property interest in the submerged lands and waters in controversy. Reservation of federally controlled public lands for national monument purposes has the effect of placing the area reserved under the "supervision, management, and control" of the Director of the National Park Service. 39 Stat. 535, 16 U. S. C. §§ 1–3 (1976 ed.). Without such reservation, the federal lands would remain subject to "private appropriation and disposal under the public land laws," 78 Stat. 985, 43 U. S. C. § 1400 (c), or to continued federal management for other designated purposes, see, *e. g., ibid.;* 78 Stat. 986, 43 U. S. C. § 1411. The Antiquities Act of 1906 permits the President, "in his discretion," to create a national monument and reserve land for its use simply by issuing a proclamation with respect to land "owned or controlled by the Government of the United States." 34 Stat. 225, 16 U. S. C. § 431 (1976 ed.). A reservation under the Antiquities Act thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another.[17]

[17] This view is reflected in a memorandum written by the Director of the Bureau of Land Management to the Director of the National Park Service

A reservation for a national monument purpose cannot operate to escalate the underlying claim of the United States to the land in question.

Congress was well aware of its power to transfer to the States as much or as little of the submerged lands in which the Government held "paramount rights" as it deemed wise. With that knowledge, Congress expressly "emphasize[d] that the exceptions spelled out in [§ 5] do not in anywise include any claim resting solely upon the doctrine of 'paramount rights' enunciated by the Supreme Court with respect to the Federal Government's status in the areas beyond inland waters and mean low tide." S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, p. 20 (1953). A plainer statement of congressional intent would be hard to find.

Because the United States' claim to the submerged lands and waters within one mile of Anacapa and Santa Barbara Islands derives solely from the doctrine of "paramount rights" announced in this Court's 1947 *California* decision, we hold that, by operation of the Submerged Lands Act, the Government's proprietary and administrative interests in these areas passed to the State of California in 1953.[18]

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in 1947, in response to the latter's proposal that the Channel Islands National Monument be enlarged:

"If you wish to have these islands added to the Channel Islands National Monument, the bureau will be glad to prepare an appropriate proclamation. In the event you desire at this time to have the islands withdrawn for national monument classification, a public land order to accomplish this purpose will be prepared."

[18] With the exception, of course, of any interests retained by the United States via provisions other than the last clause of § 5 (a) of the Submerged Lands Act. For example, § 6 (a) provides for the retention by the United States of its navigational servitude and its "rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs . . . ." 67 Stat. 32, 43 U. S. C. § 1314 (a).

The parties are requested to submit an appropriate decree within 90 days.

*So ordered.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of the case.

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

Although the majority lucidly states the issue in this case, it plainly errs in deciding it.

Section 5 (a) of the Submerged Lands Act excepted from its general cession of land to the States those "rights the United States has in lands presently and actually occupied by the United States under claim of right." [1] Actual title to the lands was not required; lands to which the United States held title were already excepted by the previous language in § 5 (a). The reference to claims of right was critical for the United States' stake in submerged lands, since *United States* v. *California*, 332 U. S. 19 (1947), and 332 U. S. 804 (1947), did not actually vest the United States with title to the submerged lands. While specifically denying California title, the Court fell short of declaring title in the United States, recognizing instead the federal "paramount rights" in the lands. *Id.*, at 805.

Section 5 (a) was added at the suggestion of the Attorney General. His purpose was to guarantee "that all installations and acquisitions of the Federal Government within such area [as was to be ceded] belong to it." [2] Senator Holland's original Joint Resolution No. 13 had provided:

> "There is excepted from the operation of section 3 of this Act—
>
> "(a) all specifically described tracts or parcels of land

[1] 43 U. S. C. § 1313 (a).

[2] Letter of Attorney General Brownell, Hearings on S. J. Res. 13 et al. before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 935 (1953) (hereafter Hearings).

and resources therein or improvements thereon title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the decisions of the courts of such State, or their respective grantees, or successors in interest, by cession, grant, quitclaim, or condemnation or from any other owner or owners thereof by conveyance or by condemnation, provided such owner or owners had lawfully acquired the title to such lands and resources in accordance with the statutes or decisions of the courts of the State in which the lands are located . . . ." Hearings 14.

The Attorney General's substitute read as follows:

"There is excepted from the operation of section 3 of this Joint Resolution:

"(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by the United States when the State entered the Union; all lands acquired by the United States by eminent domain proceedings; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and all lands presently occupied by the United States under claim of right . . . ." *Id.*, at 935.

The clearest, most observable difference between the original draft and the language proposed by the Attorney General is this final statement about "lands presently occupied by the United States under claim of right." [3] The conclusion is that

[3] There is no quarrel that the use of the word "lands" in this context extends to submerged lands. The Act concerns submerged lands in its sec-

some lands to which the United States did not possess outright title might be part of federal installations, and, if so, they were to be preserved in federal control. This inference is strongly supported in further legislative history.

The Acting Chairman of the Senate Committee on Interior and Insular Affairs explained to the Joint Resolution's author why the Committee had added the phrase concerning claim of right:

> "I should like to add that the last language quoted, namely, 'any rights the United States has in lands presently and actually occupied by the United States under claim of right,' came into the bill at the request of the Department of Justice. It was presented to the committee and explained by the Department of Justice as being for the purpose of reserving to the Federal Government the area of any installation, or part of an installation—and I use the term 'installation' to distinguish a specific area, used for a specific purpose, from any vast area that might be claimed under the paramount right doctrine—actually occupied by the Government under a claim of right." 99 Cong. Rec. 2619 (1953) (Sen. Cordon).

The resolution's author, Senator Holland, asked the Acting Chairman:

> "Am I correct in understanding that under that particular provision the mere fact that the Supreme Court might have held that the United States has paramount rights in submerged lands beyond mean low water, and within State boundaries, would not in any way give the United States the right to claim exceptions of such lands from the joint resolution, *in view of the fact that such*

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tion ceding the area to the States, 43 U. S. C. § 1311, and similarly in this section concerning exceptions to that cession.

> *lands would not be 'presently and actually occupied by the United States'?* Am I correct in that understanding?
>
> "Mr. CORDON: The Senator is correct in his understanding." *Ibid.* (emphasis added).

Hence, the test is whether the lands held under some claim of right are "actually occupied" by the Federal Government. If so, they are not relinquished.

The same issue arose in the hearings, with identical resolution. The Acting Chairman explained:

> "[A]ny land occupied by the United States under claim by the United States that it has a right there, is excluded from this conveyance or quitclaim or assignment. . . . It is general language that . . . protects every installation of every kind." Hearings 1322.

Senator Long summarized, to the Acting Chairman's agreement:

> "That, in effect, says that this act does not at all affect any land which the United States is actually occupying. And that means that a representative of the United States Government in one capacity or another is occupying that land." *Ibid.*

Senator Long was concerned that the definition of occupied lands might be stretched to include submerged lands over which the Federal Government had been given dominion in *United States* v. *California,* 332 U. S. 19 (1947), by reason of the fact that the United States Navy from time to time might sail across them. It was in response to *that* suggestion that the Acting Chairman made the statement quoted by the majority that " 'the claim of right' [is] 'other than the claim arising by virtue of the decision in [that case] . . . .' "[4] Such a construction was, of course, barred, for it would eviscerate the purpose of returning any sub-

[4] *Ante,* at 39, quoting Hearings 1322.

merged lands. *Ante,* at 39. But this ignores the much narrower meaning of "submerged lands occupied by the United States under claim of right" which was intended: the submerged lands that were actually occupied as part of a federal "installation," meaning "a specific area, used for a specific purpose." The distinction is between a general claim under *United States* v. *California* to paramount rights, and a very specific claim associated with a federal installation actually occupied. Recalling the Acting Chairman's words: "Occupancy to me is some type of actual either continuous possession or possession in such way as to indicate that the individual claims some special right there different from a vast unoccupied area." [5] "[The language is] for the purpose of reserving to the Federal Government the area of any installation, or part of an installation—and I use the term 'installation' to distinguish a specific area, used for a specific purpose, from any vast area that might be claimed under the paramount right doctrine . . . ." [6]

The Channel Islands National Monument includes the submerged lands within a one-mile radius of Anacapa and Santa Barbara Islands.[7] The parties have stipulated that "the United States 'presently and actually occupied' the areas within one nautical mile of the shoreline of Anacapa and Santa

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[5] *Ibid.*

[6] 99 Cong. Rec. 2619 (1953).

[7] Although the point is contested, there is little left to decide upon reading in President Truman's Presidential Proclamation No. 2825 of February 9, 1949, 63 Stat. 1258, that "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands" were added to the National Monument. The parties have stipulated that "the acreage figures shown on the diagram accompanying Presidential Proclamation No. 2825 are figures which approximate the total surface area of Anacapa and Santa Barbara Islands and one nautical mile of waters surrounding those islands." App. 2. This leaves no force at all to defendant's reliance on the Proclamation's preamble which refers to "certain islets and rocks" but not specifically to submerged lands or water.

Barbara Islands for purposes of Section 5 of the Submerged Lands Act of 1953, 43 U. S. C. § 1313." [8] The federal occupation is to fulfill the specific purpose of providing for "the proper care, management, and protection of the objects of geological and scientific interest located on lands within the said monument." Presidential Proclamation No. 2825, 63 Stat. 1258. The federal occupation is under claim of right, since only federally "owned or controlled" property can be made into a national monument. 16 U. S. C. § 431 (1976 ed.).

The majority opinion stresses that the United States' occupation of the submerged lands within the Channel Islands National Monument [9] was originally premised on federal control of those areas as granted in *United States* v. *California, supra.* This is true. The paramount rights of the United States to these submerged lands, and the absence of California title to them, were recognized in that 1947 decision. In 1949, President Truman allocated a small portion of all the submerged lands within the Federal Government's paramount rights to become part of the Channel Islands National Monument. And in 1953, all the submerged lands not actually occupied by the Federal Government were ceded to the States. But the Channel Islands National Monument remained.

Submerged lands for which the federal claim rested "solely upon the doctrine of 'paramount rights' " [10] were given up by the Federal Government. The majority's quotation of that statement comes from that part of the Senate Report explaining why the Attorney General's language was accepted, the language that included for the first time "rights . . . in

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[8] *Id.*, at 1. The stipulation was made contingent upon a finding that the submerged lands and waters within the one-mile radius were found to be part of the National Monument.

[9] The majority does not reach whether the submerged lands are actually within the Monument.

[10] S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, p. 20 (1953).

lands presently and actually occupied by the United States under claim of right . . . ." It says "any claim resting *solely* upon the doctrine of 'paramount rights' " (emphasis added) is lost to the Federal Government, but the majority holds that any claim *originating* in the doctrine of paramount rights is lost. The majority does not recognize that some rights can originate in the paramount-rights doctrine, yet rest on actual occupation under claim of right as part of a federal installation, annexed before the doctrine of paramount rights was waived in 1953.

That, I respectfully submit, is an erroneous interpretation of even that one bit of legislative history.[11] It is also contrary to the dominant theme in the legislative history that general, amorphous paramount rights claims were lost, but specific claims coupled with actual occupation of an installation were not. And most critically, the majority view is without support in the statute's plain language that "all lands presently occupied by the United States under claim of right" were preserved. It is stipulated that the lands were occupied, and a *claim* of right certainly arises when a President treats property in a manner to which only United States property is subject.[12]

I respectfully dissent.

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[11] The purpose of the Attorney General's proposed amendment was to preserve federal control over "all installations and acquisitions of the Federal Government within such area." Hearings 935. The submerged lands within a one-nautical-mile radius became an "acquisition" of the Channel Islands National Monument "installation" in 1949.

[12] On the face of the statute, it might be asked how any claim of right could arise more clearly than for a President to incorporate the property within a national monument. If President Truman did not act under claim of right, it is hard to surmise how he did act.

Syllabus

# SANTA CLARA PUEBLO ET AL. *v.* MARTINEZ ET AL.

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

No. 76–682. Argued November 29, 1977—Decided May 15, 1978

Respondents, a female member of the Santa Clara Pueblo and her daughter, brought this action for declaratory and injunctive relief against petitioners, the Pueblo and its Governor, alleging that a Pueblo ordinance that denies tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violates Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U. S. C. §§ 1301–1303, which in relevant part provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." 25 U. S. C. § 1302 (8). The ICRA's only express remedial provision, 25 U. S. C. § 1303, extends the writ of habeas corpus to any person, in a federal court, "to test the legality of his detention by order of an Indian tribe." The District Court held that jurisdiction was conferred by 28 U. S. C. § 1343 (4) and 25 U. S. C. § 1302 (8), apparently concluding that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and also that the tribe was not immune from such a suit. Subsequently, the court found for petitioners on the merits. The Court of Appeals, while agreeing on the jurisdictional issue, reversed on the merits. *Held:*

1. Suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit, since nothing on the face of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief. Pp. 58–59.

2. Nor does § 1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's Governor. Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate, as is manifest from the structure of the statutory scheme and the legislative history of Title I. Pp. 59–72.

(a) Congress was committed to the goal of tribal self-determination, as is evidenced by the provisions of Title I itself. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal governments, and other parts of the ICRA similarly manifest a congressional purpose to protect tribal sovereignty from undue interference. Creation of a federal cause

of action for the enforcement of § 1302 rights would not comport with the congressional goal of protecting tribal self-government. Pp. 62–65.

(b) Tribal courts, which have repeatedly been recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians, are available to vindicate rights created by the ICRA. Pp. 65–66.

(c) After considering numerous alternatives for review of tribal criminal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments. Similarly, Congress considered and rejected proposals for federal review of alleged violations of the ICRA arising in a civil context. It is thus clear that only the limited review mechanism of § 1303 was contemplated. Pp. 66–70.

(d) By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom that tribal forums may be in a better position to evaluate than federal courts. Pp. 71–72.

540 F. 2d 1039, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, POWELL, and STEVENS, JJ., joined, and in all but Part III of which REHNQUIST, J., joined. WHITE, J., filed a dissenting opinion, *post*, p. 72. BLACKMUN, J., took no part in the consideration or decision of the case.

*Marcelino Prelo* argued the cause and filed briefs for petitioners.

*Richard B. Collins* argued the cause for respondents. With him on the brief was *Alan R. Taradash.**

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*Briefs of *amici curiae* urging reversal were filed by *George B. Christensen* and *Joseph S. Fontana* for the National Tribal Chairmen's Assn.; and by *Reid Peyton Chambers, Harry R. Sachse,* and *Glen A. Wilkinson* for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation et al.

*Stephen L. Pevar* and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Alvin J. Ziontz* for the Confederated

MR. JUSTICE MARSHALL delivered the opinion of the Court.†

This case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

Petitioner Santa Clara Pueblo is an Indian tribe that has been in existence for over 600 years. Respondents, a female member of the tribe and her daughter, brought suit in federal court against the tribe and its Governor, petitioner Lucario Padilla, seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe. Respondents claimed that this rule discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U. S. C. §§ 1301–1303, which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." § 1302 (8).[1]

Title I of the ICRA does not expressly authorize the bringing of civil actions for declaratory or injunctive relief to

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Tribes of the Colville Indian Reservation; and by *Philip R. Ashby, William C. Schaab, L. Lamar Parrish,* and *Richard B. Wilks* for the Pueblo de Cochiti et al.

†MR. JUSTICE REHNQUIST joins Parts I, II, IV, and V of this opinion.

[1] The ICRA was initially passed by the Senate in 1967, 113 Cong. Rec. 35473, as a separate bill containing six Titles. S. 1843, 90th Cong., 1st Sess. (1967). It was re-enacted by the Senate in 1968 without change, 114 Cong. Rec. 5838, as an amendment to a House-originated bill, H. R. 2516, 90th Cong., 2d Sess. (1968), and was then approved by the House and signed into law by the President as Titles II through VII of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 77. Thus, the first Title of the ICRA was enacted as Title II of the Civil Rights Act of 1968. The six Titles of the ICRA will be referred to herein by their title numbers as they appeared in the version of S. 1843 passed by the Senate in 1967.

enforce its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.

## I

Respondent Julia Martinez is a full-blooded member of the Santa Clara Pueblo, and resides on the Santa Clara Reservation in Northern New Mexico. In 1941 she married a Navajo Indian with whom she has since had several children, including respondent Audrey Martinez. Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claran.[2] Although the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their

[2] The ordinance, enacted by the Santa Clara Pueblo Council pursuant to its legislative authority under the Constitution of the Pueblo, establishes the following membership rules:

"1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.

"2. . . . [C]hildren born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

"3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

"4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances."

Respondents challenged only subparagraphs 2 and 3. By virtue of subparagraph 4, Julia Martinez' husband is precluded from joining the Pueblo and thereby assuring the children's membership pursuant to subparagraph 1.

mother's death, or to inherit their mother's home or her possessory interests in the communal lands.

After unsuccessful efforts to persuade the tribe to change the membership rule, respondents filed this lawsuit in the United States District Court for the District of New Mexico, on behalf of themselves and others similarly situated.[3] Petitioners moved to dismiss the complaint on the ground that the court lacked jurisdiction to decide intratribal controversies affecting matters of tribal self-government and sovereignty. The District Court rejected petitioners' contention, finding that jurisdiction was conferred by 28 U. S. C. § 1343 (4) and 25 U. S. C. § 1302 (8). The court apparently concluded, first, that the substantive provisions of Title I impliedly authorized civil actions for declaratory and injunctive relief, and second, that the tribe was not immune from such suit.[4] Accordingly, the motion to dismiss was denied. 402 F. Supp. 5 (1975).

Following a full trial, the District Court found for petitioners on the merits. While acknowledging the relatively recent origin of the disputed rule, the District Court never-

[3] Respondent Julia Martinez was certified to represent a class consisting of all women who are members of the Santa Clara Pueblo and have married men who are not members of the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Claran women and men who are not members of the Pueblo.

[4] Section 1343 (4) gives the district courts "jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights" (emphasis added). The District Court evidently believed that jurisdiction could not exist under § 1343 (4) unless the ICRA did in fact authorize actions for declaratory or injunctive relief in appropriate cases. For purposes of this case, we need not decide whether § 1343 (4) jurisdiction can be established merely by presenting a *substantial question* concerning the availability of a particular form of relief. Cf. *Bell* v. *Hood,* 327 U. S. 678 (1946) (jurisdiction under 28 U. S. C. § 1331). See also *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67–68 (1933) (Cardozo, J.).

theless found it to reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents' interests,[5] but also determined that membership rules were "no more or less than a mechanism of social . . . self-definition," and as such were basic to the tribe's survival as a cultural and economic entity. *Id.*, at 15.[6] In sustaining the ordinance's validity under the "equal protection clause" of the ICRA, 25 U. S. C. § 1302 (8), the District Court concluded that the balance to be struck between these competing interests was better left to the judgment of the Pueblo:

> "[T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . .
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> ". . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it." 402 F. Supp., at 18–19.

On respondents' appeal, the Court of Appeals for the Tenth Circuit upheld the District Court's determination that 28 U. S. C. § 1343 (4) provides a jurisdictional basis for actions

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[5] The court found that "Audrey Martinez and many other children similarly situated have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Claran Indians." 402 F. Supp., at 18.

[6] The Santa Clara Pueblo is a relatively small tribe. Approximately 1,200 members reside on the reservation; 150 members of the Pueblo live elsewhere. In addition to tribal members, 150–200 nonmembers live on the reservation.

under Title I of the ICRA. 540 F. 2d 1039, 1042 (1976). It found that "since [the ICRA] was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect [of the ICRA]. Otherwise, it would constitute a mere unenforceable declaration of principles." *Ibid.* The Court of Appeals disagreed, however, with the District Court's ruling on the merits. While recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute, the Court of Appeals apparently concluded that because the classification was one based upon sex it was presumptively invidious and could be sustained only if justified by a compelling tribal interest. See *id.*, at 1047–1048. Because of the ordinance's recent vintage, and because in the court's view the rule did not rationally identify those persons who were emotionally and culturally Santa Clarans, the court held that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory effect. *Ibid.*

We granted certiorari, 431 U. S. 913 (1977), and we now reverse.

## II

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester* v. *Georgia,* 6 Pet. 515, 559 (1832); see *United States* v. *Mazurie,* 419 U. S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122–123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States* v. *Kagama,* 118 U. S. 375, 381–382 (1886). See *United States* v. *Wheeler,* 435 U. S. 313 (1978). They have power to make their own substantive law in internal matters, see *Roff* v. *Burney,* 168 U. S. 218 (1897) (mem-

bership); *Jones* v. *Meehan*, 175 U. S. 1, 29 (1899) (inheritance rules); *United States* v. *Quiver*, 241 U. S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959).

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton* v. *Mayes*, 163 U. S. 376 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.[7]

As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid.* See, *e. g.*, *United States* v. *Kagama*, *supra*,

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[7] See, *e. g.*, *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529, 533 (CA8 1967) (Due Process Clause of Fourteenth Amendment); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (CA10 1959) (freedom of religion under First and Fourteenth Amendments); *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (CA8 1958), cert. denied, 358 U. S. 932 (1959) (Fourteenth Amendment). See also *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915, 919 (CA10 1957), cert. denied, 356 U. S. 960 (1958) (applying *Talton* to Fifth Amendment due process claim); *Groundhog* v. *Keeler*, 442 F. 2d 674, 678 (CA10 1971). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (CA9 1965), and *Settler* v. *Yakima Tribal Court*, 419 F. 2d 486 (CA9 1969), cert. denied, 398 U. S. 903 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

at 379–381, 383–384; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 305–307 (1902). Title I of the ICRA, 25 U. S. C. §§ 1301–1303, represents an exercise of that authority. In 25 U. S. C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.[8]

[8] Section 1302 in its entirety provides that:

"No Indian tribe in exercising powers of self-government shall—

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensation;

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, 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 at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia,* that the "powers of self-government" shall include "all governmental powers pos-

In 25 U. S. C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Petitioners concede that § 1302 modifies the substantive law applicable to the tribe; they urge, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argue, further, that Congress did not waive the tribe's sovereign immunity from suit. Respondents, on the other hand, contend that § 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts. We consider these contentions first with respect to the tribe.

## III

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U. S. 354, 358 (1919); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512–513 (1940); *Puyallup Tribe* v. *Washington Dept. of Game*, 433 U. S. 165, 172–173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States* v. *United States Fidelity & Guaranty Co., supra*, at 512.

It is settled that a waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan*, 424 U. S. 392, 399 (1976), quoting, *United*

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sessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed . . . ." 25 U. S. C. § 1301 (2).

*States* v. *King,* 395 U. S. 1, 4 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, see, *e. g.,* 28 U. S. C. § 2243, the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

## IV

As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe* v. *Washington Dept. of Game, supra,* at 171–172; cf. *Ex parte Young,* 209 U. S. 123 (1908). We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms.

In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher* v. *District Court,* 424 U. S. 382, 387–388 (1976), may "undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves." *Williams* v. *Lee,* 358 U. S., at 223.[9]

[9] In *Fisher,* we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that

*A fortiori,* resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine* v. *Washington,* 420 U. S. 194, 199–200 (1975); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912).

With these considerations of "Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read," *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 172 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See *Cort* v. *Ash,* 422 U. S. 66 (1975).[10] We note at the outset that

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denying her access to the state courts constituted an impermissible racial discrimination, we reasoned:

"The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . . [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U. S., at 390–391.

In *Williams* v. *Lee,* we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and arising out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

[10] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny

a central purpose of the ICRA and in particular of Title I was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916); see *Cort* v. *Ash, supra,* at 78. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, *e. g., Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 414 n. 13 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 238–240 (1969). See also *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. See *National Railroad Passenger Corp.* v. *Na-*

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one? See, *e. g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g., Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey,* 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash,* 422 U. S., at 78.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich. L. Rev. 210 (1976).

*tional Assn. of Railroad Passengers,* 414 U. S. 453 (1974); *Cort* v. *Ash, supra.*

A

Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." *Morton* v. *Mancari,* 417 U. S. 535, 551 (1974); see *Fisher* v. *District Court,* 424 U. S., at 391.[11] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,[12] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal gov-

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[11] One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong. Rec. 5518, 5520 (1968).

[12] Exploratory hearings which led to the ICRA commenced in 1961 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041–3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961–968 and were the subject of extensive hearings by the Subcommittee. Hearings on S. 961–968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereinafter cited as 1965 Hearings).

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings 318, which, with some changes in wording, was enacted into law as 25 U. S. C. §§ 1302–1303. See also n. 1, *supra.*

ernments.[13] See n. 8, *supra.* Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases, cf. *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).[14]

The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference. For instance, Title III, 25 U. S. C. §§ 1321–1326, hailed by some of the ICRA's supporters as the most important part of the Act,[15] provides that States may not assume civil or criminal jurisdiction over "Indian country" without

[13] See, *e. g.,* Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 8–11, 25 (Comm. Print 1966); 1965 Hearings 17, 21, 50 (statements of Solicitor of the Dept. of Interior); *id.,* at 65 (statement of Arthur Lazarus, Jr., General Counsel for the Association of American Indian Affairs).

[14] The provisions of § 1302, set forth fully in n. 8, *supra,* differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely. The provision here at issue, § 1302 (8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of "*the* laws." Moreover, § 1302 (7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a $500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton* v. *Mayes,* discussed *supra,* at 56.

[15] See, *e. g.,* 114 Cong. Rec. 9596 (1968) (remarks of Rep. Meeds); Hearings on H. R. 15419 before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings). See also 1965 Hearings 198 (remarks of Executive Director, National Congress of American Indians).

the prior consent of the tribe, thereby abrogating prior law to the contrary.[16] Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,[17] and for minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation.[18]

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see *supra,* at 59–60, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional

[16] In 25 U. S. C. § 1323 (b), Congress expressly repealed § 7 of the Act of Aug. 15, 1953, 67 Stat. 590, which had authorized States to assume criminal and civil jurisdiction over reservations without tribal consent.

[17] Title II of the ICRA provides, *inter alia,* "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U. S. C. § 1311 (4). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, Indian Police and Judges 104–125 (1966).

[18] Under 25 U. S. C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra,* it became apparent that the Interior Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal rights. See, *e. g.,* Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. 53, 87th Cong., 1st Sess., 211 (1961) (hereinafter cited as 1961 Hearings); *id.,* at 290, 341, 410. Title V of the ICRA, 25 U. S. C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report).[19]

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.[20] Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[21] See, *e. g., Fisher* v. *District Court,* 424 U. S.

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[19] The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally 1 American Indian Policy Review Commission, Final Report 160–166 (1977); M. Price, Law and the American Indian 154–160 (1973). And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits. See, *e. g.,* 1965 Hearings 131, 157; Summary Report 12; House Hearings 69 (remarks of the Governor of the San Felipe Pueblo).

[20] Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, *e. g.,* 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S. Res. 58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong. Rec. 5520 (1968) (message from the President).

[21] There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976. 1 American Indian Policy Review Commission, *supra* n. 19, at 5, 163. In 1973 these courts

382 (1976); *Williams* v. *Lee,* 358 U. S. 217 (1959). See also *Ex parte Crow Dog,* 109 U. S. 556 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See *United States* v. *Mazurie,* 419 U. S. 544 (1975).[22] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

B

Our reluctance is strongly reinforced by the specific legislative history underlying 25 U. S. C. § 1303. This history, extending over more than three years,[23] indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments,

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handled approximately 70,000 cases. *Id.,* at 163–164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts. See, *e. g., United States ex rel. Mackey* v. *Coxe,* 18 How. 100 (1856); *Standley* v. *Roberts,* 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896).

[22] By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U. S. C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U. S. C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. See 1 American Indian Policy Review Commission, *supra* n. 19, at 187–188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

[23] See n. 12, *supra.* Although extensive hearings on the ICRA were held in the Senate, see *ibid.,* House consideration was extremely abbreviated. See House Hearings, *supra;* 114 Cong. Rec. 9614–9615 (1968) (remarks of Rep. Aspinall).

on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." Summary Report 11.

In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.[24] At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision—to provide some form of judicial review of criminal proceedings in tribal courts—believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. See *id.*, at 12; 1965 Hearings 22–23, 157, 162, 341–342. Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts . . . be reviewed in the U. S. district courts upon petition for a writ of habeas corpus." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

Similarly, and of more direct import to the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints

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[24] S. 962, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings 6–7. See n. 12, *supra*.

relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian." [25] Notwithstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated:

> "This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government. . . . [B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings 235 (statement of Mr. Real Bird).

In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of a tribal government." *Id.*, at 343. In response, this provision for suit by the Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.[26]

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[25] S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

[26] The Interior Department substitute, reprinted in 1965 Hearings 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act may be reviewed by the Secretary of the Interior upon his own motion or upon the request of said Indian. If

Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S. Rep. No. 841, 90th Cong., 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion.[27] Indeed, its description of the purpose of Title I,[28] as well as the floor

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the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose and such court shall have jurisdiction thereof."

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts the jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." *Id.*, at 23–24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

[27] Respondents rely most heavily on a rambling passage in the Report discussing *Talton* v. *Mayes* and its progeny, see n. 7, *supra*, some of which arose in a civil context. S. Rep. No. 841, at 8–11. Although there is some language suggesting that Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

[28] The Report states: "The purpose of title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This

debates on the bill,[29] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.[30] These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.

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is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government." *Id.*, at 6. It explains further that "[i]t is hoped that title II [25 U. S. C. § 1311], requiring the Secretary of the Interior to recommend a model code [to govern the administration of justice] for all Indian tribes, will implement the effect of title I." *Ibid.* (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts. S. Rep. No. 841, *supra*, at 6, 11.) Thus, it appears that the Committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

[29] Senator Ervin described the model code provisions of Title II, see n. 28, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong. Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong. Rec. 9553 (1968).

[30] Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton* v. *Ruiz*, 415 U. S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views.

## V

As the bill's chief sponsor, Senator Ervin,[31] commented in urging its passage, the ICRA "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian." 113 Cong. Rec. 13473 (1967). Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. See *ibid.,* quoting Summary Report 24. In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings.

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been . . . anomalous . . . and of a complex character." *United States* v. *Kagama,* 118 U. S., at 381. Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. See *Elk* v. *Wilkins,* 112 U. S. 94 (1884). As is suggested by the District Court's opinion in this case, see *supra,* at 54,

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[31] See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv. J. Legis. 557, 574–602, 603 (1972).

efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.[32]

As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

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. JUSTICE WHITE, dissenting.

The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U. S. C. §§ 1301–1341, is "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." S. Rep. No. 841, 90th

[32] A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff* v. *Burney*, 168 U. S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U. S. 76 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Cong., 1st Sess., 6 (1967) (hereinafter Senate Report). The Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA and in particular frustrates Title I's[1] purpose of "protect[ing] individual Indians from arbitrary and unjust actions of tribal governments." *Ibid.* Because I believe that implicit within Title I's declaration of constitutional rights is the authorization for an individual Indian to bring a civil action in federal court against tribal officials[2] for declaratory and injunctive relief to enforce those provisions, I dissent.

Under 28 U. S. C. § 1343 (4), federal district courts have jurisdiction over "any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Because the ICRA is unquestionably a federal Act "providing for the protection of civil rights," the necessary inquiry is whether the Act authorizes the commencement of a civil action for such relief.

The Court noted in *Bell* v. *Hood,* 327 U. S. 678, 684 (1946) (footnote omitted), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." The fact that a statute is merely declarative and does not expressly provide for a cause of action to enforce its terms "does not, of course, prevent a federal court from fashioning an effective equitable remedy,"

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[1] 25 U. S. C. §§ 1301–1303.

[2] Because the ICRA is silent on the question, I agree with the Court that the Act does not constitute a waiver of the Pueblo's sovereign immunity. The relief respondents seek, however, is available against petitioner Lucario Padilla, the Governor of the Pueblo. Under the Santa Clara Constitution, the Governor is charged with the duty of enforcing the Pueblo's laws. App. 5.

*Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 414 n. 13 (1968), for "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969). We have previously identified the factors that are relevant in determining whether a private remedy is implicit in a statute not expressly providing one: whether the plaintiff is one of the class for whose especial benefit the statute was enacted; whether there is any indication of legislative intent either to create a remedy or to deny one; whether such a remedy is consistent with the underlying purposes of the statute; and whether the cause of action is one traditionally relegated to state law. *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). Application of these factors in the present context indicates that a private cause of action under Title I of the ICRA should be inferred.

As the majority readily concedes, "respondents, American Indians living on the Santa Clara reservation, are among the class for whose especial benefit this legislation was enacted." *Ante*, at 61. In spite of this recognition of the congressional intent to provide these particular respondents with the guarantee of equal protection of the laws, the Court denies them access to the federal courts to enforce this right because it concludes that Congress intended habeas corpus to be the exclusive remedy under Title I. My reading of the statute and the legislative history convinces me that Congress did not intend to deny a private cause of action to enforce the rights granted under § 1302.

The ICRA itself gives no indication that the constitutional rights it extends to American Indians are to be enforced only by means of federal habeas corpus actions. On the contrary, since several of the specified rights are most frequently invoked in noncustodial situations,[3] the natural assumption is

[3] For example, habeas corpus relief is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property.

that some remedy other than habeas corpus must be contemplated. This assumption is not dispelled by the fact that the Congress chose to enumerate specifically the rights granted under § 1302, rather than to state broadly, as was originally proposed, that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." S. 961, 89th Cong., 1st Sess. (1965). The legislative history reflects that the decision "to indicate in more specific terms the constitutional protections the American Indian possesses in relation to his tribe," was made in recognition of the "peculiarities of the Indian's economic and social condition, his customs, his beliefs, and his attitudes . . . ." Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations pursuant to S. Res. 194, 89th Cong., 2d Sess., 25, 9 (Comm. Print 1966) (hereinafter Summary Report). While I believe that the uniqueness of the Indian culture must be taken into consideration in applying the constitutional rights granted in § 1302, I do not think that it requires insulation of official tribal actions from federal-court scrutiny. Nor do I find any indication that Congress so intended.

The inferences that the majority draws from various changes Congress made in the originally proposed legislation are to my mind unsupported by the legislative history. The first change the Court points to is the substitution of a habeas corpus provision for S. 962's provision of *de novo* federal-court review of tribal criminal proceedings. See *ante,* at 67. This change, restricted in its concern to the criminal context, is of limited relevance to the question whether Congress intended a private cause of action to enforce rights arising in a civil context. Moreover, the reasons this change was made are not inconsistent with the recognition of such a cause of action.

The Summary Report explains that the change in S. 962 was made only because of displeasure with the *degree* of intrusion permitted by the original provision:

> "No one appearing before the subcommittee or submitting testimony for the subcommittee's consideration opposed the provision of some type of appeal from the decisions of tribal courts. Criticism of S. 962, however, was directed at the bill's use of a trial *de novo* in a U. S. district court as the appropriate means of securing appellate review. . . .
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> . . . . .
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> "There was considerable support for the suggestion that the district court, instead of reviewing tribal court decisions on a *de novo* basis, be authorized only to decide *whether* the accused was deprived of a constitutional right. If no deprivation were found, the tribal court decision would stand. If, on the other hand, the district court determined that an accused had suffered a denial of his rights at the hands of the tribal court, the case would be remanded with instructions for dismissal or retrial, as the district court might decide." Summary Report 12–13 (footnote omitted).

The degree of intrusion permitted by a private cause of action to enforce the civil provisions of § 1302 would be no greater than that permitted in a habeas corpus proceeding. The federal district court's duty would be limited to determining whether the challenged tribal action violated one of the enumerated rights. If found to be in violation, the action would be invalidated; if not, it would be allowed to stand. In no event would the court be authorized, as in a *de novo* review proceeding, to substitute its judgment concerning the wisdom of the action taken for that of the tribal authorities.

Nor am I persuaded that Congress, by rejecting various proposals for administrative review of alleged violations of Indian

rights, indicated its rejection of federal *judicial* review of such violations. As the majority notes, the original version of the Act provided for investigation by the Attorney General of "any written complaint filed with him by any Indian . . . alleging that such Indian has been deprived of a right conferred upon citizens of the United States by the laws and Constitution of the United States." S. 963, 89th Cong., 1st Sess. (1965). The bill would have authorized the Attorney General to bring whatever action he deemed appropriate to vindicate such right. Although it is true that this provision was eliminated from the final version of the ICRA, the inference the majority seeks to draw from this fact is unwarranted.

It should first be noted that the focus of S. 963 was in large part aimed at nontribal deprivations of Indian rights. In explaining the need for the bill, the Subcommittee stated that it had received complaints of deprivations of Indians' constitutional rights in the following contexts, only two of which concern tribal actions: "[I]llegal detention of reservation Indians by State and tribal officials; arbitrary decisionmaking by the Bureau of Indian Affairs; denial of various State welfare services to Indians living off the reservations; discrimination by government officials in health services; mistreatment and brutality against Indians by State and tribal law enforcement officers; and job discrimination by Federal and State agencies and private businesses." Hearings on S. 961–968 and S. J. Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 8 (1965) (hereinafter 1965 Hearings). See also *id.*, at 86 (testimony of Arthur Lazarus, Jr., General Counsel for the Association on American Indian Affairs, Inc.: "It is my understanding . . . that the complaints to be filed with the Attorney General are generally to be off-reservation violations of rights along the lines of the provisions in the Civil Rights Act"). Given this difference in focus, the elimination of this proposal has little relevance to the issue before us.

Furthermore, the reasons for the proposal's deletion are not as clear as the majority seems to indicate. While two witnesses did express their fears that the proposal would disrupt tribal governments, many others expressed the view that the proposals gave the Attorney General no more authority than he already possessed. *Id.*, at 92, 104, 227, 319. The Acting Secretary of the Interior was among those who thought that this additional authorization was not needed by the Attorney General because the Department of the Interior already routinely referred complaints of Indian rights violations to him for the commencement of appropriate litigation. *Id.*, at 319.

The failure of Congress to adopt the Department of the Interior's substitute provision provides even less support for the view that Congress opposed a private cause of action. This proposal would have allowed the Secretary of the Interior to review "[a]ny action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom established and protected by this Act . . ." and to take "such corrective action" as he deemed necessary. *Id.*, at 318. It was proposed in tandem with a provision that would have allowed an Indian to appeal from a criminal conviction in a tribal court to the Secretary, who would then have been authorized to affirm, modify, or reverse the tribal court's decision. Most of the discussion about this joint proposal focused on the review of criminal proceedings, and several witnesses expressed objection to it because it improperly "mixed" "the judicial process . . . with the executive process." *Id.*, at 96. See also *id.*, at 294. Senator Ervin himself stated that he had "difficulty reconciling [his] ideas of the nature of the judicial process and the notion of taking an appeal in what is supposed to be a judicial proceeding to the executive branch of the Government." *Id.*, at 225. While the discussion of the civil part of the proposal was limited, it may be assumed that Congress was equally unreceptive to the

idea of the Executive Branch's taking "corrective actions" with regard to noncriminal actions of tribal governments.

In sum, then, I find no positive indication in the legislative history that Congress opposed a private cause of action to enforce the rights extended to Indians under § 1302.[4] The absence of any express approval of such a cause of action, of course, does not prohibit its inference, for, as we stated in *Cort:* "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." 422 U. S., at 82 (footnote omitted).

The most important consideration, of course, is whether a private cause of action would be consistent with the underly-

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[4] References in the legislative history to the role of Title II's model code in effectuating the purposes of Title I do not indicate that Congress rejected the possibility of a federal cause of action under § 1302. The wording of § 1311, which directs the Secretary of the Interior to recommend a model code, demonstrates that in enacting Title II Congress was primarily concerned with criminal proceedings. Thus it requires the code to include

"provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual . . . ."

The remaining required provisions concern the qualifications for office of judges of courts of Indian offenses and educational classes for the training of such judges. While the enactment of Title II shows Congress' desire to implement the provisions of § 1302 concerning rights of criminal defendants and to upgrade the quality of tribal judicial proceedings, it gives no indication that Congress decided to deny a federal cause of action to review tribal actions arising in a noncriminal context.

ing purposes of the Act. As noted at the outset, the Senate Report states that the purpose of the ICRA "is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." Senate Report 6. Not only is a private cause of action consistent with that purpose, it is necessary for its achievement. The legislative history indicates that Congress was concerned, not only about the Indian's lack of substantive rights, but also about the lack of remedies to enforce whatever rights the Indian might have. During its consideration of this legislation, the Senate Subcommittee pointed out that "[t]hough protected against abridgment of his rights by State or Federal action, the individual Indian is . . . without redress against his tribal authorities." Summary Report 3. It is clear that the Subcommittee's concern was not limited to the criminal context, for it explained:

> "It is not only in the operation of tribal courts that Indians enjoy something other than full benefit of the Bill of Rights. For example, a Navajo tribal council ordinance prohibiting the use of peyote resulted in an alleged abridgment of religious freedom when applied to members of the Native American Church, an Indian sect which uses the cactus plant in connection with its worship services.
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> "The opinion of the U. S. Court of Appeals for the 10th Circuit, in dismissing an action of the Native American Church against the Navajo tribal council, is instructive in pointing up the lack of remedies available to the Indian in resolving his differences with tribal officials." *Id.*, at 3–4 (footnotes omitted).[5]

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[5] The opinion to which the Subcommittee was referring was *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (CA10 1959), in which the court dismissed for lack of federal jurisdiction an action challenging a Navajo tribal ordinance making it a criminal offense "to introduce into the Navajo country, sell, use or have in possession within the Navajo country, the bean known as peyote . . . ." *Id.*, at 132. It was

It was "[t]o remedy these various situations and thereby to safeguard the rights of Indian citizens . . ." that the legislation resulting in the ICRA was proposed. *Id.*, at 5.

Several witnesses appearing before the Senate Subcommittee testified concerning deprivations of their rights by tribal authorities and their inability to gain relief. Mr. Frank Takes Gun, President of the Native American Church, for example, stated that "the Indian is without an effective means to enforce whatever constitutional rights he may have in tribal proceedings instituted to deprive him of liberty or property. While I suppose that abstractedly [*sic*] we might be said to enjoy [certain] rights . . . , the blunt fact is that unless the tribal court elects to confer that right upon us we have no way of securing it." 1965 Hearings 164. Miss Emily Schuler, who accompanied a former Governor of the Isleta Pueblo to the hearings, echoed these concerns. She complained that "[t]he people get governors and sometimes they get power hungry and then the people have no rights at all," to which Senator Ervin responded: " 'Power hungry' is a pretty good shorthand statement to show why the people of the United States drew up a Constitution. They wanted to compel their rulers to

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contended that the ordinance violated plaintiffs' right to the free exercise of religion. Because the court concluded that the First Amendment was not applicable to the tribe, it held that the federal courts lacked jurisdiction, "even though [the tribal laws or regulations] may have an impact to some extent on forms of religious worship." *Id.*, at 135.

The Senate Report also made note of this decision in what the majority terms a "rambling passage." *Ante*, at 69 n. 27. In this passage the Committee reviewed various federal decisions relating to the question "whether a tribal Indian can successfully challenge on constitutional grounds specific acts or practices of the Indian tribe." Senate Report 9. With only one exception, these decisions held that federal courts lacked jurisdiction to review alleged constitutional violations by tribal officials because the provisions of the Bill of Rights were not binding on the tribes. This section of the Senate Report, which is included under the heading "Need for Legislation," indicates Congress' concern over the Indian's lack of remedies for tribal constitutional violations.

stay within the bounds of that Constitution and not let that hunger for power carry them outside it." *Id.*, at 264.

Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them. In the case of the Santa Clara Pueblo, for example, both legislative and judicial powers are vested in the same body, the Pueblo Council. See App. 3–5. To suggest that this tribal body is the "appropriate" forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders.[6]

Although the Senate Report's statement of the purpose of the ICRA refers only to the granting of constitutional rights to the Indians, I agree with the majority that the legislative history demonstrates that Congress was also concerned with furthering Indian self-government. I do not agree, however, that this concern on the part of Congress precludes our recognition of a federal cause of action to enforce the terms of the Act. The major intrusion upon the tribe's right to govern itself occurred when Congress enacted the ICRA and man-

[6] Testimony before the Subcommittee indicated that the mere provision of constitutional rights to the tribes did not necessarily guarantee that those rights would be observed. Mr. Lawrence Jaramillo, a former Governor of the Isleta Pueblo, testified that, despite the tribal constitution's guarantee of freedom of religion, the present tribal Governor had attempted to "alter certain religious procedures of the Catholic priest who resides on the reservation." 1965 Hearings 261, 264. Mr. Jaramillo stated that the Governor "has been making his own laws and he has been making his own decisions and he has been making his own court rulings," and he implored the Subcommittee:

"Honorable Senator Ervin, we ask you to see if we can have any protection on these constitutional rights. We do not want to give jurisdiction to the State. We want to keep it in Federal jurisdiction. But we are asking this. We know if we are not given justice that we would like to appeal a case to the Federal court." *Id.*, at 264.

dated that the tribe "in exercising powers of self-government" observe the rights enumerated in § 1302. The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-à-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," *ante,* at 59, in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

The final consideration suggested in *Cort* is the appropriateness of a federal forum to vindicate the right in question. As even the majority acknowledges, "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights . . . ." *Ante,* at 61. For the reasons set out above, I would make no exception here.

Because I believe that respondents stated a cause of action over which the federal courts have jurisdiction, I would proceed to the merits of their claim. Accordingly, I dissent from the opinion of the Court.

# KULKO *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (HORN, REAL PARTY IN INTEREST)

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 77–293. Argued March 29, 1978—Decided May 15, 1978

Appellant and appellee, both then New York domiciliaries, were married in 1959 in California during appellant's three-day stopover while he was en route to overseas military duty. After the marriage, appellee returned to New York, as did appellant following his tour of duty and a 24-hour stopover in California. In 1961 and 1962 a son and daughter were born to them in New York, where the family resided together until March 1972, when appellant and appellee separated. Appellee then moved to California. Under a separation agreement, executed by both parties in New York, the children were to remain with appellant father during the school year but during specified vacations with appellee mother, whom appellant agreed to pay $3,000 per year in child support for the periods when the children were in her custody. Appellee, after obtaining a divorce in Haiti, which incorporated the terms of the separation agreement, returned to California. In December 1973 the daughter at her request and with her father's consent joined her mother in California, and remained there during the school year, spending vacations with her father. Appellee, without appellant's consent, arranged for the son to join her in California about two years later. Appellee then brought this action against appellant in California to establish the Haitian divorce decree as a California judgment, to modify the judgment so as to award her full custody of the children, and to increase appellant's child-support obligations. Appellant, resisting the claim for increased support, appeared specially, claiming that he lacked sufficient "minimum contacts" with that State under *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316, to warrant the State's assertion of personal jurisdiction over him. The California Supreme Court, upholding lower-court determinations adverse to appellant, concluded that where a nonresident defendant has caused an "effect" in the State by an act or omission outside the State, personal jurisdiction over the defendant arising from the effect may be exercised whenever "reasonable," and that such exercise was "reasonable" here because appellant had "purposely availed himself of the benefits and protections of California" by sending the daughter to

live with her mother there, and that it was "fair and reasonable" for the defendant to be subject to personal jurisdiction for the support of both children. *Held:* The exercise of *in personam* jurisdiction by the California courts over appellant, a New York domiciliary, would violate the Due Process Clause of the Fourteenth Amendment. The mere act of sending a child to California to live with her mother connotes no intent to obtain nor expectancy of receiving a corresponding benefit in that State that would make fair the assertion of that State's judicial jurisdiction over appellant. Pp. 91–101.

(a) A defendant to be bound by a judgment against him must "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington, supra,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463. P. 92.

(b) The acquiescence of appellant in his daughter's desire to live with her mother in California was not enough to confer jurisdiction over appellant in the California courts. See *Shaffer* v. *Heitner,* 433 U. S 186, 216. P. 94.

(c) Exercise of *in personam* jurisdiction over appellant was not warranted by the financial benefit appellant derived from his daughter's presence in California for nine months of the year, since any diminution in appellant's household costs resulted not from the child's presence in California but from her absence from appellant's home, and from appellee's failure to seek an increase in support payments in New York. Pp. 94–96.

(d) The "effects" rule that the California courts applied is intended to reach wrongful activity outside of the forum State causing injury within the State where such application would not be "unreasonable," but here, where there is no claim that appellant visited physical injury on either property or persons in California; where the cause of action arises from appellant's personal, domestic relations; and where the controversy arises from a separation that occurred in New York, and modification is sought of a contract negotiated and signed in New York that had virtually no connection with the forum State, it is "unreasonable" for California to assert personal jurisdiction over appellant. Pp. 96–97.

(e) Since appellant remained in the State of marital domicile and did no more than acquiesce in the stated preference of his daughter to live with her mother in California, basic considerations of fairness point decisively to appellant's State of domicile as the proper forum for adjudicating this case, whatever be the merits of appellee's underlying claim. Pp. 97–98.

(f) California's legitimate interest in ensuring the support of children residing in California without unduly disrupting the children's lives is already being served by the State's participation in the Uniform Reciprocal Enforcement of Support Act of 1968, which permits a California resident claiming support from a nonresident to file a petition in California and have its merits adjudicated in the State of the alleged obligor's residence, without either party's having to leave his or her own State. New York is a signatory to a similar statute. Those statutes appear to provide appellee with means to vindicate her claimed right to additional child support from appellant and collection of any support payments found to be owed to her by appellant. Pp. 98–101.

Appeal dismissed and certiorari granted; 19 Cal. 3d 514, 564 P. 2d 353, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE and POWELL, JJ., joined, *post*, p. 101.

*Lawrence H. Stotter* argued the cause for appellant. With him on the brief was *Edward Schaeffer*.

*Suzie S. Thorn* argued the cause for appellee. With her on the brief was *James E. Sutherland*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue before us is whether, in this action for child support, the California state courts may exercise *in personam* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled within the State. For reasons set forth below, we hold that the exercise of such jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.

## I

Appellant Ezra Kulko married appellee Sharon Kulko Horn in 1959, during appellant's three-day stopover in California en route from a military base in Texas to a tour of duty in Korea. At the time of this marriage, both parties were domiciled in and residents of New York State. Immediately fol-

lowing the marriage, Sharon Kulko returned to New York, as did appellant after his tour of duty. Their first child, Darwin, was born to the Kulkos in New York in 1961, and a year later their second child, Ilsa, was born, also in New York. The Kulkos and their two children resided together as a family in New York City continuously until March 1972, when the Kulkos separated.

Following the separation, Sharon Kulko moved to San Francisco, Cal. A written separation agreement was drawn up in New York; in September 1972, Sharon Kulko flew to New York City in order to sign this agreement. The agreement provided, *inter alia,* that the children would remain with their father during the school year but would spend their Christmas, Easter, and summer vacations with their mother. While Sharon Kulko waived any claim for her own support or maintenance, Ezra Kulko agreed to pay his wife $3,000 per year in child support for the periods when the children were in her care, custody, and control. Immediately after execution of the separation agreement, Sharon Kulko flew to Haiti and procured a divorce there;[1] the divorce decree incorporated the terms of the agreement. She then returned to California, where she remarried and took the name Horn.

The children resided with appellant during the school year and with their mother on vacations, as provided by the separation agreement, until December 1973. At this time, just before Ilsa was to leave New York to spend Christmas vacation with her mother, she told her father that she wanted to remain in California after her vacation. Appellant bought his daughter a one-way plane ticket, and Ilsa left, taking her

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[1] While the Jurisdictional Statement, at 5, asserts that "the parties" flew to Haiti, appellant's affidavit submitted in the Superior Court stated that Sharon Kulko flew to Haiti with a power of attorney signed by appellant. App. 28. The Haitian decree states that Sharon Kulko appeared "in person" and that appellant filed a "Power of Attorney and submission to jurisdiction." *Id.,* at 14.

clothing with her. Ilsa then commenced living in California with her mother during the school year and spending vacations with her father. In January 1976, appellant's other child, Darwin, called his mother from New York and advised her that he wanted to live with her in California. Unbeknownst to appellant, appellee Horn sent a plane ticket to her son, which he used to fly to California where he took up residence with his mother and sister.

Less than one month after Darwin's arrival in California, appellee Horn commenced this action against appellant in the California Superior Court. She sought to establish the Haitian divorce decree as a California judgment; to modify the judgment so as to award her full custody of the children; and to increase appellant's child-support obligations.[2] Appellant appeared specially and moved to quash service of the summons on the ground that he was not a resident of California and lacked sufficient "minimum contacts" with the State under *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945), to warrant the State's assertion of personal jurisdiction over him.

The trial court summarily denied the motion to quash, and appellant sought review in the California Court of Appeal by petition for a writ of mandate. Appellant did not contest the court's jurisdiction for purposes of the custody determination, but, with respect to the claim for increased support, he renewed his argument that the California courts lacked personal jurisdiction over him. The appellate court affirmed the denial of appellant's motion to quash, reasoning that, by consenting to his children's living in California, appellant had "caused

[2] Appellee Horn's complaint also sought an order restraining appellant from removing his children from the State. The trial court immediately granted appellee temporary custody of the children and restrained both her and appellant from removing the children from the State of California. See 19 Cal. 3d 514, 520, 564 P. 2d 353, 355 (1977). The record does not reflect whether appellant is still enjoined from removing his children from the State.

an effect in th[e] state" warranting the exercise of jurisdiction over him. 133 Cal. Rptr. 627, 628 (1976).

The California Supreme Court granted appellant's petition for review, and in a 4-2 decision sustained the rulings of the lower state courts. 19 Cal. 3d 514, 564 P. 2d 353 (1977). It noted first that the California Code of Civil Procedure demonstrated an intent that the courts of California utilize all bases of *in personam* jurisdiction "not inconsistent with the Constitution." [3] Agreeing with the court below, the Supreme Court stated that, where a nonresident defendant has caused an effect in the State by an act or omission outside the State, personal jurisdiction over the defendant in causes arising from that effect may be exercised whenever "reasonable." *Id.*, at 521, 564 P. 2d, at 356. It went on to hold that such an exercise was "reasonable" in this case because appellant had "purposely availed himself of the benefits and protections of the laws of California" by sending Ilsa to live with her mother in California. *Id.*, at 521–522, 524, 564 P. 2d, at 356, 358. While noting that appellant had not, "with respect to his other child, Darwin, caused an effect in [California]"—since it was appellee Horn who had arranged for Darwin to fly to California in January 1976—the court concluded that it was "fair and reasonable for defendant to be subject to personal jurisdiction for the support of both children, where he has committed acts with respect to one child which confers [*sic*] personal jurisdiction and has consented to the permanent residence of the other child in California." *Id.*, at 525, 564 P. 2d, at 358–359.

In the view of the two dissenting justices, permitting a minor child to move to California could not be regarded as a

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[3] Section 410.10, Cal. Civ. Proc. Code Ann. (West 1973), provides:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

The opinion below does not appear to distinguish between the requirements of the Federal and State Constitutions. See 19 Cal. 3d, at 521–522, 564 P. 2d, at 356.

purposeful act by which appellant had invoked the benefits and protection of state law. Since appellant had been in the State of California on only two brief occasions many years before on military stopovers, and lacked any other contact with the State, the dissenting opinion argued that appellant could not reasonably be subjected to the *in personam* jurisdiction of the California state courts. *Id.*, at 526–529, 564 P. 2d, at 359–360.

On Ezra Kulko's appeal to this Court, probable jurisdiction was postponed. 434 U. S. 983 (1977). We have concluded that jurisdiction by appeal does not lie,[4] but, treating the papers as a petition for a writ of certiorari, we hereby grant the petition and reverse the judgment below.[5]

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[4] As was true in both *Hanson* v. *Denckla,* 357 U. S. 235 (1958), and *May* v. *Anderson,* 345 U. S. 528 (1953), this case was improperly brought to this Court as an appeal, since no state statute was "drawn in question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States," 28 U. S. C. § 1257 (2). The jurisdictional statute construed by the California Supreme Court provides that the State's jurisdiction is as broad as the Constitution permits. See n. 3, *supra.* Appellant did not argue below that this statute was unconstitutional, but instead argued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction.

Appellant requested that, in the event that appellate jurisdiction under 28 U. S. C. § 1257 (2) was found lacking, the papers be acted upon as a petition for certiorari pursuant to 28 U. S. C. § 2103. We follow the practice of both *Hanson* and *May* in deeming the papers to be a petition for a writ of certiorari. As in *Hanson* and *May,* moreover, we shall continue to refer to the parties herein as appellant and appellee to minimize confusion. See 357 U. S., at 244; 345 U. S., at 530.

[5] After the California Supreme Court's decision, appellant sought a continuance of trial-court proceedings pending this Court's disposition of his appeal. Appellant's request for a continuance was denied by the trial court, and subsequently that court determined that appellant was in

## II

The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. See *Shaffer* v. *Heitner,* 433 U. S. 186, 198–200 (1977). It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *Pennoyer* v. *Neff,* 95 U. S. 714, 732–733 (1878); *International Shoe Co.* v. *Washington,* 326 U. S., at 316. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought, *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313–314 (1950), and a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum. *Milliken* v. *Meyer,* 311 U. S. 457, 463–464 (1940). In this case, appellant does not dispute the adequacy of the notice that he received, but contends that his connection with the State of California is too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon him the burden and inconvenience of defense in California.

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arrears on his child-support payments. App. to Brief for Appellant ii–iii. In light of the change in custody arrangements, the court also ordered that appellant's child-support obligations be increased substantially. *Ibid.*

Appellee Horn argues that appellant's request for a continuance amounted to a general appearance and a waiver of jurisdictional objections, and that accordingly there is no longer a live controversy as to the jurisdictional issue before us. Appellee's argument concerning the jurisdictional effect of a motion for a continuance, however, does not find support in the California statutes, rules, or cases that she cites. Moreover, the state trial court expressly determined, subsequent to the request for a continuance, that appellant had "made a special appearance only to contest the jurisdiction of the Court." *Id.,* at i. Under these circumstances, appellant's challenge to the state court's *in personam* jurisdiction is not moot.

The parties are in agreement that the constitutional standard for determining whether the State may enter a binding judgment against appellant here is that set forth in this Court's opinion in *International Shoe Co.* v. *Washington, supra:* that a defendant "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U. S., at 316, quoting *Milliken* v. *Meyer, supra,* at 463. While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered, see *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 223 (1957), an essential criterion in all cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State. *International Shoe Co.* v. *Washington, supra,* at 316–317, 319. Accord, *Shaffer* v. *Heitner, supra,* at 207–212; *Perkins* v. *Benguet Mining Co.,* 342 U. S. 437, 445 (1952).

Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson* v. *Denckla,* 357 U. S. 235, 246 (1958). We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable." *Estin* v. *Estin,* 334 U. S. 541, 545 (1948). But we believe that the California Supreme Court's application of the minimum-contacts test in this case represents an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just, nor reasonable.

A

In reaching its result, the California Supreme Court did not rely on appellant's glancing presence in the State some 13

years before the events that led to this controversy, nor could it have. Appellant has been in California on only two occasions, once in 1959 for a three-day military stopover on his way to Korea, see *supra,* at 86–87, and again in 1960 for a 24-hour stopover on his return from Korean service. To hold such temporary visits to a State a basis for the assertion of *in personam* jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment. Nor did the California court rely on the fact that appellant was actually married in California on one of his two brief visits. We agree that where two New York domiciliaries, for reasons of convenience, marry in the State of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident in an action relating to child support.

Finally, in holding that personal jurisdiction existed, the court below carefully disclaimed reliance on the fact that appellant had agreed at the time of separation to allow his children to live with their mother three months a year and that he had sent them to California each year pursuant to this agreement. As was noted below, 19 Cal. 3d, at 523–524, 564 P. 2d, at 357, to find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements. Moreover, it could arbitrarily subject one parent to suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement.[6] As we have emphasized:

"The unilateral activity of those who claim some rela-

[6] Although the separation agreement stated that appellee Horn resided in California and provided that child-support payments would be mailed to her California address, it also specifically contemplated that appellee might move to a different State. The agreement directed appellant to mail the

> tionship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . ." *Hanson* v. *Denckla, supra,* at 253.

The "purposeful act" that the California Supreme Court believed did warrant the exercise of personal jurisdiction over appellant in California was his "actively and fully consent[ing] to Ilsa living in California for the school year . . . and . . . sen[ding] her to California for that purpose." 19 Cal. 3d, at 524, 564 P. 2d, at 358. We cannot accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws. See *Shaffer* v. *Heitner,* 433 U. S., at 216.[7]

Nor can we agree with the assertion of the court below that the exercise of *in personam* jurisdiction here was warranted by the financial benefit appellant derived from his daughter's presence in California for nine months of the year. 19 Cal. 3d, at 524–525, 564 P. 2d, at 358. This argument rests on the premise that, while appellant's liability for support payments

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support payments to appellee's San Francisco address or "any other address which the Wife may designate from time to time in writing." App. 10.

[7] The court below stated that the presence in California of appellant's daughter gave appellant the benefit of California's "police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums . . . ." 19 Cal. 3d, at 522, 564 P. 2d, at 356. But, in the circumstances presented here, these services provided by the State were essentially benefits to the child, not the father, and in any event were not benefits that appellant purposefully sought for himself.

remained unchanged, his yearly expenses for supporting the child in New York decreased. But this circumstance, even if true, does not support California's assertion of jurisdiction here. Any diminution in appellant's household costs resulted, not from the child's presence in California, but rather from her absence from appellant's home. Moreover, an action by appellee Horn to increase support payments could now be brought, and could have been brought when Ilsa first moved to California, in the State of New York; [8] a New York court would clearly have personal jurisdiction over appellant and, if a judgment were entered by a New York court increasing appellant's child-support obligations, it could properly be enforced against him in both New York and California.[9] Any ultimate financial advantage to appellant thus results not from the child's presence in California, but from appellee's failure earlier to seek an increase in payments under the separation agreement.[10] The argument below to the contrary, in our

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[8] Under the separation agreement, appellant is bound to "indemnify and hold [his] Wife harmless from any and all attorney fees, costs and expenses which she may incur by reason of the default of [appellant] in the performance of any of the obligations required to be performed by him pursuant to the terms and conditions of this agreement." App. 11. To the extent that appellee Horn seeks arrearages, see n. 5, *supra*, her litigation expenses, presumably including any additional costs incurred by her as a result of having to prosecute the action in New York, would thus be borne by appellant.

[9] A final judgment entered by a New York court having jurisdiction over the defendant's person and over the subject matter of the lawsuit would be entitled to full faith and credit in any State. See *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610, 614 (1947). See also *Sosna* v. *Iowa*, 419 U. S. 393, 407 (1975).

[10] It may well be that, as a matter of state law, appellee Horn could still obtain through New York proceedings additional payments from appellant for Ilsa's support from January 1974, when a *de facto* modification of the custody provisions of the separation agreement took place, until the present. See H. Clark, Domestic Relations § 15.2, p. 500 (1968); cf. *In re Santa Clara County* v. *Hughes*, 43 Misc. 2d 559, 251 N. Y. S. 2d 579 (1964).

view, confuses the question of appellant's liability with that of the proper forum in which to determine that liability.

B

In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an "effect" in California was misplaced. See *supra,* at 89. This "effects" test is derived from the American Law Institute's Restatement (Second) of Conflict of Laws § 37 (1971), which provides:

> "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." [11]

While this provision is not binding on this Court, it does not in any event support the decision below. As is apparent from the examples accompanying § 37 in the Restatement, this section was intended to reach wrongful activity outside of the State causing injury within the State, see, *e. g.,* Comment *a,* p. 157 (shooting bullet from one State into another), or commercial activity affecting state residents, *ibid.* Even in such situations, moreover, the Restatement recognizes that there might be circumstances that would render "unreasonable" the assertion of jurisdiction over the nonresident defendant.

The circumstances in this case clearly render "unreasonable" California's assertion of personal jurisdiction. There is no claim that appellant has visited physical injury on either

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[11] Section 37 of the Restatement has effectively been incorporated into California law. See Judicial Council Comment (9) to Cal. Civ. Proc. Code Ann. § 410.10 (West 1973).

property or persons within the State of California. Cf. *Hess* v. *Pawloski,* 274 U. S. 352 (1927). The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State. Cf. *McGee* v. *International Life Insurance Co.,* 355 U. S. 220 (1957). Furthermore, the controversy between the parties arises from a separation that occurred in the State of New York; appellee Horn seeks modification of a contract that was negotiated in New York and that she flew to New York to sign. As in *Hanson* v. *Denckla,* 357 U. S., at 252, the instant action involves an agreement that was entered into with virtually no connection with the forum State. See also n. 6, *supra.*

Finally, basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. Cf. *May* v. *Anderson,* 345 U. S. 528, 534–535, n. 8 (1953). Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have

anticipated being "haled before a [California] court," *Shaffer* v. *Heitner*, 433 U. S., at 216.[12] To make jurisdiction in a case such as this turn on whether appellant bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the "quality and nature" of appellant's activities in or relating to the State of California. *International Shoe Co.* v. *Washington*, 326 U. S., at 319.

III

In seeking to justify the burden that would be imposed on appellant were the exercise of *in personam* jurisdiction in California sustained, appellee argues that California has substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised. These interests are unquestionably important. But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the " 'center of gravity' " for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant. *Hanson* v. *Denckla*, *supra*, at 254. And California has not attempted to assert any particularized interest in trying such cases in its courts by, *e. g.*, enacting a special jurisdictional statute. Cf. *McGee* v. *International Life Ins. Co.*, *supra*, at 221, 224.

California's legitimate interest in ensuring the support of children resident in California without unduly disrupting the children's lives, moreover, is already being served by the State's participation in the Revised Uniform Reciprocal Enforcement of Support Act of 1968. This statute provides a mechanism

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[12] See also Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 911 (1960).

for communication between court systems in different States, in order to facilitate the procurement and enforcement of child-support decrees where the dependent children reside in a State that cannot obtain personal jurisdiction over the defendant. California's version of the Act essentially permits a California resident claiming support from a nonresident to file a petition in California and have its merits adjudicated in the State of the alleged obligor's residence, without either party's having to leave his or her own State. Cal. Civ. Proc. Code Ann. § 1650 *et seq.* (West 1972 and Supp. 1978).[13] New York State is a signatory to a similar Act.[14] Thus, not only may

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[13] In addition to California, 24 other States are signatories to this Act. 9 U. L. A. 473 (Supp. 1978). Under the Act, an "obligee" may file a petition in a court of his or her State (the "initiating court") to obtain support. 9 U. L. A. §§ 11, 14 (1973). If the court "finds that the [petition] sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property," it may send a copy of the petition to the "responding state." § 14. This has the effect of requesting the responding State "to obtain jurisdiction over the obligor." § 18 (b). If jurisdiction is obtained, then a hearing is set in a court in the responding State at which the obligor may, if he chooses, contest the claim. The claim may be litigated in that court, with deposition testimony submitted through the initiating court by the initiating spouse or other party. § 20. If the responding state court finds that the obligor owes a duty of support pursuant to the laws of the State where he or she was present during the time when support was sought, § 7, judgment for the petitioner is entered. § 24. If the money is collected from the spouse in the responding State, it is then sent to the court in the initiating State for distribution to the initiating party. § 28.

[14] While not a signatory to the Uniform Reciprocal Enforcement of Support Act of 1968, New York is a party to the Uniform Reciprocal Enforcement of Support Act of 1950, as amended. N. Y. Dom. Rel. Law § 30 *et seq.* (McKinney 1977) (Uniform Support of Dependents Law). By 1957 this Act, or its substantial equivalent, had been enacted in all States, organized Territories, and the District of Columbia. 9 U. L. A. 885 (1973). The "two-state" procedure in the 1950 Act for obtaining and

plaintiff-appellee here vindicate her claimed right to additional child support from her former husband in a New York court, see *supra,* at 95, but also the Uniform Acts will facilitate both her prosecution of a claim for additional support and collection of any support payments found to be owed by appellant.[15]

It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children. But these interests simply do not make California a "fair forum," *Shaffer* v. *Heitner, supra,* at 215, in which to require appellant, who derives no personal or commercial benefit from his child's presence in California and who lacks any other

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enforcing support obligations owed by a spouse in one State to a spouse in another is similar to that provided in the 1968 Act. See n. 13, *supra.* See generally Note, 48 Cornell L. Q. 541 (1963).

In *Landes* v. *Landes,* 1 N. Y. 2d 358, 135 N. E. 2d 562, appeal dismissed, 352 U. S. 948 (1956), the court upheld a support decree entered against a divorced husband living in New York, on a petition filed by his former wife in California pursuant to the Uniform Act. No prior support agreement or decree existed between the parties; the California spouse sought support from the New York husband for the couple's minor child, who was residing with her mother in California. The New York Court of Appeals concluded that the procedures followed—filing of a petition in California, followed by its certification to New York's Family Court, the obtaining of jurisdiction over the husband, a hearing in New York on the merits of the petition, and entry of an award—were proper under the laws of both States and were constitutional. The constitutionality of these procedures has also been upheld in other jurisdictions. See, *e. g., Watson* v. *Dreadin,* 309 A. 2d 493 (DC 1973), cert. denied, 415 U. S. 959 (1974); *State ex rel. Terry* v. *Terry,* 80 N. M. 185, 453 P. 2d 206 (1969); *Harmon* v. *Harmon,* 184 Cal. App. 2d 245, 7 Cal. Rptr. 279 (1960), appeal dismissed and cert. denied, 366 U. S. 270 (1961).

[15] Thus, it cannot here be concluded, as it was in *McGee* v. *International Life Insurance Co.,* 355 U. S. 220, 223–224 (1957), with respect to actions on insurance contracts, that resident plaintiffs would be at a "severe disadvantage" if *in personam* jurisdiction over out-of-state defendants were sometimes unavailable.

relevant contact with the State, either to defend a child-support suit or to suffer liability by default.

IV

We therefore believe that the state courts in the instant case failed to heed our admonition that "the flexible standard of *International Shoe*" does not "heral[d] the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson* v. *Denckla,* 357 U. S., at 251. In *McGee* v. *International Life Ins. Co.,* we commented on the extension of *in personam* jurisdiction under evolving standards of due process, explaining that this trend was in large part "attributable to the . . . increasing nationalization of commerce . . . [accompanied by] modern transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U. S., at 222–223. But the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction.

Accordingly, we conclude that the appellant's motion to quash service, on the ground of lack of personal jurisdiction, was erroneously denied by the California courts. The judgment of the California Supreme Court is, therefore,

*Reversed.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE POWELL join, dissenting.

The Court properly treats this case as presenting a single narrow question. That question is whether the California Supreme Court correctly "weighed" "the facts," *ante,* at 92, of this particular case in applying the settled "constitutional standard," *ibid.,* that before state courts may exercise *in*

*personam* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled in the State, it must appear that the nonresident has "certain minimum contacts [with the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945). The Court recognizes that "this determination is one in which few answers will be written 'in black and white,'" *ante,* at 92. I cannot say that the Court's determination against state-court *in personam* jurisdiction is implausible, but, though the issue is close, my independent weighing of the facts leads me to conclude, in agreement with the analysis and determination of the California Supreme Court, that appellant's connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the Due Process Clause, to require him to conduct his defense in the California courts. I therefore dissent.

Syllabus

# SECURITIES AND EXCHANGE COMMISSION *v.* SLOAN

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

No. 76–1607. Argued March 27–28, 1978—Decided May 15, 1978

The Securities and Exchange Commission (Commission) has the authority under § 12 (k) of the Securities Exchange Act of 1934 (Act) "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require." Acting pursuant to § 12 (k) and its predecessor, the Commission issued a series of summary 10-day orders continuously suspending trading in the common stock of a certain corporation for over a year. Respondent, who owned 13 shares of the stock and who had engaged in substantial purchases and short sales of shares of the stock, filed a petition pursuant to the Act in the Court of Appeals for a review of the orders, contending, *inter alia*, that the "tacking" of the 10-day summary suspension orders exceeded the Commission's authority under § 12 (k). Because shortly after the suit was brought no suspension order remained in effect and the Commission asserted that it had no plans to issue such orders in the foreseeable future, the Commission claimed that the case was moot. The court rejected that claim and upheld respondent's position on the merits. In this Court, the Commission contends that the facts on the record are inadequate to allow a proper resolution of the mootness issue and that in any event it has the authority to issue consecutive 10-day summary suspension orders. *Held:*

1. The case is not moot, since it is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515. Effective judicial review is precluded during the life of the orders because a series of consecutive suspension orders may last no more than 20 days. In view of the numerous violations ascribed to the corporation involved, there is a reasonable probability that its stock will again be subjected to consecutive summary suspension orders; thus, there is a "reasonable expectation that the same complaining party" will be subjected to the same action again. Cf. *Weinstein* v. *Bradford*, 423 U. S. 147. Pp. 108–110.

2. The Commission does not have the authority under § 12 (k), based upon a single set of circumstances, to issue a series of summary orders that would suspend trading in a stock beyond the initial 10-day period,

even though the Commission periodically redetermines that such action is required by "the public interest" and for "the protection of investors." Pp. 110–123.

(a) The language of the statute establishes the 10-day period as the maximum time during which stock trading can be suspended for any single set of circumstances. Pp. 111–112.

(b) In view of congressional recognition in other sections of the Act that any long-term sanctions or continuation of summary restrictions must be accompanied by notice and an opportunity for a hearing, the absence of any provision in § 12 (k) for extending summary suspensions beyond the initial 10-day period must be taken as a clear indication that extended summary restrictions are not authorized under § 12 (k). Pp. 112–114.

(c) The statutory pattern leaves little doubt that § 12 (k) is designed to empower the Commission to prepare to deploy such other remedies as injunctive relief or a suspension or revocation of security registration, not to empower the Commission to reissue a summary order absent the discovery of a new manipulative scheme. Pp. 114–115.

(d) Those other remedies are not as unavailable as the Commission claims, as is evidenced by this very case, where the Commission during the first series of suspension orders actually sought an injunction against the corporation involved and certain of its principals and during the second series of suspensions approved the filing of an injunction action against its management. Moreover, though the Commission contends that the suspension of trading is necessary for the dissemination in the marketplace of information about manipulative schemes, the Commission is at liberty to reveal such information at the end of the 10-day period and let investors make their own judgments. And in any event the mere claim that a broad summary suspension power is necessary cannot persuade the Court to read § 12 (k) more broadly than its language and the statutory scheme reasonably permit. Pp. 115–117.

(e) Though the Commission's view that the Act authorizes successive suspension orders may be entitled to deference, that consideration cannot overcome the clear contrary indications of the statute itself, especially when the Commission has not accompanied its administrative construction with a contemporaneous well-reasoned explanation of its action. *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 287–288, n. 5. Pp. 117–119.

(f) There is no convincing indication that Congress has approved the Commission's construction of the Act. Pp. 119–123.

547 F. 2d 152, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 123. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 126.

*Harvey L. Pitt* argued the cause for petitioner. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Jones, Howard E. Shapiro,* and *Frederick B. Wade.*

*Samuel H. Sloan,* respondent, argued the cause and filed a brief *pro se.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, the Securities and Exchange Commission has the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require." [1] Acting

**Reginald Leo Duff* filed a brief for Canadian Javelin, Ltd., as *amicus curiae* urging affirmance.

[1] This authority is presently found in § 12 (k) of the Act, which was added by amendment in 1975 by Pub. L. 94–29 § 9, 89 Stat. 118. It provides in pertinent part:

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days . . . . No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended." 15 U. S. C. § 78*l* (k) (1976 ed.).

This power was previously found in §§ 15 (c) (5) and 19 (a) (4) of the Act, which for all purposes relevant to this case were substantially identical to the current statute, § 12 (k), except that § 15 (c) (5) authorized summary suspension of trading in securities which were traded in the over-the-counter market, while § 19 (a) (4) permitted summary suspension of trading in securities which were traded on the national exchanges. 15 U. S. C. §§ 78*o* (c) (5) and 78s (a) (4). Congress consolidated those powers in § 12 (k).

pursuant to this authority the Commission issued a series of consecutive orders suspending trading in the common stock of Canadian Javelin, Ltd. (CJL), for over a year. The Court of Appeals for the Second Circuit held that such a series of suspensions was beyond the scope of the Commission's statutory authority. 547 F. 2d 152, 157–158 (1976). We granted certiorari to consider this important question, 434 U. S. 901 (1977), and, finding ourselves in basic agreement with the Court of Appeals, we affirm. We hold that even though there be a periodic redetermination of whether such action is required by "the public interest" and for "the protection of investors," the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period.

## I

On November 29, 1973, apparently because CJL had disseminated allegedly false and misleading press releases concerning certain of its business activities, the Commission issued the first of what was to become a series of summary 10-day suspension orders continuously suspending trading in CJL common stock from that date until January 26, 1975. App. 109. During this series of suspensions respondent Sloan, who owned 13 shares of CJL stock and had engaged in substantial purchases and short sales of shares of that stock, filed a petition in the United States Court of Appeals for the Second Circuit challenging the orders on a variety of grounds. On October 15, 1975, the court dismissed as frivolous all respondent's claims, except his allegation that the "tacking" of 10-day summary suspension orders for an indefinite period was an abuse of the agency's authority and a deprivation of due process. It further concluded, however, that in light of two events which had occurred prior to argument, it could not address this question at that time. The first event of significance was the resumption of trading on January 26, 1975.

The second was the commencement of a second series of summary 10-day suspension orders, which was still in effect on October 15. This series had begun on April 29, 1975, when the Commission issued a 10-day order based on the fact that the Royal Canadian Mounted Police had launched an extensive investigation into alleged manipulation of CJL common stock on the American Stock Exchange and several Canadian stock exchanges. App. 11–12. This time 37 separate orders were issued, suspending trading continuously from April 29, 1975, to May 2, 1976. The court thought the record before it on October 15 inadequate in light of these events and dismissed respondent's appeal "without prejudice to his repleading after an administrative hearing before the SEC . . . ," which hearing, though apparently not required by statute or regulation, had been offered by the Commission at oral argument. 527 F. 2d 11, 12 (1975), cert. denied, 426 U. S. 935 (1976).

Thereafter respondent immediately petitioned the Commission for the promised hearing. The hearing was not forthcoming, however, so on April 23, 1976, during the period when the second series of orders was still in effect, respondent brought the present action pursuant to § 25 (a)(1) of the Act, 15 U. S. C. § 78y (a)(1) (1976 ed.), challenging the second series of suspension orders. He argued, among other things, that there was no rational basis for the suspension orders, that they were not supported by substantial evidence in any event, and that the "tacking" of 10-day summary suspension orders was beyond the Commission's authority because the statute specifically authorized suspension "for a period not exceeding ten days." [2] The court held in respondent's favor on this latter point. It first concluded that despite the fact that there had been no 10-day suspension order in effect since May 2,

[2] Respondent also argued that the orders violated his due process rights because he was never given notice and an opportunity for a hearing and that § 12 (k) was an unconstitutional delegation of legislative power. The court found it unnecessary to address these issues.

1976, and the Commission had asserted that it had no plans to consider or issue an order against CJL in the foreseeable future, the case was not moot because it was " 'capable of repetition, yet evading review.' " 547 F. 2d, at 158, quoting from *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911).

The court then decided that the statutes which authorized summary suspensions—§ 12 (k) and its predecessors—did not empower the Commission to issue successive orders to curtail trading in a security for a period beyond the initial 10-day period. 547 F. 2d, at 157–158. We granted certiorari, specifically directing the attention of the parties to the question of mootness, 434 U. S. 901 (1977), to which we now turn.

## II

Respondent argues that this case is not moot because, as the Court of Appeals observed, it is "capable of repetition, yet evading review." [3] The Commission, on the other hand, does not urge that the case is demonstrably moot, but rather that there simply are not enough facts on the record to allow a proper determination of mootness. It argues that there is no "reasonable expectation" that respondent will be harmed by further suspensions because, " 'the investing public now ha[ving] been apprised of the relevant facts, the concealment of which had threatened to disrupt the market in CJL stock, there is no reason to believe that it will be necessary to suspend trading again.' " Brief for Petitioner 15, quoting from Pet. for Cert. 12 n. 7. Cf. *Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975). The Commission concedes, however, that respondent, in his capacity as a diversified investor, might be harmed in the future by the suspension of some other

[3] Respondent also contends that he has suffered collateral legal consequences from the series of suspension orders, and thus the case is not moot. Cf. *Sibron* v. *New York,* 392 U. S. 40, 57 (1968). We find it unnecessary to address this further contention.

security which he owns. But it further contends that respondent has not provided enough data about the number or type of securities in his portfolio to enable the Court to determine whether there is a "reasonable" likelihood that any of those securities will be subjected to consecutive summary suspension orders.[4]

Contrary to the Commission's contention, we think even on the record presently before us this case falls squarely within the general principle first enunciated in *Southern Pacific Terminal Co.* v. *ICC, supra,* and further clarified in *Weinstein* v. *Bradford, supra,* that even in the absence of a class action a case is not moot when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the same action again." *Weinstein* v. *Bradford, supra,* at 147 (emphasis added). That the first prong of this test is satisfied is not in dispute. A series of consecutive suspension orders may last no more than 20 days, making effective judicial review impossible during the life of the orders. We likewise have no doubt that the second part of the test also has been met here. CJL has, to put it mildly, a history of sailing close to the wind.[5] Thus,

[4] The Commission contends that to determine the mathematical probability that at least one of the securities held by respondent will be subjected to consecutive suspension orders it is necessary to know, in addition to other information admittedly available in the Commission's own records, the number of publicly traded corporations of which respondent is a shareholder. This datum cannot be ascertained with any accuracy on this record, however, claims the Commission, because respondent has made various representations regarding that number at various stages of the litigation. Compare App. 153 with Brief in Response 18. The Commission adds that the probability could be determined with even greater accuracy if respondent revealed the nature of his portfolio because certain securities—those listed on the New York Stock Exchange, for example—are seldom summarily suspended.

[5] Within the last five years the Commission has twice issued a series of orders, each of which suspended trading in CJL stock for over a year. In

the Commission's protestations to the contrary notwithstanding, there is a reasonable expectation, within the meaning of *Weinstein* v. *Bradford, supra,* that CJL stock will again be subjected to consecutive summary suspension orders and that respondent, who apparently still owns CJL stock, will suffer the same type of injury he suffered before. This is sufficient in and of itself to satisfy this part of the test. But in addition, respondent owns other securities, the trading of which may also be summarily suspended. As even the Commission admits, this fact can only increase the probability that respondent will again suffer the type of harm of which he is presently complaining. It thus can only buttress our conclusion that there is a reasonable expectation of recurring injury to the same complaining party.

## III

### A

Turning to the merits, we note that this is not a case where the Commission, discovering the existence of a manipulative scheme affecting CJL stock, suspended trading for 10 days and then, upon the discovery of a second manipulative scheme or other improper activity unrelated to the first scheme, ordered a second 10-day suspension.[6] Instead it is a case in which the

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the various staff reports given to the Commission in connection with and attached to the second series of orders, the Division of Enforcement indicates in no less than six separate reports that either the Commission or the various stock exchanges view CJL as a "chronic violator." App. 20, 22, 24, 26, 28, 31. And reference is made to "the continuous [CJL] problems." *Id.*, at 61. Furthermore, counsel for the Commission represented at oral argument that there were in fact three separate bases for the second series of suspensions—alleged market manipulation, a change in management of the company, and a failure to file current reports. Tr. of Oral Arg. 17–18.

[6] Neither does the first series of orders appear to be of this type. Rather, like the second series, it appears to be predicated mainly on one major impropriety on the part of CJL and its personnel, which impropriety required the Commission, in its opinion, to issue a year-long series of summary suspension orders to protect investors and for the public interest.

Commission issued a series of summary suspension orders lasting over a year on the basis of evidence revealing a single, though likely sizable, manipulative scheme.[7] Thus, the only question confronting us is whether, even upon a periodic redetermination of "necessity," the Commission is statutorily authorized to issue a series of summary suspension orders based upon a single set of events or circumstances which threaten an orderly market. This question must, in our opinion, be answered in the negative.

The first and most salient point leading us to this conclusion is the language of the statute. Section 12 (k) authorizes the Commission "summarily to suspend trading in any security . . . *for a period not exceeding ten days . . . .*" 15 U. S. C. § 78*l* (k) (1976 ed.) (emphasis added). The Commission would have us read the underscored phrase as a limitation only upon the duration of a single suspension order. So read, the Commission could indefinitely suspend trading in a security without any hearing or other procedural safeguards as long as it redetermined every 10 days that suspension was required by

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[7] As previously indicated, see n. 5, *supra*, the Commission advances three separate reasons for the suspensions, thus implicitly suggesting that perhaps this is a case where the Commission discovered independent reasons to suspend trading after the initial suspension. We note first that there are doubts whether these "reasons" independently would have justified suspension. For example, we doubt the Commission regularly suspends trading because of a "change in management." A suspension might be justified if management steps down under suspicious circumstances, but the suspicious circumstance here is the initial reason advanced for suspension—the manipulative scheme—and thus the change in management can hardly be considered an independent justification for suspension. More importantly, however, even assuming the existence of three independent reasons for suspension, that leaves 34 suspension orders that were not based on independent reasons and thus the question still remains. Does the statute empower the Commission to continue to "roll over" suspension orders for the same allegedly improper activity simply upon a redetermination that the continued suspension is "required" by the public interest and for the protection of investors?

the public interest and for the protection of investors. While perhaps not an impossible reading of the statute, we are persuaded it is not the most natural or logical one. The duration limitation rather appears on its face to be just that—a maximum time period for which trading can be suspended for any single set of circumstances.

Apart from the language of the statute, which we find persuasive in and of itself, there are other reasons to adopt this construction of the statute. In the first place, the power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors. A clear mandate from Congress, such as that found in § 12 (k), is necessary to confer this power. No less clear a mandate can be expected from Congress to authorize the Commission to extend, virtually without limit, these periods of suspension. But we find no such unmistakable mandate in § 12 (k). Indeed, if anything, that section points in the opposite direction.

Other sections of the statute reinforce the conclusion that in this area Congress considered summary restrictions to be somewhat drastic and properly used only for very brief periods of time. When explicitly longer term, though perhaps temporary, measures are to be taken against some person, company, or security, Congress invariably requires the Commission to give some sort of notice and opportunity to be heard. For example, § 12 (j) of the Act authorizes the Commission, as it deems necessary for the protection of investors, to suspend the registration of a security for a period not exceeding 12 months if it makes certain findings *"on the record after notice and opportunity for hearing . . . ."* 15 U. S. C. § 78*l* (j) (1976 ed.) (emphasis added). Another section of the Act empowers the Commission to suspend broker-dealer registration for a period not exceeding 12 months upon certain findings made

only *"on the record after notice and opportunity for hearing."* § 78*o* (b)(4) (1976 ed.) (emphasis added). Still another section allows the Commission, pending final determination whether a broker-dealer's registration should be revoked, to temporarily suspend that registration, but only *"after notice and opportunity for hearing."* § 78*o* (b)(5) (1976 ed.) (emphasis added). Former § 15 (b)(6), which dealt with the registration of broker-dealers, also lends support to the notion that as a general matter Congress meant to allow the Commission to take summary action only for the period specified in the statute when that action is based upon any single set of circumstances. That section allowed the Commission to summarily postpone the effective date of registration for 15 days, and then, *after appropriate notice and opportunity for hearing,* to continue that postponement pending final resolution of the matter.[8] The section which replaced § 15 (b)(6) even further underscores this general pattern. It requires the Commission to take some action—either granting the registration or instituting proceedings to determine whether registration should be denied—within 45 days. 15 U. S. C. § 78*o* (b)(1) (1976 ed.). In light of the explicit congressional recognition in other sections of the Act, both past and present, that any long-term sanctions or any continuation of summary

[8] The former § 15 (b)(6) provided in pertinent part:

"Pending final determination whether any registration under this subsection shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice and opportunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors. . . ." 15 U. S. C. § 78*o* (b)(6).

restrictions must be accompanied by notice and an opportunity for a hearing, it is difficult to read the silence in § 12 (k) as an authorization for an extension of summary restrictions without such a hearing, as the Commission contends. The more plausible interpretation is that Congress did not intend the Commission to have the power to extend the length of suspensions under § 12 (k) at all, much less to repeatedly extend such suspensions without any hearing.

B

The Commission advances four arguments in support of its position, none of which we find persuasive. It first argues that only its interpretation makes sense out of the statute. That is, if the Commission discovers a manipulative scheme and suspends trading for 10 days, surely it can suspend trading 30 days later upon the discovery of a second manipulative scheme. But if trading may be suspended a second time 30 days later upon the discovery of another manipulative scheme, it surely could be suspended only 10 days later if the discovery of the second scheme were made on the eve of the expiration of the first order. And, continues the Commission, since nothing on the face of the statute requires it to consider only evidence of new manipulative schemes when evaluating the public interest and the needs of investors, it must have the power to issue consecutive suspension orders even in the absence of a new or different manipulative scheme, as long as the public interest requires it.

This argument is unpersuasive, however, because the conclusion simply does not follow from the various premises. Even assuming the Commission can again suspend trading upon learning of another event which threatens the stability of the market, it simply does not follow that the Commission therefore must necessarily have the power to do so even in the absence of such a discovery. On its face and in the context of this statutory pattern, § 12 (k) is more properly viewed as a

device to allow the Commission to take emergency action for 10 days while it prepares to deploy its other remedies, such as a temporary restraining order, a preliminary or permanent injunction, or a suspension or revocation of the registration of a security. The Commission's argument would render unnecessary to a greater or lesser extent all of these other admittedly more cumbersome remedies which Congress has given to it.

Closely related to the Commission's first argument is its second—its construction furthers the statute's remedial purposes. Here the Commission merely asserts that it "has found that the remedial purposes of the statute require successive suspension of trading in particular securities, in order to maintain orderly and fair capital markets." Brief for Petitioner 37. Other powers granted the Commission are, in its opinion, simply insufficient to accomplish its purposes.

We likewise reject this argument. In the first place, the Commission has not made a very persuasive showing that other remedies are ineffective. It argues that injunctions and temporary restraining orders are insufficient because they take time and evidence to obtain and because they can be obtained only against wrongdoers and not necessarily as a stopgap measure in order to suspend trading simply until more information can be disseminated into the marketplace. The first of these alleged insufficiencies is no more than a reiteration of the familiar claim of many Government agencies that any semblance of an adversary proceeding will delay the imposition of the result which they believe desirable. It seems to us that Congress, in weighing the public interest against the burden imposed upon private parties, has concluded that 10 days is sufficient for gathering necessary evidence.

This very case belies the Commission's argument that injunctions cannot be sought in appropriate cases. At exactly the same time the Commission commenced the first series of suspension orders it also sought a civil injunction against CJL and certain of its principals, alleging violations of the registra-

tion and antifraud provisions of the Securities Act of 1933, violations of the antifraud and reporting provisions of the Securities Exchange Act of 1934, and various other improper practices, including the filing of false reports with the Commission and the dissemination of a series of press releases containing false and misleading information. App. 109. And during the second series of suspension orders, the Commission approved the filing of an action seeking an injunction against those in the management of CJL to prohibit them from engaging in further violations of the Acts. *Id.*, at 101.

The second of these alleged insufficiencies is likewise less than overwhelming. Even assuming that it is proper to suspend trading simply in order to enhance the information in the marketplace, there is nothing to indicate that the Commission cannot simply reveal to the investing public at the end of 10 days the reasons which it thought justified the initial summary suspension and then let the investors make their own judgments.

Even assuming, however, that a totally satisfactory remedy—at least from the Commission's viewpoint—is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read § 12 (k) more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that § 12 (k) *ought* to be a panacea for every type of problem which may beset the marketplace. This does not appear to be the first time the Commission has adopted this construction of the statute. As early as 1961 a recognized authority in this area of the law called attention to the fact that the Commission was gradually carrying over the summary suspension power granted in the predecessors of § 12 (k) into other areas of its statutory authority and using it as a *pendente lite* power to keep in effect a suspension of trading pending final disposition of delisting proceedings. 2 L. Loss, Securities Regulation 854–855 (2d ed. 1961).

The author then questioned the propriety of extending the summary suspension power in that manner, *id.*, at 854, and we think those same questions arise when the Commission argues that the summary suspension power should be available not only for the purposes clearly contemplated by § 12 (k), but also as a solution to virtually any other problem which might occur in the marketplace. We do not think § 12 (k) was meant to be such a cure-all. It provides the Commission with a powerful weapon for dealing with certain problems. But its time limit is clearly and precisely defined. It cannot be judicially or administratively extended simply by doubtful arguments as to the need for a greater duration of suspension orders than it allows. If extension of the summary suspension power is desirable, the proper source of that power is Congress. Cf. *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 744–745 (1973).

The Commission next argues that its interpretation of the statute—that the statute authorizes successive suspension orders—has been both consistent and longstanding, dating from 1944. It is thus entitled to great deference. See *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974).

While this undoubtedly is true as a general principle of law, it is not an argument of sufficient force in this case to overcome the clear contrary indications of the statute itself. In the first place it is not apparent from the record that on any of the occasions when a series of consecutive summary suspension orders was issued the Commission actually addressed in any detail the statutory authorization under which it took that action. As we said just this Term in *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287 n. 5 (1978):

> "This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), that one factor to be considered in giving

> weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

To further paraphrase that opinion, since this Court can only speculate as to the Commission's reasons for reaching the conclusion that it did, the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks "power to persuade" as to the existence of such authority. *Ibid.* Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications,* 322 U. S. 111, 131; *Unemployment Commission* v. *Aragon,* 329 U. S. 143, 153–154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.,* 380 U. S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown,* 380 U. S. 278, 291." *Volkswagenwerk* v. *FMC,* 390 U. S. 261, 272 (1968).

And this is just such a case—the construction placed on the statute by the Commission, though of long standing, is, for the reasons given in Part III–A of this opinion, inconsistent with the statutory mandate. We explicitly contemplated just this

situation in *FMC* v. *Seatrain Lines, Inc., supra,* at 745, where we said:

> "But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. . . . This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

And our clear duty in such a situation is to reject the administrative interpretation of the statute.

Finally, the Commission argues that for a variety of reasons Congress should be considered to have approved the Commission's construction of the statute as correct. Not only has Congress re-enacted the summary suspension power without disapproving the Commission's construction, but the Commission participated in the drafting of much of this legislation and on at least one occasion made its views known to Congress in Committee hearings.[9] Furthermore, at least one Committee

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[9] In 1963, when Congress was considering the former § 15 (c)(5), which extended the Commission's summary suspension power to securities traded in the over-the-counter market, the Commission informed a Subcommittee of the House Committee on Interstate and Foreign Commerce of its current administrative practice. One paragraph in the Commission's 30-page report to the Subcommittee reads as follows:

"Under section 19 (a)(4), the Commission has issued more than one suspension when, upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary. At the same time the Commission has recognized that suspension of trading in a security is a serious step, and therefore has exercised the power with restraint and has proceeded with diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible. The Commission would follow that policy in administering the proposed new section 15 (c)(5)." Hearings on H. R. 6789, H. R. 6793, S. 1642 before a Subcommmittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 219 (1963).

indicated on one occasion that it understood and approved of the Commission's practice.[10] See *Zuber* v. *Allen,* 396 U. S. 168, 192 (1969); *United States* v. *Correll,* 389 U. S. 299, 305–306 (1967); *Fribourg Navigation Co.* v. *Commissioner,* 383 U. S. 272, 283 (1966).

While we of course recognize the validity of the general principle illustrated by the cases upon which the Commission relies, we do not believe it to be applicable here. In *Zuber* v. *Allen, supra,* at 192, the Court stated that a contemporaneous administrative construction of an agency's own enabling legislation "is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12 (k) to the Congress which drafted the "enabling legislation" here in question—the Securities Exchange Act of 1934. They made known to at least one Committee their subsequent construction of that section 29 years later, at a time when the attention of the Committee and of the Congress was focused on issues not directly related to

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[10] The Senate Committee on Banking and Currency, when it reported on the proposed 1964 amendments to the Act, indicated that it understood and did not disapprove of the Commission's practice. It stated:

"The Commission has consistently construed section 19 (a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible." S. Rep. No. 379, 88th Cong., 1st Sess., 66–67 (1963).

the one presently before the Court.[11] Although the section in question was re-enacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber, supra.*

We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12 (k). On this point the present case differs significantly from *United States* v. *Correll, supra,* at 304, where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that "to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position . . . ."

Subsequent congressional pronouncements also cast doubt on whether the prior statements called to our attention can be

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[11] The purpose of the 1964 amendments was merely to grant the Commission the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities traded on national exchanges. The purpose of the 1975 amendments was simply to consolidate into one section the power formerly contained in two.

taken at face value. When consolidating the former §§ 15 (c)(5) and 19 (a)(4) in 1975, see n. 1, *supra,* Congress also enacted § 12 (j), which allows the Commission "to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." 15 U. S. C. § 78*l* (j) (1976 ed.). While this particular power is not new, see 15 U. S. C. § 78s (a)(2), the effect of its exercise was expanded to include a suspension of trading.[12] *"With this change,"* stated the Senate Committee on Banking, Housing and Urban Affairs, *"the Commission is expected to use this section rather than its ten-day suspension power, in cases of extended duration."* S. Rep. No. 94–75, p. 106 (1975) (emphasis added). Thus, even assuming, *arguendo,* that the 1963 statements have more force than we are willing to attribute to them, and that, as the Commission argues, § 12 (j) does not cover quite as broad a range of situations as § 12 (k), the 1975 congressional statements would still have to be read as seriously undermining the continued validity of the 1963 statements as a basis upon which to adopt the Commission's construction of the statute.

In sum, had Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely we expect that it could and would have authorized it more clearly than it did in § 12 (k). The sweeping nature of that power supports this expectation. The absence of any truly persuasive legislative history to support the Commission's view,

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[12] Under the new provision, when the Commission suspends or revokes the registration of a security, "[n]o . . . broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence." 15 U. S. C. § 78*l* (j) (1976 ed.).

and the entire statutory scheme suggesting that in fact the Commission is not so empowered, reinforce our conclusion that the Court of Appeals was correct in concluding no such power exists. Accordingly, its judgment is

*Affirmed.*

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Although I concur in much of the Court's reasoning and in its holding that "the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period," *ante,* at 106, I cannot join the Court's opinion because of its omissions and unfortunate dicta.

I

The Court's opinion does not reveal how flagrantly abusive the Security and Exchange Commission's use of its § 12 (k) authority has been. That section authorizes the Commission "summarily to suspend trading in any security . . . for a period not exceeding ten days . . . ." 15 U. S. C. § 78*l* (k) (1976 ed.). As the Court says, this language "is persuasive in and of itself" that 10 days is the "maximum time period for which trading can be suspended for any single set of circumstances." *Ante,* at 112. But the Commission has used § 12 (k), or its predecessor statutes, see *ante,* at 105 n. 1, to suspend trading in a security for up to 13 *years.* See App. to Brief for Canadian Javelin, Ltd., as *Amicus Curiae* 1a. And, although the 13-year suspension is an extreme example, the record is replete with suspensions lasting the better part of a year. See App. 184–211. I agree that § 12 (k) is clear on its face and that it prohibits this administrative practice. But even if § 12 (k) were unclear, a 13-year suspension, or even a 1-year suspension as here, without notice or hearing so obviously violates fundamentals of due process and fair play that no

reasonable individual could suppose that Congress intended to authorize such a thing. See also 15 U. S. C. § 78*l* (j) (1976 ed.) (requiring notice and a hearing before a registration statement can be suspended), discussed *ante*, at 121–122.

Moreover, the SEC's procedural implementation of its § 12 (k) power mocks any conclusion other than that the SEC simply could not care whether its § 12 (k) orders are justified. So far as this record shows, the SEC never reveals the reasons for its suspension orders.[1] To be sure, here respondent was able long after the fact to obtain some explanation through a Freedom of Information Act request, but even the information tendered was heavily excised and none of it even purports to state the reasoning of the Commissioners under whose authority § 12 (k) orders issue.[2] Nonetheless, when the SEC finally

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[1] The only document made public by the SEC at the time it suspends trading in a security is a "Notice of Suspension of Trading." Numerous copies of this notice are included in the Appendix and each contains only the boilerplate explanation:

"It appearing to the Securities and Exchange Commission that the summary suspension of trading in such securities on such exchange and otherwise than on a national securities exchange is required in the public interest and for the protection of investors; [therefore, trading is suspended]."

See App. 11, 13, 16, 19, 21, 23, 25, 27, 30, 33, 36, 39, 41, 44, 47, 50, 53, 56, 59, 62, 65, 67, 69, 71, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103, 106. The sole exception to this monotonous pattern is the notice which issued after respondent lodged his verified petition with the SEC. That notice recounted the allegations of the petition and stated in some detail why it was necessary to continue the suspension of Canadian Javelin stock. See *id.*, at 109–110.

[2] In each instance, the explanation consists only of memoranda from the SEC's Division of Enforcement *to* the Commission. See, *e. g.*, *id.*, at 12, 14, 15. In at least one instance, the memorandum postdates the public notice of suspension. Compare *id.*, at 11 with *id.*, at 12. In no case is there a memorandum *from* the Commission explaining its action. The Court apparently assumes that the memoranda of the Division of Enforcement adequately explain the Commission's action, although the basis for any such assumption is not apparent. Moreover, since the recommendations

agreed to give respondent a hearing on the suspension of Canadian Javelin stock, it required respondent to state, in a verified petition (that is, *under oath*) why he thought the unrevealed conclusions of the SEC to be wrong.[3] This is obscurantism run riot.

Accordingly, while we today leave open the question whether the SEC could tack successive 10-day suspensions if this were necessary to meet first one and then a different emergent situation, I for one would look with great disfavor on any effort to tack suspension periods unless the SEC concurrently adopted a policy of stating its reasons for each suspension. Without such a statement of reasons, I fear our holding today will have no force since the SEC's administration of its suspension power will be reviewable, if at all, only by the circuitous and time-consuming path followed by respondent here.

## II

In addition, I cannot join the Court's reaffirmance of *Adamo Wrecking*'s increasingly scholastic approach to the use of administrative practice in interpreting federal statutes. See *ante,* at 117–118. This reaffirmance is totally unnecessary in this case for, as the Court notes, whatever that administrative construction might be in this case, it is "inconsistent with the statutory mandate," *ante,* at 118, which is clear on the face of the statute. *Ante,* at 112.

Worse, however, is the Court's insistence that, to be credited, an administrative practice must pay " 'specific attention to the statutory authorization' " under which an agency purports to operate. *Ante,* at 117, quoting *Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 287 n. 5 (1978). As my Brother STEVENS

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portion of each memoranda is excised, presumably as permitted (but not required) by Exemption 5 of the Freedom of Information Act, see *EPA* v. *Mink,* 410 U. S. 73, 89 (1973), there is no statement of reasons in any traditional sense in any of the memoranda.

[3] See Brief for Respondent 19; App. to Brief for Respondent 20a–21a.

noted in dissent in *Adamo*, see *id.*, at 302, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294 (1933)—perhaps our leading case on the use of administrative practice as a guide to statutory interpretation—says not a word about attention to statutory authority. Nor does it reduce the value of administrative practice to its "persuasive effect" as the Court would apparently do here. Instead, as I understand the case, *Norwegian Nitrogen* focuses on the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," *id.*, at 315, precisely because their action is itself evidence of assumptions—perhaps unspoken by either the administrators or Congress—brought to a regulatory problem by all involved in its solution. Indeed, common experience tells us that it is assumptions which everyone shares which often go unspoken because their very obviousness negates the need to set them out.

Therefore, while I do not dispute that well-reasoned administrative opinions which pay scrupulous attention to every jot and tittle of statutory language are more persuasive than unexplained actions—and certainly more in keeping with a norm of administrative action that ought to be encouraged—I cannot dismiss, as the Court apparently does, less well-reasoned, or even unexplained, administrative actions as irrelevant to the meaning of a statute.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the Court in its judgment, but I am less sure than the Court is that the Congress has not granted the Securities and Exchange Commission at least some power to suspend trading in a nonexempt security for successive 10-day periods despite the absence of a new set of circumstances. The Congress' awareness, recognition, and acceptance of the Commission's practice, see *ante*, at 119–120, nn. 9 and 10, at the time of the 1964 amendments, blunts, it seems to me, the original literal language of the statute. The 1975 Report of the Senate

Banking Committee, stating that the Commission was "expected to use" § 12 (j)'s amended suspension-of-registration provision "in cases of extended duration," *ante,* at 122, certainly demands new circumspection of the Commission, but I do not believe it wholly extinguished Congress' acceptance of restrained use of successive 10-day suspensions when an emergency situation is presented, as for instance, where the Commission is unable adequately to inform the public of the existence of a suspected market manipulation within a single 10-day period. Section 12 (j)'s suspension remedy provides no aid when a nonissuer has violated the securities law, or where the security involved is not registered, or in the interim period before notice and an opportunity for a hearing can be provided and a formal finding of misconduct made on the record.

Here, the Commission indulged in 37 suspension orders, all but the last issued "quite bare of any emergency findings," to borrow Professor Loss' phrase. Beyond the opaque suggestion in an April 1975 Release, No. 11,383, that the Commission was awaiting the "dissemination of information concerning regulatory action by Canadian authorities," shareholders of CJL were given no hint why their securities were to be made nonnegotiable for over a year. Until April 22, 1976, see Release No. 12,361, the SEC provided no opportunity to shareholders to dispute the factual premises of a suspension, and, in the absence of any explanation by the Commission of the basis for its suspension orders, such a right to comment would be useless. As such, I conclude that the use of suspension orders in this case exceeded the limits of the Commission's discretion. Given the 1975 amendments, a year-long blockade of trading without reasoned explanation of the supposed emergency or opportunity for an interim hearing clearly exceeds Congress' intention.

# SCOTT ET AL. *v.* UNITED STATES

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

No. 76-6767. Argued March 1, 1978—Decided May 15, 1978

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 requires that wiretapping or electronic surveillance "be conducted in such a way as to minimize" the interception of communications not otherwise subject to interception under that Title. 18 U. S. C. § 2518 (5) (1976 ed.). Pursuant to a court wiretap authorization order requiring such minimization, Government agents intercepted for a one-month period virtually all conversations over a particular telephone suspected of being used in furtherance of a conspiracy to import and distribute narcotics. Forty percent of the calls were clearly narcotics related, and the remaining calls were for the most part very short, such as wrong-number calls, and calls to persons unavailable to come to the phone, or were ambiguous in nature, and in a few instances were between the person to whom the telephone was registered and her mother. After the interceptions were terminated, petitioners, among others, were indicted for various narcotics offenses. The District Court, on petitioners' pretrial motion, ordered suppression of all the intercepted conversations and derivative evidence, on the ground that the agents had failed to comply with the wiretap order's minimization requirement, primarily because only 40% of the conversations were shown to be narcotics related. The Court of Appeals reversed and remanded, stating that the District Court should not have based its determination upon a general comparison of the number of narcotics-related calls with the total number of calls intercepted, but rather should have engaged in a particularized assessment of the reasonableness of the agents' attempts to minimize in light of the purpose of the wiretap and information available to the agents at the time of interception. On remand, the District Court again ordered suppression, relying largely on the fact that the agents were aware of the minimization requirement "but made no attempt to comply therewith." The Court of Appeals again reversed, holding that the District Court had yet to apply the correct standard, that the decision on the suppression motion ultimately had to be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions, and that suppression in this case was not

appropriate. Petitioners were eventually convicted, and the Court of Appeals affirmed. *Held:*

1. The proper approach for evaluating compliance with the minimization requirement, like evaluation of all alleged violations of the Fourth Amendment, is objectively to assess the agent's or officer's actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive. Pp. 135–138.

2. Even if the agents fail to make good-faith efforts at minimization, that is not itself a violation of the statute requiring suppression, since the use of the word "conducted" in § 2518 (5) makes it clear that the focus was to be on the agents' actions, not their motives, and since the legislative history shows that the statute was not intended to extend the scope of suppression beyond search-and-seizure law under the Fourth Amendment. Pp. 138–139.

3. The Court of Appeals did not err in rejecting petitioners' minimization claim, but properly analyzed the reasonableness of the wiretap. Pp. 139–143.

(a) Blind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer. While such percentages may provide assistance, there are cases, like this one, where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable. P. 140.

(b) It is also important to consider the circumstances of the wiretap, such as whether more extensive surveillance may be justified because of a suspected widespread conspiracy, or the type of use to which the wiretapped telephone is normally put. P. 140.

(c) Other factors, such as the exact point during the authorized period at which the interception was made, may be significant in a particular case. P. 141.

(d) As to most of the calls here that were not narcotics related, such calls did not give the agents an opportunity to develop a category of innocent calls that should not have been intercepted, and hence their interception cannot be viewed as a violation of the minimization requirement. As to the calls between the telephone registrant and her mother, it cannot be said that even though they turned out not to be relevant to the investigation, the Court of Appeals was incorrect in concluding that the agents did not act unreasonably at the time they made these interceptions. Pp. 142–143.

179 U. S. App. D. C. 281, 551 F. 2d 467, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined.

BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 143.

*John A. Shorter* argued the cause for petitioners. With him on the briefs were *Samuel Dash* and *Michael E. Geltner.*

*Richard A. Allen* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti,* and *Deputy Solicitor General Frey.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which deals with wiretapping and other forms of electronic surveillance. 18 U. S. C. §§ 2510–2520 (1976 ed.). In this Act Congress, after this Court's decisions in *Berger* v. *New York,* 388 U. S. 41 (1967), and *Katz* v. *United States,* 389 U. S. 347 (1967), set out to provide law enforcement officials with some of the tools thought necessary to combat crime without unnecessarily infringing upon the right of individual privacy. See generally S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). We have had occasion in the past, the most recent being just last Term, to consider exactly how the statute effectuates this balance.[1] This case requires us to construe the statutory requirement that wiretapping or electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." 18 U. S. C. §2518(5) (1976 ed.).

Pursuant to judicial authorization which required such minimization, Government agents intercepted all the phone conversations over a particular phone for a period of one

**Peter S. Smith* filed a brief for Chloe V. Daviage as *amicus curiae* urging reversal.

[1] See *United States* v. *Donovan,* 429 U. S. 413 (1977), which involved that part of the Act which requires the Government to identify the person, if known, whose conversations are to be intercepted.

month. The District Court for the District of Columbia suppressed all intercepted conversations and evidence derived therefrom in essence because the "admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable . . . even if every intercepted call were narcotic-related." App. 39. The Court of Appeals for the District of Columbia Circuit reversed, concluding that an assessment of the reasonableness of the efforts at minimization first requires an evaluation of the reasonableness of the actual interceptions in light of the purpose of the wiretap and the totality of the circumstances before any inquiry is made into the subjective intent of the agents conducting the surveillance. 170 U. S. App. D. C. 158, 516 F. 2d 751 (1975). We granted certiorari to consider this important question, 434 U. S. 888 (1977), and, finding ourselves in basic agreement with the Court of Appeals, affirm.

## I

In January 1970, Government officials applied, pursuant to Title III, for authorization to wiretap a telephone registered to Geneva Jenkins.[2] The supporting affidavits alleged that there was probable cause to believe nine individuals, all named, were participating in a conspiracy to import and distribute narcotics in the Washington, D. C., area and that Geneva Jenkins' telephone had been used in furtherance of the conspiracy, particularly by petitioner Thurmon, who was then living with Jenkins. The District Court granted the application on January 24, 1970, authorizing agents to "[i]ntercept the wire communications of Alphonso H. Lee, Bernis Lee Thurmon, and other persons as may make use of the facilities hereinbefore described." App. 80. The order also required the agents to conduct the wiretap in "such a way as to mini-

[2] The application and subsequent court order identified the subscriber as Geneva Thornton, but that was apparently an alias. 331 F. Supp. 233, 236 (DC 1971).

mize the interception of communications that are [not] otherwise subject to interception" under the Act [3] and to report to the court every five days "the progress of the interception and the nature of the communication intercepted." *Ibid.* Interception began that same day and continued, pursuant to a judicially authorized extension, until February 24, 1970, with the agents making the periodic reports to the judge as required. Upon cessation of the interceptions, search and arrest warrants were executed which led to the arrest of 22 persons and the indictment of 14.

Before trial the defendants, including petitioners Scott and Thurmon, moved to suppress all the intercepted conversations on a variety of grounds. After comprehensive discovery and an extensive series of hearings, the District Court held that the agents had failed to comply with the minimization requirement contained in the wiretap order and ordered suppression of the intercepted conversations and all derivative evidence. The court relied in large part on the fact that virtually all the conversations were intercepted while only 40% of them were shown to be narcotics related. This, the court reasoned, "strongly indicate[d] the indiscriminate use of wire surveillance that was proscribed by *Katz* [4] and *Berger*." [5] 331 F. Supp. 233, 247 (DC 1971).

The Court of Appeals for the District of Columbia Circuit reversed and remanded, stating that the District Court should not have based its determination upon a general comparison of the number of narcotics-related calls with the total number of calls intercepted, but rather should have engaged in a particularized assessment of the reasonableness of the agents' attempts to minimize in light of the purpose of the wiretap and the information available to the agents at the time of

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[3] The word "not" was inadvertently omitted, but the agents apparently understood the intent of the order. *Id.*, at 245 n. 1.

[4] *Katz* v. *United States*, 389 U. S. 347 (1967).

[5] *Berger* v. *New York*, 388 U. S. 41 (1967).

interception. 164 U. S. App. D. C. 125, 129, 504 F. 2d 194, 198 (1974).[6]

Upon remand, the District Court again ordered suppression, this time relying largely on the fact that the agents were aware of the minimization requirement, "but made no attempt to comply therewith." App. 37, 38.[7] "The admitted knowing

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[6] The District Court also made a number of other related rulings which were affirmed on appeal. It upheld Title III against a claim that the statute contravened the Fourth Amendment restriction against unreasonable searches and seizures; determined that the application and affidavits were sufficient on their face to establish probable cause; and held that the order complied with the requirements of the statute. Petitioners have not sought review of any of these holdings. The Court of Appeals also held that Scott could introduce evidence based on conversations in which he did not participate to demonstrate that the intercepted conversations to which he was a party were not seized "in conformity with the order of authorization." 18 U. S. C. § 2518 (10) (a) (iii) (1976 ed.). See 164 U. S. App. D. C., at 127–128, 504 F. 2d, at 196–197.

[7] This conclusion was based on the fact that virtually all calls were intercepted and on the testimony of Special Agent Glennon Cooper, the agent in charge of the investigation, who testified that the only steps taken which actually resulted in the nonreception of a conversation were those taken when the agents discovered the wiretap had inadvertently been connected to an improper line. The court laid particular stress on the following exchange:

"BY THE COURT:

. . . . . .

"Q. The question I wish to ask you is this, whether at any time during the course of the wiretap—of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

"A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line. We discontinued at that time.

"Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

"A. That is correct, Your Honor." App. 179.

and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable . . . even if every intercepted call were narcotic-related." *Id.*, at 39.

The Court of Appeals again reversed, holding that the District Court had yet to apply the correct standard. 170 U. S. App. D. C. 158, 516 F. 2d 751 (1975). The court recognized that the "presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied," but went on to hold that "the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions." *Id.*, at 163, 516 F. 2d, at 756. Then, because of the extended period of time which had elapsed since the commission of the offense in question, that court itself examined the intercepted conversations and held that suppression was not appropriate in this case because the court could not conclude that "some conversation was intercepted which clearly would not have been intercepted had reasonable attempts at minimization been made." *Id.*, at 164, 516 F. 2d, at 757.[8]

On the remand from the Court of Appeals, following a nonjury trial on stipulated evidence which consisted primarily of petitioners' intercepted conversations, Scott was found guilty of selling and purchasing narcotics not in the original stamped package, see 26 U. S. C. § 4704 (a) (1964 ed.), and Thurmon of conspiracy to sell narcotics, see 26 U. S. C. §§ 7237 (b) and 4705 (a) (1964 ed.).[9] The Court of Appeals affirmed

[8] The Court of Appeals, with four judges dissenting, denied rehearing and rehearing en banc, 173 U. S. App. D. C. 118, 522 F. 2d 1333 (1975), and we denied certiorari, 425 U. S. 917 (1976). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL dissented from the denial of certiorari.

[9] The specific statutes under which petitioners were convicted were repealed in connection with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292.

the convictions, 179 U. S. App. D. C. 281, 551 F. 2d 467 (1977), and we granted certiorari. 434 U. S. 888 (1977).

## II

Petitioners' principal contention is that the failure to make good-faith efforts to comply with the minimization requirement is itself a violation of § 2518 (5). They urge that it is only after an assessment is made of the agents' good-faith efforts, and presumably a determination that the agents did make such efforts, that one turns to the question of whether those efforts were reasonable under the circumstances. See Reply Brief for Petitioner 4–5. Thus, argue petitioners, Agent Cooper's testimony, which is basically a concession that the Government made no efforts which resulted in the non-interception of any call, is dispositive of the matter. The so-called "call analysis," which was introduced by the Government to suggest the reasonableness of intercepting most of the calls, cannot lead to a contrary conclusion because, having been prepared after the fact by a Government attorney and using terminology and categories which were not indicative of the agents' thinking at the time of the interceptions, it does not reflect the perceptions and mental state of the agents who actually conducted the wiretap.

The Government responds that petitioners' argument fails to properly distinguish between what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established.[10] In view of the deterrent purposes of the exclu-

[10] The Government also argues that even if the agents in this case violated the minimization requirement by intercepting some conversations which could not have reasonably been intercepted, § 2518 (10) requires suppression of only those conversations which were illegally intercepted, not suppression of all the intercepted conversations. See, *e. g., United States* v. *Cox,* 462 F. 2d 1293, 1301–1302 (CA8 1972), cert. denied, 417 U. S. 918 (1974); *United States* v. *Sisca,* 361 F. Supp. 735, 746–747

sionary rule, consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established. But the existence *vel non* of such a violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone, the Government contends, does not make otherwise lawful conduct illegal or unconstitutional.[11]

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(SDNY 1973), aff'd, 503 F. 2d 1337 (CA2), cert. denied, 419 U. S. 1008 (1974); *United States* v. *Mainello,* 345 F. Supp. 863, 874–877 (EDNY 1972); *United States* v. *LaGorga,* 336 F. Supp. 190 (WD Pa. 1971). It also renews its argument that petitioner Scott does not have standing to raise a minimization challenge based upon the interception of conversations to which he was not a party. To permit such a challenge would allow Scott to secure the suppression of evidence against him by showing that the rights of other parties were violated. This, argues the Government, would contravene well-settled principles of Fourth Amendment law, cf. *Brown* v. *United States,* 411 U. S. 223, 230 (1973); *Alderman* v. *United States,* 394 U. S. 165, 197 (1969); *Simmons* v. *United States,* 390 U. S. 377 (1968), which clearly apply to Title III cases, see S. Rep. No. 1097, 90th Cong., 2d Sess., 91, 106 (1968); *Alderman* v. *United States, supra,* at 175–176.

Given our disposition of this case we find it unnecessary to reach the Government's contention regarding the scope of the suppression remedy in the event of a violation of the minimization requirement. We also decline to address the Government's argument with respect to standing. The Government concedes that petitioner Thurmon was a party to some nonnarcotics-related calls and thus has standing to make the arguments advanced herein. Thus, even if we were to decide that Scott has no standing we would be compelled to undertake the decision of these issues. If, on the other hand, we were to decide that Scott does have standing, we would simply repeat exactly the same analysis made with respect to Thurmon's claim and find against Scott as well. In this circumstance we need not decide the questions of Scott's standing. See *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 44–45 (1974); *Doe* v. *Bolton,* 410 U. S. 179, 189 (1973).

[11] The Government also adds that even if subjective intent were the standard, the record does not support the District Court's conclusion that

We think the Government's position, which also served as the basis for decision in the Court of Appeals, embodies the proper approach for evaluating compliance with the minimization requirement. Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. The language of the Amendment itself proscribes only "unreasonable" searches and seizures. In *Terry* v. *Ohio,* 392 U. S. 1, 21–22 (1968), the Court emphasized the objective aspect of the term "reasonable."

> "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" (Footnotes omitted.)

See also *Beck* v. *Ohio,* 379 U. S. 89, 96–97 (1964); *Henry* v. *United States,* 361 U. S. 98, 102–103 (1959).

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the agents subjectively intended to violate the statute or the Constitution. It contends that the failure to stop intercepting calls, the interception of which was entirely reasonable, does not support a finding that the agents would have intercepted calls that should not have been intercepted had they been confronted with that situation. We express no view on this matter.

We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. In *United States* v. *Robinson*, 414 U. S. 218 (1973), a suspect was searched incident to a lawful arrest. He challenged the search on the ground that the motivation for the search did not coincide with the legal justification for the search-incident-to-arrest exception. We rejected this argument: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed." *Id.*, at 236. The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.[12]

Petitioners do not appear, however, to rest their argument entirely on Fourth Amendment principles. Rather, they argue in effect that regardless of the search-and-seizure analysis conducted under the Fourth Amendment, the statute regulating wiretaps requires the agents to make good-faith efforts at

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[12] See, *e. g.*, *United States* v. *Bugarin-Casas*, 484 F. 2d 853, 854 n. 1 (CA9 1973), cert. denied, 414 U. S. 1136 (1974) ("The fact that the agents were intending at the time they stopped the car to search it in any event . . . does not render the search, supported by independent probable cause, invalid"); *Dodd* v. *Beto*, 435 F. 2d 868, 870 (CA5 1970), cert. denied, 404 U. S. 845 (1971); *Klingler* v. *United States*, 409 F. 2d 299, 304 (CA8), cert. denied, 396 U. S. 859 (1969); *Green* v. *United States*, 386 F. 2d 953, 956 (CA10 1967); *Sirimarco* v. *United States*, 315 F. 2d 699, 702 (CA10), cert. denied, 374 U. S. 807 (1963). As is our usual custom, we do not, in citing these or other cases, intend to approve any particular language or holding in them.

minimization, and the failure to make such efforts is itself a violation of the statute which requires suppression.

This argument fails for more than one reason. In the first place, in the very section in which it directs minimization Congress, by its use of the word "conducted," made it clear that the focus was to be on the agents' actions not their motives. Any lingering doubt is dispelled by the legislative history which, as we have recognized before in another context, declares that § 2515 was not intended "generally to press the scope of the suppression role beyond present search and seizure law." S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968). See *Alderman* v. *United States*, 394 U. S. 165, 175–176 (1969).[13]

## III

We turn now to the Court of Appeals' analysis of the reasonableness of the agents' conduct in intercepting all of the calls in this particular wiretap. Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case.

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[13] This is not to say, of course, that the question of motive plays absolutely no part in the suppression inquiry. On occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule. For example, in *United States* v. *Janis*, 428 U. S. 433, 458 (1976), we ruled that evidence unconstitutionally seized by state police could be introduced in federal civil tax proceedings because "the imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest." See also *United States* v. *Ceccolini*, 435 U. S. 268, 276–277 (1978). This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated. We also have little doubt that as a practical matter the judge's assessment of the motives of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question. But the assessment and use of motive in this limited manner is irrelevant to our analysis of the questions at issue in this case.

The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to "minimize" the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case.

We agree with the Court of Appeals that blind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer. Such percentages may provide assistance, but there are surely cases, such as the one at bar, where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable. The reasons for this may be many. Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still other calls may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that the calls are not pertinent prior to their termination.

In determining whether the agents properly minimized, it is also important to consider the circumstances of the wiretap. For example, when the investigation is focusing on what is thought to be a widespread conspiracy more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise. And it is possible that many more of the conversations will be permissibly interceptable because they will involve one or more of the co-conspirators. The type of use to which the telephone is normally put may also have some bearing on the extent of minimization required. For example, if the agents are permitted to tap a public telephone because one individual is thought to be placing bets over the phone, substantial doubts as to minimization may arise if the agents listen to every call which goes out over that phone regardless of who places the call. On the other hand, if the phone is located in the residence of a person who is thought to be the head of a major drug ring, a contrary conclusion may be indicated.

Other factors may also play a significant part in a particular case. For example, it may be important to determine at exactly what point during the authorized period the interception was made. During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter. Interception of those same types of calls might be unreasonable later on, however, once the nonpertinent categories have been established and it is clear that this particular conversation is of that type. Other situations may arise where patterns of nonpertinent calls do not appear. In these circumstances it may not be unreasonable to intercept almost every short conversation because the determination of relevancy cannot be made before the call is completed.

After consideration of the minimization claim in this case in the light of these observations, we find nothing to persuade us that the Court of Appeals was wrong in its rejection of that claim.[14] Forty percent of the calls were clearly narcotics related and the propriety of their interception is, of course, not in dispute. Many of the remaining calls were very short, such as wrong-number calls, calls to persons who were not available to come to the phone, and calls to the telephone company to

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[14] Petitioners argue that the "district court found that the call analysis contained errors of characterization and factual inaccuracies and did not represent information known to the agents at the time of interception." Brief for Petitioners 25–26. We do not think petitioners have fairly characterized the District Court's findings, however. The District Court found: "The 'call analysis' conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case." App. 38. This does not suggest that the call analysis was factually erroneous, but rather that the categories used by the attorney who prepared the analysis were not necessarily of the same sort employed by the monitoring agents. This finding would thus have relevance if the critical inquiry focused on the subjective intent of the agents, but it certainly cannot be read as a finding that the general analysis of the calls set forth in the call analysis contains "factual inaccuracies."

hear the recorded weather message which lasts less than 90 seconds. In a case such as this, involving a wide-ranging conspiracy with a large number of participants, even a seasoned listener would have been hard pressed to determine with any precision the relevancy of many of the calls before they were completed.[15] A large number were ambiguous in nature, making characterization virtually impossible until the completion of these calls. And some of the nonpertinent conversations were one-time conversations. Since these calls did not give the agents an opportunity to develop a category of innocent calls which should not have been intercepted, their interception cannot be viewed as a violation of the minimization requirement.

We are thus left with the seven calls between Jenkins and her mother. The first four calls were intercepted over a three-day period at the very beginning of the surveillance. They were of relatively short length and at least two of them indicated that the mother may have known of the conspiracy. The next two calls, which occurred about a week later, both contained statements from the mother to the effect that she had something to tell Jenkins regarding the "business" but did not want to do so over the phone. The final call was substantially longer and likewise contained a statement which could have been interpreted as having some bearing on the conspiracy, *i. e.*, that one "Reds," a suspect in the conspiracy,

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[15] Petitioners intimate that the scope of the investigation was narrower than originally anticipated because the intercepts revealed only local purchases within the Washington area. That certainly has no bearing on what the officers had reasonable cause to believe at the time they made the interceptions, however. And while it is true that the conspiracy turned out to involve mainly local distribution, rather than major interstate and international importation, it is not at all clear that the information garnered through the wiretap reduced the agents' estimates of the number of people involved or the extent of the drug traffic. In short, there is little doubt on the record that, as the agents originally thought, the conspiracy can fairly be characterized as extensive.

had called to ask for a telephone number. Although none of these conversations turned out to be material to the investigation at hand, we cannot say that the Court of Appeals was incorrect in concluding that the agents did not act unreasonably at the time they made these interceptions. Its judgment is accordingly

*Affirmed.*

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

In 1968, Congress departed from the longstanding national policy forbidding surreptitious interception of wire communications,[1] by enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520 (1976 ed.). That Act, for the first time authorizing law enforcement personnel to monitor private telephone conversations, provided strict guidelines and limitations on the use of wiretaps as a barrier to Government infringement of individual privacy. One of the protections thought essential by Congress as a bulwark against unconstitutional governmental intrusion on private conversations is the "minimization requirement" of § 2518 (5). The Court today eviscerates this congressionally mandated protection of individual privacy, marking the third decision in which the Court has disregarded or diluted congressionally established safeguards [2] designed to prevent Government electronic surveillance from becoming the abhorred

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[1] Prior to the enactment of Title III, § 605 of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1104, provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

[2] See *United States* v. *Donovan*, 429 U. S. 413, 445 (1977) (MARSHALL, J., dissenting in part); *United States* v. *Kahn*, 415 U. S. 143, 158 (1974) (Douglas, J., dissenting); see also *United States* v. *Chavez*, 416 U. S. 562, 580 (1974) (opinion of Douglas, J.).

general warrant which historically had destroyed the cherished expectation of privacy in the home.[3]

The "minimization provision" of § 2518 (5) provides, *inter alia,* that every order authorizing interception of wire communications include a requirement that the interception *"shall be conducted* in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." (Emphasis added.) The District Court's findings of fact, not challenged here or in the Court of Appeals, plainly establish that this requirement was shamelessly violated. The District Court found:

> "[T]he monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the [subject] telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion." App. 36.

The District Court further found that the special agent who conducted the wiretap testified under oath that "he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith." *Id.,* at 37. The District Court found a "knowing and purposeful failure" to comply with the minimization requirements. *Id.,* at 39. These findings, made on remand after re-examination, reiterated the District Court's initial finding that "[the agents] did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it." 331 F. Supp. 233, 247 (DC 1971). In the face of this clear finding that the agents monitored every call and, moreover, knowingly failed to conduct the wiretap "in such a way as to minimize the interception of communications" not subject to interception, and despite the fact that 60% of all calls intercepted were not subject to intercep-

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[3] See *United States* v. *Kahn, supra,* at 160–162, and nn. 3–4 (Douglas, J., dissenting).

tion, the Court holds that no violation of § 2518 (5) occurred. The basis for that conclusion is a *post hoc* reconstruction offered by the Government of what would have been reasonable assumptions on the part of the agents had they attempted to comply with the statute. Since, on the basis of this reconstruction of reality, it would have been reasonable for the agents to assume that each of the calls dialed and received was likely to be in connection with the criminal enterprise, there was no violation, notwithstanding the fact that the agents intercepted every call with no effort to minimize interception of the noninterceptable calls. That reasoning is thrice flawed.

First, and perhaps most significant, it totally disregards the explicit congressional command that the wiretap be *conducted* so as to minimize interception of communications not subject to interception. Second, it blinks reality by accepting, as a substitute for the good-faith exercise of judgment as to which calls should not be intercepted by the agent most familiar with the investigation, the *post hoc* conjectures of the Government as to how the agent would have acted had he exercised his judgment. Because it is difficult to know with any degree of certainty whether a given communication is subject to interception prior to its interception, there necessarily must be a margin of error permitted. But we do not enforce the basic premise of the Act that intrusions of privacy must be kept to the minimum by excusing the failure of the agent to make the good-faith effort to minimize which Congress mandated. In the nature of things it is impossible to know how many fewer interceptions would have occurred had a good-faith judgment been exercised, and it is therefore totally unacceptable to permit the failure to exercise the congressionally imposed duty to be excused by the difficulty in predicting what might have occurred had the duty been exercised. Finally, the Court's holding permits Government agents deliberately to flout the duty imposed upon them by Congress. In a linguistic *tour*

*de force* the Court converts the mandatory language that the interception "shall be conducted" to a precatory suggestion. Nor can the Court justify its disregard of the statute's language by any demonstration that it is necessary to do so to effectuate Congress' purpose as expressed in the legislative history. On the contrary, had the Court been faithful to the congressional purpose, it would have discovered in § 2518 (10) (a) and its legislative history the unambiguous congressional purpose to have enforced the several limitations on interception imposed by the statute. Section 2518 (10)(a) requires suppression of evidence intercepted in violation of the statute's limitations on interception, and the legislative history emphasizes Congress' intent that the exclusionary remedy serve as a deterrent against the violation of those limitations by law enforcement personnel. See S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968).

The Court's attempted obfuscation in Part II, *ante*, at 135–139, of its total disregard of the statutory mandate [4] is a transparent failure. None of the cases discussed there deciding the reasonableness under the Fourth Amendment of searches and seizures deals with the discrete problems of wire interceptions or addresses the construction of the minimization requirement of § 2518 (5). Congress provided the answer to that problem, and the wording of its command, and not general Fourth Amendment principles, must be the guide to our decision. The Court offers no explanation for its failure to heed the aphorism: "Though we may not end with the words in construing a disputed statute, one certainly begins there." Frankfurter,

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[4] Although the Court's refusal to recognize as violative of § 2518 (5) a wiretap conducted in bad faith without regard to minimization necessarily will result in many invasions of privacy which otherwise would not occur, the objective requirement of "reasonableness" left unimpaired by the Court will clearly require suppression of interceptions in other circumstances. See, *e. g., Bynum* v. *United States,* 423 U. S. 952 (1975) (BRENNAN, J., dissenting from denial of certiorari).

Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535 (1947).[5]

Moreover, today's decision does not take even a sidelong glance at *United States* v. *Kahn,* 415 U. S. 143 (1974), whose reasoning it undercuts, and which may now require overruling. Answering the question in *Kahn* of who must be named in an application and order authorizing electronic surveillance, the Court held:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought." *Id.,* at 155.

To support that holding against the argument that it would, in effect, approve a general warrant proscribed by Title III and the Fourth Amendment, see *id.,* at 158–163 (Douglas, J., dissenting), the Court relied on the minimization requirement as an adequate safeguard to prevent such unlimited invasions of personal privacy:

> "[I]n accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations. . . . Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communication that came over the wire—and there is no indication that such abuses took place in this case." *Id.,* at 154–155. (Footnotes omitted.)

Beyond the inconsistency of today's decision with the reasoning of *Kahn,* the Court manifests a disconcerting willingness to unravel individual threads of statutory protection without

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[5] Accord, *United States* v. *Kahn,* 415 U. S., at 151 ("[T]he starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III").

regard to their interdependence and to whether the cumulative effect is to rend the fabric of Title III's "congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger* v. *New York,* 388 U. S. 41 (1967), and *Katz* v. *United States,* 389 U. S. 347 (1967)," *Bynum* v. *United States,* 423 U. S. 952 (1975) (BRENNAN, J., dissenting from denial of certiorari). This process of myopic, incremental denigration of Title III's safeguards raises the specter that, as judicially "enforced," Title III may be vulnerable to constitutional attack for violation of Fourth Amendment standards, thus defeating the careful effort Congress made to avert that result.

# FLAGG BROS., INC., ET AL. *v.* BROOKS ET AL.

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

No. 77–25. Argued January 18, 1978—Decided May 15, 1978*

After respondent Brooks and her family had been evicted from their apartment and their belongings had been stored by petitioner storage company, Brooks was threatened with sale of her belongings pursuant to New York Uniform Commercial Code § 7–210 unless she paid her storage account. She thereupon brought this class action under 42 U. S. C. § 1983, seeking damages and injunctive relief and a declaration that the sale pursuant to § 7–210 (which provides a procedure whereby a warehouseman conforming to the provisions of the statute may convert his lien into good title) would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Subsequent interventions by respondent Jones as plaintiff and petitioners warehouse associations and the New York State Attorney General as defendants were permitted. The District Court dismissed the complaint for failure to state a claim for relief under § 1983, which provides, *inter alia*, that every person who under color of any state statute subjects any citizen to the deprivation of any rights secured by the Constitution and federal laws shall be liable to the injured party. The Court of Appeals reversed, holding that state action might be found in the exercise by a private party of "some power delegated to it by the State which is traditionally associated with sovereignty," and that "by enacting § 7–210 New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution . . . but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." *Held:* A warehouseman's proposed sale of goods entrusted to him for storage, as permitted by § 7–210, is not "state action," and since the allegations of the complaint failed to establish that any violation of respondents' Fourteenth Amendment rights was committed by either the storage company or the State of New York,

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*Together with No. 77–37, *Lefkowitz, Attorney General of New York* v. *Brooks et al.;* and No. 77–42, *American Warehousemen's Assn. et al.* v. *Brooks et al.*, also on certiorari to the same court.

the District Court properly concluded that no claim for relief was stated by respondents under 42 U. S. C. § 1983. Pp. 155–166.

(a) Respondents' failure to allege the participation of any public officials in the proposed sale plainly distinguishes this litigation from decisions such as *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601; *Fuentes* v. *Shevin*, 407 U. S. 67; and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, which imposed procedural restrictions on creditors' remedies. P. 157.

(b) The challenged statute does not delegate to the storage company an exclusive prerogative of the sovereign. Other remedies for the settlement of disputes between debtors and creditors (which is not traditionally a public function) remain available to the parties. *Terry* v. *Adams*, 345 U. S. 461; *Smith* v. *Allwright*, 321 U. S. 649; *Nixon* v. *Condon*, 286 U. S. 73; and *Marsh* v. *Alabama*, 326 U. S. 501, distinguished. Pp. 157–163.

(c) Though respondents contend that the State authorized and encouraged the storage company's action by enacting § 7–210, a State's mere acquiescence in a private action does not convert such action into that of the State. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163. Pp. 164–166.

553 F. 2d 764, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 166. STEVENS, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 168. BRENNAN, J., took no part in the consideration or decision of the cases.

*Alvin Altman* argued the cause and filed briefs for petitioners in No. 77–25. *A. Seth Greenwald*, Assistant Attorney General of New York, argued the cause for petitioner in No. 77–37. With him on the briefs were *Louis J. Lefkowitz*, Attorney General, *pro se*, and *Samuel A. Hirshowitz*, First Assistant Attorney General. *William H. Towle* filed a brief for petitioners in No. 77–42. *Arnold H. Shaw* filed a brief for the Warehousemen's Association of New York and New Jersey, Inc., et al., respondents under this Court's Rule 21 (4), in support of petitioners.

*Martin A. Schwartz* argued the cause for respondents Brooks

et al. in all cases. With him on the brief was *Lawrence S. Kahn*.†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented by this litigation is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7–210 (McKinney 1964),[1] is an action properly attributable

†Briefs of *amici curiae* urging affirmance were filed by *W. Bernard Richland* and *L. Kevin Sheridan* for the city of New York; by *John E. Kirklin* and *Kalman Finkel* for the Legal Aid Society of New York City; by *John C. Esposito* for the New York State Consumer Protection Board; and by *Robert S. Catz* for the Urban Law Institute in No. 77–42.

[1] The challenged statute reads in full:

"§ 7—210. Enforcement of Warehouseman's Lien

"(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

"(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

"(a) All persons known to claim an interest in the goods must be notified.

"(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

"(c) The notification must include an itemized statement of the claim, a

to the State of New York. The District Court found that the warehouseman's conduct was not that of the State, and dismissed this suit for want of jurisdiction under 28 U. S. C.

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description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

"(d) The sale must conform to the terms of the notification.

"(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

"(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

"(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

"(4) The warehouseman may buy at any public sale pursuant to this section.

"(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

"(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

"(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

"(8) Where a lien is on goods stored by a merchant in the course of his

§ 1343 (3). 404 F. Supp. 1059 (SDNY 1975). The Court of Appeals for the Second Circuit, in reversing the judgment of the District Court, found sufficient state involvement with the proposed sale to invoke the provisions of the Due Process Clause of the Fourteenth Amendment. 553 F. 2d 764 (1977). We agree with the District Court, and we therefore reverse.

## I

According to her complaint, the allegations of which we must accept as true, respondent Shirley Brooks and her family were evicted from their apartment in Mount Vernon, N. Y., on June 13, 1973. The city marshal arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse. Brooks was informed of the cost of moving and storage, and she instructed the workmen to proceed, although she found the price too high. On August 25, 1973, after a series of disputes over the validity of the charges being claimed by petitioner Flagg Brothers, Brooks received a letter demanding that her account be brought up to date within 10 days "or your furniture will be sold." App. 13a. A series of subsequent letters from respondent and her attorneys produced no satisfaction.

Brooks thereupon initiated this class action in the District Court under 42 U. S. C. § 1983, seeking damages, an injunction against the threatened sale of her belongings, and the declaration that such a sale pursuant to § 7–210 would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. She was later joined in her action by Gloria Jones, another resident of Mount Vernon whose goods had been stored by Flagg Brothers following her eviction.

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business the lien may be enforced in accordance with either subsection (1) or (2).

"(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

The American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., moved to intervene as defendants, as did the Attorney General of New York and others seeking to defend the constitutionality of the challenged statute.[2] On July 7, 1975, the District Court, relying primarily on our decision in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974), dismissed the complaint for failure to state a claim for relief under § 1983.

A divided panel of the Court of Appeals reversed.[3] The majority noted that *Jackson* had suggested that state action might be found in the exercise by a private party of " 'some

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[2] In his order granting the motions to intervene, Judge Gurfein noted that respondent Brooks' goods had been returned to her, but he found that her action had been saved from mootness by her claim for damages. 63 F. R. D. 409, 412 (SDNY 1974). We have no occasion to consider the correctness of that decision, since we have concluded, n. 3, *infra*, that the claim of respondent Jones remains alive.

[3] Jones died prior to the court's decision. However, the court concluded that, under 42 U. S. C. § 1983, her claim survived for the benefit of her estate, since a comparable claim would survive under applicable New York law. 553 F. 2d, at 768 n. 7. For simplicity, Jones will be referred to as a respondent herein.

The court also noted that Jones had recovered most of her possessions after the District Court's dismissal of her action. Unlike Brooks, she paid the charges demanded by Flagg Brothers, but did so "only because of alleged threats of sale and the twenty-month detention of the goods." *Ibid.*

At this point in the litigation, it is clear that Flagg Brothers has not sold and will not sell the belongings of either respondent. Although injunctive relief against such sale is therefore no longer available, we must reach the merits of the claim if either respondent can demonstrate that she has suffered monetary damage by reason of the workings of § 7–210. See, *e. g.*, *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 305–306 (1964). The affidavit submitted with Jones' complaint alleges that Flagg Brothers charged her an auctioneer's fee, pursuant to § 7–210 (3), which she has now paid. If she is correct that the warehouseman's invocation of the statute constitutes a violation by the State itself of the Fourteenth Amendment, she would surely be entitled to recover that fee. We express no opinion as to whether she could prove other damages causally related to the threatened use of the sale provisions.

power delegated to it by the State which is traditionally associated with sovereignty.'" 553 F. 2d, at 770, quoting 419 U. S., at 353. The majority found:

> "[B]y enacting § 7–210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution [citations omitted], but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." 553 F. 2d, at 771.

The court, although recognizing that the Court of Appeals for the Ninth Circuit had reached a contrary conclusion in dealing with an identical California statute in *Melara* v. *Kennedy,* 541 F. 2d 802 (1976), concluded that this delegation of power constituted sufficient state action to support federal jurisdiction under 28 U. S. C. § 1343 (3). The dissenting judge found the reasoning of *Melara* persuasive.

We granted certiorari, 434 U. S. 817, to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia, and to address the important question it presents concerning the meaning of "state action" as that term is associated with the Fourteenth Amendment.[4]

## II

A claim upon which relief may be granted to respondents against Flagg Brothers under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that Flagg Brothers deprived them of this right acting "under color of any statute" of the State of New York. It is clear that these two elements denote two separate areas of

[4] Even if there is "state action," the ultimate inquiry in a Fourteenth Amendment case is, of course, whether that action constitutes a denial or deprivation by the State of rights that the Amendment protects.

inquiry. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 150 (1970).

Respondents allege in their complaints that "the threatened sale of the goods pursuant to New York Uniform Commercial Code § 7–210" is an action under color of state law. App. 14a, 47a. We have previously noted, with respect to a private individual, that "[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." *Adickes, supra,* at 162 n. 23. Certainly, the complaints can be fairly read to allege such knowledge on the part of Flagg Brothers. However, we need not determine whether any further showing is necessary, since it is apparent that neither respondent has alleged facts which constitute a deprivation of any right "secured by the Constitution and laws" of the United States.

A moment's reflection will clarify the essential distinction between the two elements of a § 1983 action. Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. See, *e. g., Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 422–424 (1968) (discussing 42 U. S. C. § 1982). Although a private person may cause a deprivation of such a right, he may be subjected to liability under § 1983 only when he does so under color of law. Cf. 392 U. S., at 424–425, and n. 33. However, most rights secured by the Constitution are protected only against infringement by governments. See, *e. g., Jackson,* 419 U. S., at 349; *Civil Rights Cases,* 109 U. S. 3, 17–18 (1883). Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York.

It must be noted that respondents have named no public officials as defendants in this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties.[5] This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). In those cases, the Court was careful to point out that the dictates of the Due Process Clause "attac[h] only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." *Fuentes, supra,* at 84. While as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action "may be fairly treated as that of the State itself," *Jackson, supra,* at 351, may deprive him of "an interest encompassed within the Fourteenth Amendment's protection," *Fuentes, supra,* at 84. Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not.

## III

Respondents' primary contention is that New York has delegated to Flagg Brothers a power "traditionally exclusively reserved to the State." *Jackson, supra,* at 352. They argue that the resolution of private disputes is a traditional function of civil government, and that the State in § 7–210 has delegated this function to Flagg Brothers. Respondents,

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[5] Of course, where the defendant is a public official, the two elements of a § 1983 action merge. "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized, or lawful." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970) (citations omitted).

however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."

One such area has been elections. While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function. This principle was established by a series of cases challenging the exclusion of blacks from participation in primary elections in Texas. *Terry* v. *Adams,* 345 U. S. 461 (1953); *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Nixon* v. *Condon,* 286 U. S. 73 (1932). Although the rationale of these cases may be subject to some dispute,[6] their scope is carefully defined. The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce "the uncontested choice of public officials." *Terry, supra,* at 484 (Clark, J., concurring). As Mr. Justice Black described the situation in *Terry, supra,* at 469: "The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded." [7]

A second line of cases under the public-function doctrine originated with *Marsh* v. *Alabama,* 326 U. S. 501 (1946). Just as the Texas Democratic Party in *Smith* and the Jaybird Democratic Association in *Terry* effectively performed the entire public function of selecting public officials, so too the

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[6] Indeed, the majority in *Terry* produced three separate opinions, none of which commanded a majority of the Court.

[7] In construing the public-function doctrine in the election context, the Court has given special consideration to the fact that Congress, in 42 U. S. C. § 1971 (a)(1), has made special provision to protect equal access to the ballot. *Terry,* 345 U. S., at 468 (opinion of Black, J.); *Smith,* 321 U. S., at 651. No such congressional pronouncement speaks to the ordinary commercial transaction presented here.

Gulf Shipbuilding Corp. performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned. Under those circumstances, the Court concluded it was bound to recognize the right of a group of Jehovah's Witnesses to distribute religious literature on its streets. The Court expanded this municipal-function theory in *Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), to encompass the activities of a private shopping center. It did so over the vigorous dissent of Mr. Justice Black, the author of *Marsh*. As he described the basis of the *Marsh* decision:

> "The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i. e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U. S., at 502." 391 U. S., at 332 (dissenting opinion).

This Court ultimately adopted Mr. Justice Black's interpretation of the limited reach of *Marsh* in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), in which it announced the overruling of *Logan Valley*.

These two branches of the public-function doctrine have in common the feature of exclusivity.[8] Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the

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[8] Respondents also contend that *Evans* v. *Newton*, 382 U. S. 296 (1966), establishes that the operation of a park for recreational purposes is an exclusively public function. We doubt that *Newton* intended to establish any such broad doctrine in the teeth of the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes. We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed "no change in the municipal maintenance and concern over this facility," *id.*, at 301, after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park.

Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under § 7–210 is not the only means of resolving this purely private dispute. Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. See N. Y. Civ. Prac. Law § 7101 *et seq.* (McKinney 1963). The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. N. Y. U. C. C. § 7–210 (9) (McKinney 1964). This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world,[9] can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.[10]

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[9] Unlike the parade of horribles suggested by our Brother STEVENS in dissent, *post,* at 170, this case does not involve state authorization of private breach of the peace.

[10] It is undoubtedly true, as our Brother STEVENS says in dissent, *post,* at 169, that "respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law. It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.

This situation is clearly distinguishable from cases such as *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975); *Fuentes* v. *Shevin,*

Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function.[11] Cf. *United States* v. *Kras*, 409

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407 U. S. 67 (1972); and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor. See *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

The "consent" inquiry in *Fuentes* occurred only after the Court had concluded that state action for purposes of the Fourteenth Amendment was supplied by the participation in the seizure on the part of the sheriff. The consent inquiry was directed to whether there had been a waiver of the constitutional right to due process which had been triggered by state deprivation of property. But our Brother STEVENS puts the cart before the horse; he concludes that the respondents' lack of consent to the deprivations triggers affirmative constitutional protections which the State is bound to provide. Thus what was a mere coda to the constitutional analysis in *Fuentes* becomes the major theme of the dissent.

[11] It may well be, as my Brother STEVENS' dissent contends, that "[t]he power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system." *Post*, at 178–179. But here New York, unlike Florida in *Fuentes*, Georgia in *North Georgia Finishing*, and Wisconsin in *Sniadach*, has not ordered respondents to surrender any property whatever. It has merely enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title. There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the "surrenders of property" to which that dissent refers, and that

U. S. 434, 445–446 (1973). Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh*.[12] This is true whether these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a

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the compliance of Flagg Brothers with applicable New York property law would be reviewed after customary notice and hearing in such a proceeding.

The fact that such a judicial review of a self-help remedy is seldom encountered bears witness to the important part that such remedies have played in our system of property rights. This is particularly true of the warehouseman's lien, which is the source of this provision in the Uniform Commercial Code which is the law in 49 States and the District of Columbia. The lien in this case, particularly because it is burdened by procedural constraints and provides for a compensatory remedy and judicial relief against abuse, is not atypical of creditors' liens historically, whether created by statute or legislatively enacted. The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Railway Employees' Dept.* v. *Hanson*, 351 U. S. 225 (1956).

[12] This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints. We merely address the public-function doctrine as respondents would apply it to this case.

Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York's statute has done nothing more than authorize (and indeed limit)—without participation by any public official—what Flagg Brothers would tend to do, even in the absence of such authorization, *i. e.*, dispose of respondents' property in order to free up its valuable storage space. The proposed sale pursuant to the lien in this case is not a significant departure from traditional private arrangements.

particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another. Compare *Cox Bakeries* v. *Timm Moving & Storage,* 554 F. 2d 356, 358–359 (CA8 1977), with *Melara,* 541 F. 2d, at 805–806, and n. 7. Cf. *Bell* v. *Maryland,* 378 U. S. 226, 334–335 (1964) (Black, J., dissenting).[13]

Thus, even if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. We conclude that our sovereign-function cases do not support a finding of state action here.

Our holding today impairs in no way the precedential value of such cases as *Norwood* v. *Harrison,* 413 U. S. 455 (1973), or *Gilmore* v. *City of Montgomery,* 417 U. S. 556 (1974), which arose in the context of state and municipal programs which benefited private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems. And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection.[14] We express no view as to the extent,

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[13] See also *Davis* v. *Richmond,* 512 F. 2d 201, 203 (CA1 1975):

"[W]e are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England."

[14] Contrary to MR. JUSTICE STEVENS' suggestion, *post,* at 172 n. 8, this Court has never considered the private exercise of traditional police functions. In *Griffin* v. *Maryland,* 378 U. S. 130 (1964), the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he "purported to exercise the authority of a deputy sheriff." *Id.,* at 135. *Griffin* thus sheds

if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.

## IV

Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting § 7–210. Our cases state "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Adickes,* 398 U. S., at 170. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State. The Court rejected a similar argument in *Jackson,* 419 U. S., at 357:

> "Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice *by ordering it,* does not transmute a practice initiated by the utility and approved by the commission into 'state action.' " (Emphasis added.)

The clearest demonstration of this distinction appears in *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163 (1972), which held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory rules. These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as "authoriza-

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no light on the constitutional status of private police forces, and we express no opinion here.

tion" or "encouragement." See *id.*, at 190 (BRENNAN, J., dissenting).

It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. It was recognized in the earliest interpretations of the Fourteenth Amendment "that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State" infringing rights protected thereby. *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880). If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

Not only is this notion completely contrary to that "essential dichotomy," *Jackson, supra,* at 349, between public and private acts, but it has been previously rejected by this Court. In *Evans* v. *Abney,* 396 U. S. 435, 458 (1970), our Brother BRENNAN in dissent contended that a Georgia statutory provision authorizing the establishment of trusts for racially restricted parks conferred a "special power" on testators taking advantage of the provision. The Court nevertheless concluded that the State of Georgia was in no way responsible for the purely private choice involved in that case. By the same token, the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7–210 permits but does not compel, to threaten to sell these respondents' belongings.

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

We conclude that the allegations of these complaints do not establish a violation of these respondents' Fourteenth Amendment rights by either petitioner Flagg Brothers or the State of New York. The District Court properly concluded that their complaints failed to state a claim for relief under 42 U. S. C. § 1983. The judgment of the Court of Appeals holding otherwise is

*Reversed.*

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

MR. JUSTICE MARSHALL, dissenting.

Although I join my Brother STEVENS' dissenting opinion, I write separately to emphasize certain aspects of the majority opinion that I find particularly disturbing.

I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor. See, *e. g., Beal* v. *Doe,* 432 U. S. 438, 455–457 (1977) (MARSHALL, J., dissenting); *United States* v. *Kras,* 409 U. S. 434, 458–460 (1973) (MARSHALL, J., dissenting). It blandly asserts that "respondent Jones . . . could have sought to replevy her goods at any time under state law." *Ante,* at 160. In order to obtain replevin in New York, however, respondent Jones would first have had to present to a sheriff an "undertaking" from a surety by which the latter would be bound to pay "not less than twice the value" of the goods involved and perhaps substantially more, depending in

part on the size of the potential judgment against the debtor. N. Y. Civ. Prac. Law § 7102 (e) (McKinney Supp. 1977). Sureties do not provide such bonds without receiving both a substantial payment in advance and some assurance of the debtor's ability to pay any judgment awarded.

Respondent Jones, according to her complaint, took home $87 per week from her job, had been evicted from her apartment, and faced a potential liability to the warehouseman of at least $335, an amount she could not afford. App. 44a–46a. The Court's assumption that respondent would have been able to obtain a bond, and thus secure return of her household goods, must under the circumstances be regarded as highly questionable.* While the Court is technically correct that respondent "could have sought" replevin, it is also true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding eviction and the seizure of her household goods by the warehouseman. But we cannot close our eyes to the realities that led to this litigation. Just as respondent lacked the funds to prevent eviction, it seems clear that, once her goods were seized, she had no practical choice but to leave them with the warehouseman, where they were subject to forced sale for nonpayment of storage charges.

I am also troubled by the Court's cavalier treatment of the place of historical factors in the "state action" inquiry. While we are, of course, not bound by what occurred centuries ago in England, see *ante,* at 163 n. 13, the test adopted by the Court itself requires us to decide what functions have been *"traditionally* exclusively reserved to the State," *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345, 352 (1974) (emphasis added). Such an issue plainly cannot be resolved in a historical vacuum. New York's highest court has stated that "[i]n

*New York's replevin statutes have been challenged by poor persons on the ground that they violated equal protection because the poor could not obtain the required "undertaking." See *Laprease* v. *Raymours Furniture Co.,* 315 F. Supp. 716 (NDNY 1970) (three-judge court); *Tamburro* v. *Trama,* 59 Misc. 2d 488, 299 N. Y. S. 2d 528 (1969).

[New York] the execution of a lien . . . traditionally has been the function of the Sheriff." *Blye* v. *Globe-Wernicke Realty Co.*, 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713–714 (1973). Numerous other courts, in New York and elsewhere, have reached a similar conclusion. See, *e. g.*, *Sharrock* v. *Dell Buick-Cadillac, Inc.*, 56 App. Div. 2d 446, 455, 393 N. Y. S. 2d 166, 171 (1977) ("[T]he garageman in executing his lien . . . is performing the traditional function of the Sheriff and is clothed with the authority of State law"); *Parks* v. *"Mr. Ford,"* 556 F. 2d 132, 141 (CA3 1977) (en banc) ("Pennsylvania has quite literally delegated to private individuals, [forced-sale] powers 'traditionally exclusively reserved' to sheriffs and constables"); *Cox Bakeries, Inc.* v. *Timm Moving & Storage, Inc.*, 554 F. 2d 356, 358 (CA8 1977) (Clark, J.) (by giving a warehouseman forced-sale powers, "the state has delegated the traditional roles of judge, jury and sheriff"); *Hall* v. *Garson*, 430 F. 2d 430, 439 (CA5 1970) ("The execution of a lien . . . has in Texas traditionally been the function of the Sheriff or constable").

By ignoring this history, the Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere." *Ante*, at 160 n. 10. The state-action doctrine, as developed in our past cases, requires that we come down to earth and decide the issue here with careful attention to the State's traditional role.

I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Respondents contend that petitioner Flagg Brothers' proposed sale of their property to third parties will violate the Due Process Clause of the Fourteenth Amendment. Assum-

ing, *arguendo,* that the procedure to be followed would be inadequate if the sale were conducted by state officials, the Court holds that respondents have no federal protection because the case involves nothing more than a *private* deprivation of their property without due process of law. In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the State's authorization of certain creditors' remedies. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601; *Fuentes* v. *Shevin,* 407 U. S. 67; *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337.

There is no question in this case but that respondents have a property interest in the possessions that the warehouseman proposes to sell.[1] It is also clear that, whatever power of sale the warehouseman has, it does not derive from the consent of the respondents.[2] The claimed power derives solely from the State, and specifically from § 7–210 of the New York Uniform Commercial Code. The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections.[3]

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[1] Of course the warehouseman may also have a property interest and the ultimate resolution of the due process issue will require a balancing of these interests. See *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 604.

[2] Although the petitioners have at various stages of this case contended that there was an "implied contract" between the warehouseman and respondents providing for the sale of respondents' possessions in satisfaction of a lien, the Court of Appeals rejected this claim, 553 F. 2d 764, 767 n. 3, and petitioners conceded in this Court that, taking respondents' allegations as fact, as we must, there is no contractual issue in this case. Tr. of Oral Arg. 11.

[3] It could be argued that since the State has the power to create property interests, it should also have the power to determine what procedures

In determining that New York's statute cannot be scrutinized under the Due Process Clause, the Court reasons that the warehouseman's proposed sale is solely private action because the state statute "*permits* but does not compel" the sale, *ante,* at 165 (emphasis added), and because the warehouseman has not been delegated a power "*exclusively* reserved to the State," *ante,* at 158 (emphasis added). Under this approach a State could enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute could authorize the warehouseman to retain all proceeds of the lien sale, even if they far exceeded the amount of the alleged debt; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize "any person with sufficient physical power," *ante,* at 157, to acquire and sell the property of his weaker neighbor. An attempt to challenge the validity of any such outrageous statute would be defeated by the reasoning the Court uses today: The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.

As these examples suggest, the distinctions between "permission" and "compulsion" on the one hand, and "exclusive" and "nonexclusive," on the other, cannot be determinative factors in state-action analysis. There is no great chasm between "permission" and "compulsion" requiring particular state action to fall within one or the other definitional camp. Even *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, upon which the Court relies for its distinction between "permission" and

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should attend the deprivation of those interests. See *Arnett* v. *Kennedy,* 416 U. S. 134, 153–154 (REHNQUIST, J.). Although a majority of this Court has never adopted that position, today's opinion revives the theory in a somewhat different setting by holding that the State can shield its legislation affecting property interests from due process scrutiny by delegating authority to private parties.

"compulsion," recognizes that there are many intervening levels of state involvement in private conduct that may support a finding of state action.[4] In this case, the State of New York, by enacting § 7–210 of the Uniform Commercial Code, has acted in the most effective and unambiguous way a State can act. This section specifically authorizes petitioner Flagg Brothers to sell respondents' possessions; it details the procedures that petitioner must follow; and it grants petitioner the power to convey good title to goods that are now owned by respondents to a third party.[5]

While Members of this Court have suggested that statutory authorization alone may be sufficient to establish state action,[6] it is not necessary to rely on those suggestions in this case because New York has authorized the warehouseman to perform what is clearly a state function. The test of what is a state function for purposes of the Due Process Clause has been variously phrased. Most frequently the issue is presented in terms of whether the State has delegated a function traditionally and historically associated with sovereignty. See, *e. g., Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345, 353; *Evans* v. *Newton,* 382 U. S. 296, 299. In this Court, petitioners have attempted to argue that the nonconsensual trans-

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[4] In *Moose Lodge* the Court found state action on the basis of the Liquor Control Board's regulation which required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws." As the Court recognized, this regulation was neutral on its face, see 407 U. S., at 178, and did not *compel* the Lodge to adopt a discriminatory membership rule.

[5] In fact, § 7–210 (5) (1964) provides:

"A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section."

[6] See, *e. g., Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 726 (STEWART, J., concurring); *id.,* at 727 (Frankfurter, J., dissenting); and *id.,* at 729 (Harlan, J., dissenting).

fer of property rights is not a traditional function of the sovereign. The overwhelming historical evidence is to the contrary, however,[7] and the Court wisely does not adopt this position. Instead, the Court reasons that state action cannot be found because the State has not delegated to the warehouseman an *exclusive* sovereign function.[8] This distinction, how-

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[7] The New York State courts have recognized that the execution of a lien is a traditional function of the State. See *Blye* v. *Globe-Wernicke Realty Co.*, 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713–714 (1973). See also 3 W. Blackstone, Commentaries §§ 7–11, pp. *3–6, which notes that the right of self-help at common law was severely limited.

I fully agree with the Court that the decision of whether or not a statute is subject to due process scrutiny should not depend on " 'whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England.' " *Ante*, at 163 n. 13 (citation omitted). Nonetheless some reference to history and well-settled practice is necessary to determine whether a particular action is a "traditional state function." See *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345. Indeed, in *Jackson* the Court specifically referred to Pennsylvania decisions, rendered in 1879 and 1898, which had rejected the contention that the furnishing of utility services was a state function. *Id.*, at 353.

[8] See *ante*, at 157–158. As I understand the Court's notion of "exclusivity," the sovereign function here is not exclusive because there may be other state remedies, under different statutes or common-law theories, available to respondents. *Ante*, at 159–160. Even if I were to accept the notion that sovereign functions must be "exclusive," the Court's description of exclusivity is incomprehensible. The question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity. For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action. See *Griffin* v. *Maryland*, 378 U. S. 130. Under the Court's analysis, however, there would be no state action if the State provided a remedy, such as an action for wrongful imprisonment, for the individual injured by the "private" policeman. This analysis is not based on "exclusivity," but on some vague, and highly inappropriate, notion that respondents should not complain about this state statute if the State offers them a glimmer of hope of redeeming their possessions, or at least the value of the goods, through some other state action. Of course, the availability

ever, is not consistent with our prior decisions on state action; [9] is not even adhered to by the Court in this case; [10] and, most importantly, is inconsistent with the line of cases beginning with *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337.

Since *Sniadach* this Court has scrutinized various state statutes regulating the debtor-creditor relationship for compliance with the Due Process Clause. See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601; *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600; *Fuentes* v. *Shevin*, 407 U. S. 67. In each of these cases a finding of state action was a prerequisite to the Court's decision. The Court today seeks to explain these findings on the ground that in each case there was some element of "overt official involvement." *Ante*, at 157. Given the facts of those cases, this explanation is baffling. In *North Georgia Finishing*, for instance, the official involvement of the State of Georgia consisted of a court clerk who issued a writ of garnishment based solely on the affidavit of the creditor. 419 U. S., at 607. The clerk's actions were purely ministerial, and, until today, this Court had never held that purely minis-

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of other state remedies may be relevant in determining whether the statute provides sufficient procedural protections under the Due Process Clause, but it is not relevant to the state-action issue.

[9] The Court, for instance, attempts to distinguish *Evans* v. *Newton*, 382 U. S. 296. *Newton* concededly involved a function which is not exclusively sovereign—the operation of a park, but the Court claims that *Newton* actually rested on a determination that the city was still involved in the "daily maintenance and care of the park." *Ante*, at 159 n. 8. This stark attempt to rewrite the rationale of the *Newton* opinion is fully answered by MR. JUSTICE WHITE'S opinion in that case. MR. JUSTICE WHITE observed:

"It is . . . evident that the record does not show continued involvement of the city in the operation of the park—the record is silent on this point." 382 U. S., at 304.

[10] As the Court is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as "education, fire and police protection, and tax collection." *Ante*, at 163.

terial acts of "minor governmental functionaries" were sufficient to establish state action.[11] The suggestion that this was the basis for due process review in *Sniadach, Shevin,* and *North Georgia Finishing* marks a major and, in my judgment, unwise expansion of the state-action doctrine. The number of private actions in which a governmental functionary plays some ministerial role is legion; [12] to base due process review on the fortuity of such governmental intervention would demean the majestic purposes of the Due Process Clause.

Instead, cases such as *North Georgia Finishing* must be viewed as reflecting this Court's recognition of the significance of the State's role in defining *and controlling* the debtor-creditor relationship. The Court's language to this effect in the various debtor-creditor cases has been unequivocal. In *Fuentes* v. *Shevin* the Court stressed that the statutes in question "abdicate[d] effective state control over state power." 407 U. S., at 93. And it is clear that what was of concern in *Shevin* was the *private* use of state power to achieve a non-consensual resolution of a commercial dispute. The state statutes placed the state power to repossess property in the hands of an interested private party, just as the state statute in this case places the state power to conduct judicially binding sales in satisfaction of a lien in the hands of the warehouseman.

"Private parties, serving their own private advantage,

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[11] See, *e. g., Parks* v. *"Mr. Ford,"* 556 F. 2d 132, 148 (CA3 1977) (en banc) (Adams, J., concurring); *Gibbs* v. *Titelman,* 502 F. 2d 1107, 1113 n. 17 (CA3 1974), cert. denied *sub nom. Gibbs* v. *Garver,* 419 U. S. 1039; *Shirley* v. *State Nat. Bank of Connecticut,* 493 F. 2d 739, 743 n. 5 (CA2 1974).

[12] For instance, state officials often perform ministerial acts in the transferring of ownership in motor vehicles or real estate. See Burke & Reber, State Action, Congressional Power and Creditors' Rights: An Essay on The Fourth Amendment, 47 S. Cal. L. Rev. 1, 19–23 (1973). It is difficult to believe that the Court would hold that all car sales are invested with state action. See *Parks* v. *"Mr. Ford," supra,* at 141.

> may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters." *Ibid.*

This same point was made, equally emphatically, in *Mitchell* v. *W. T. Grant Co., supra,* at 614–616, and *North Georgia Finishing, supra,* at 607. Yet the very defect that made the statutes in *Shevin* and *North Georgia Finishing* unconstitutional—lack of state control—is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional *scrutiny* by removing even the mechanical supervision.

Not only has the State removed its nominal supervision in this case,[13] it has also authorized a private party to exercise a governmental power that is at least as significant as the power exercised in *Shevin* or *North Georgia Finishing.* In *Shevin,* the Florida statute allowed the debtor's property to be seized and held pending the outcome of the creditor's action for repossession. The property would not be finally disposed of until there was an adjudication of the underlying claim. Similarly, in *North Georgia Finishing,* the state statute provided for a garnishment procedure which deprived the debtor of the use of property in the garnishee's hands pending the outcome of litigation. The warehouseman's power under § 7–210 is far broader, as the Court of Appeals pointed out:

[13] Of course, the State does "supervise" the warehouseman's actions in the sense that it prescribes the procedures that warehousemen must follow to complete a legally binding sale.

"After giving the bailor specified notice, . . . the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally." 553 F. 2d 764, 771.

Whether termed "traditional," "exclusive," or "significant," the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny. This, at the very least, is the teaching of *Sniadach, Shevin,* and *North Georgia Finishing.*

It is important to emphasize that, contrary to the Court's apparent fears, this conclusion does not even remotely suggest that "all private deprivations of property [will] be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner." *Ante,* at 165. The focus is not on the private deprivation but on the state authorization. "[W]hat is always vital to remember is that it is the *state's* conduct, whether action or inaction, not the *private* conduct, that gives rise to constitutional attack." Friendly, The Dartmouth College Case and The Public-Private Penumbra, 12 Texas Quarterly, No. 2, p. 17 (1969) (Supp.) (emphasis in original). The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged.

My analysis in this case thus assumes that petitioner Flagg Brothers' proposed sale will conform to the procedure specified by the state legislature and that respondents' challenge therefore will be to the constitutionality of that process. It is only what the State itself has enacted that they may ask the federal court to review in a § 1983 case. If there should be a deviation from the state statute—such as a failure to give the

notice required by the state law—the defect could be remedied by a state court and there would be no occasion for § 1983 relief. This point has been well established ever since this Court's first explanations of the state-action doctrine in the *Civil Rights Cases,* 109 U. S. 3, 17:

> "[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." [14]

On the other hand, if there is compliance with the New York statute, the state legislative action which enabled the deprivation to take place must be subject to constitutional challenge in a federal court.[15] Under this approach, the federal courts do not have jurisdiction to review every foreclosure proceeding in which the debtor claims that there has been a procedural defect constituting a denial of due process of law. Rather, the federal district court's jurisdiction under

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[14] Furthermore, if the warehouseman has deviated from the statutory requirements, the statute would not provide him with the kind of support that would justify the conclusion that he acted "under color of law." With respect to this requirement of § 1983, while I agree with the majority that the concepts of "under color of law" and "state action" may be separately analyzed, see *Lucas* v. *Wisconsin Electric Co.,* 466 F. 2d 638, 654–655 (CA7 1972), normally as a practical matter they embody the same test of state involvement. See *United States* v. *Price,* 383 U. S. 787, 794 n. 7.

[15] Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a *state* court.

§ 1983 is limited to challenges to the constitutionality of the state procedure itself—challenges of the kind considered in *North Georgia Finishing* and *Shevin*.

Finally, it is obviously true that the overwhelming majority of disputes in our society are resolved in the private sphere. But it is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions.[16] The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its "exclusive" powers. As indicated, I believe that this limitation is neither logical nor practical. More troubling, this description of what is state action does not even attempt to reflect the concerns of the Due Process Clause, for the state-action doctrine is, after all, merely one aspect of this broad constitutional protection.

In the broadest sense, we expect government "to provide a reasonable and fair framework of rules which facilitate commercial transactions . . . ." *Mitchell* v. *W. T. Grant Co.*, 416 U. S., at 624 (POWELL, J., concurring). This "framework of rules" is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause.[17] The power to order legally bind-

[16] See, *e. g.*, Thompson, Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application To Self-Help Repossession, 1977 Wis. L. Rev. 1; Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 S. Ct. Rev. 221; Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961).

[17] Mr. Justice Harlan explained this principle as follows:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly

ing surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.

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process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." *Boddie* v. *Connecticut,* 401 U. S. 371, 375.

# SEARS, ROEBUCK & CO. *v.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 76–750. Argued November 7, 1977—Decided May 15, 1978

Upon determining that certain carpentry work in petitioner's department store was being done by men who had not been dispatched from its hiring hall, respondent Union established picket lines on petitioner's property. When the Union refused petitioner's demand to remove the pickets, petitioner filed suit in the California Superior Court and obtained a preliminary injunction against the continuing trespass, and the Court of Appeal affirmed. The California Supreme Court reversed, holding that because the picketing was both arguably protected by § 7 of the National Labor Relations Act and arguably prohibited by § 8, state jurisdiction was pre-empted under the guidelines of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236. *Held:*

1. The reasons why pre-emption of state jurisdiction is normally appropriate when union activity is arguably prohibited by federal law do not apply to this case, and therefore they are insufficient to preclude the State from exercising jurisdiction limited to the trespassory aspects of the Union's picketing. Pp. 190–198.

(a) The critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board, for it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the NLRB's unfair labor practice jurisdiction that the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. 190–197.

(b) Here the controversy that petitioner might have presented to the NLRB is not the same as the controversy presented to the state court. Had petitioner filed an unfair labor practice charge with the NLRB, the issue would have been whether the picketing had a recognitional or work-reassignment objective, whereas in the state court petitioner only challenged the location of the picketing. Accordingly, permitting the state court to adjudicate petitioner's trespass claim creates

no realistic risk of interference with the NLRB's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. P. 198.

2. Nor does the arguably protected character of the Union's picketing provide a sufficient justification for pre-emption of the state court's jurisdiction over petitioner's trespass claim. Pp. 199–207.

(a) The "primary jurisdiction" rationale of *Garmon,* requiring that when the same controversy may be presented to the state court or the NLRB, it must be presented to the NLRB, does not provide a *sufficient* justification for pre-empting state jurisdiction over arguably protected conduct when, as in this case, the party who could have presented the protection issue to the NLRB has not done so and the other party to the dispute has no acceptable means of doing so. Pp. 202–203.

(b) While it cannot be said with certainty that, if the Union had filed an unfair labor practice charge against petitioner, the NLRB would have fixed the locus of the accommodation of petitioner's property rights and the Union's § 7 rights at the unprotected end of the spectrum, it is "arguable" that the Union's peaceful picketing, though trespassory, was protected, but, nevertheless, permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct that the NLRB, and a court reviewing the NLRB's decision, would find protected. Pp. 203–207.

17 Cal. 3d 893, 553 P. 2d 603, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., *post,* p. 208, and POWELL, J., *post,* p. 212, filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post,* p. 214.

*H. Warren Siegel* argued the cause for petitioner. With him on the briefs were *Lawrence M. Cohen* and *Jeffrey S. Goldman.*

*Jerry J. Williams* argued the cause for respondent. With him on the brief were *J. Albert Woll* and *Laurence Gold.**

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**John W. Noble, Jr.,* filed a brief for the American Retail Federation as *amicus curiae* urging reversal.

*Solicitor General McCree, John S. Irving, Carl L. Taylor, Norton J. Come,* and *Linda Sher* filed a brief for the National Labor Relations Board as *amicus curiae* urging affirmance.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act, as amended,[1] deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law.

## I

On October 24, 1973, two business representatives of respondent Union visited the department store operated by petitioner (Sears) in Chula Vista, Cal., and determined that certain carpentry work was being performed by men who had not been dispatched from the Union hiring hall. Later that day, the Union agents met with the store manager and requested that Sears either arrange to have the work performed by a contractor who employed dispatched carpenters or agree in writing to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters. The Sears manager stated that he would consider the request, but he never accepted or rejected it.

Two days later the Union established picket lines on Sears' property. The store is located in the center of a large rectangular lot. The building is surrounded by walkways and a large parking area. A concrete wall at one end separates the lot from residential property; the other three sides adjoin public sidewalks which are adjacent to the public streets. The pickets patrolled either on the privately owned walkways next to the building or in the parking area a few feet away. They carried signs indicating that they were sanctioned by the "Carpenters Trade Union." The picketing was peaceful and orderly.

Sears' security manager demanded that the Union remove

[1] 49 Stat. 449, as amended, 29 U. S. C. §§ 151–169 (1970 ed. and Supp. V). Hereinafter, the National Labor Relations Act will be referred to as the Act or the NLRA.

the pickets from Sears' property. The Union refused, stating that the pickets would not leave unless forced to do so by legal action. On October 29, Sears filed a verified complaint in the Superior Court of California seeking an injunction against the continuing trespass; the court entered a temporary restraining order enjoining the Union from picketing on Sears' property. The Union promptly removed the pickets to the public sidewalks.[2] On November 21, 1973, after hearing argument on the question whether the Union's picketing on Sears' property was protected by state or federal law, the court entered a preliminary injunction.[3] The California Court of Appeal affirmed. While acknowledging the pre-emption guidelines set forth in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236,[4] the court held that the Union's continuing trespass fell within the longstanding exception for conduct which touched interests so deeply rooted in local feeling and responsibility that pre-emption could not be inferred in the absence of clear evidence of congressional intent.[5]

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[2] Although Sears claimed that some deliverymen and repairmen refused to cross the picket lines on the public sidewalks, the Union ultimately concluded that the picketing was then too far removed from the store to be effective. The picketing was discontinued on November 12.

[3] The Superior Court apparently rested its decision on two grounds: (1) that the injunction was not prohibited by state law, and (2) that the picketing was not protected by the First and Fourteenth Amendments of the Federal Constitution. Transcript of Preliminary Injunction Hearing, App. 32. Thus, the precise issue presently before the Court was not decided until the case reached the Court of Appeal.

[4] The court was referring to this statement in the *Garmon* opinion:

"When an activity is arguably subject to § 7, or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S., at 245.

[5] The court also reaffirmed the conclusion of the Superior Court that the injunction was not prohibited by either state law or the Federal Constitution.

In concluding that the state courts were "not preempted from exercising their general jurisdiction in matters of trespass related to labor disputes,"

The Supreme Court of California reversed. 17 Cal. 3d 893, 553 P. 2d 603. It concluded that the picketing was arguably protected by § 7 of the Act, 29 U. S. C. § 157, because it was intended to secure work for Union members and to publicize Sears' undercutting of the prevailing area standards for the employment of carpenters. The court reasoned that the trespassory character of the picketing did not disqualify it from arguable protection, but was merely a factor which the National Labor Relations Board would consider in determining whether or not it was in fact protected. The court also considered it "arguable" that the Union had engaged in recognitional picketing subject to § 8 (b)(7)(C) of the Act, 29 U. S. C. § 158 (b)(7)(C), which could not continue for more than 30 days without petitioning for a representation election. Because the picketing was both arguably protected by § 7 and arguably prohibited by § 8, the court held that state jurisdiction was pre-empted under the *Garmon* guidelines.

Since the Wagner Act was passed in 1935, this Court has not decided whether, or under what circumstances, a state court has power to enforce local trespass laws against a union's peaceful picketing.[6] The obvious importance of this problem led us to grant certiorari in this case. 430 U. S. 905.[7]

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App. to Pet. for Cert. A–10, the Court of Appeal noted that the right to peaceful possession of property was regarded as basic in California and that the assumption of state jurisdiction would not directly infringe on the jurisdiction of the National Labor Relations Board, since no attempt had been made to invoke that jurisdiction. In a subsequent amended opinion, the Court of Appeal also emphasized the fact that the trial court injunction was narrowly confined to the " 'location' of the controversy as opposed to the purpose of the acts . . . and did not deny the Union effective communication with all persons going to Sears." 125 Cal. Rptr. 245, 252 (1975).

[6] The issue was left open by the Court in *Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24–25. Cf. *Taggart* v. *Weinacker's, Inc.*, 283 Ala. 171, 214 So. 2d 913 (1968), cert. dismissed, 397 U. S. 223.

[7] The state courts have divided on the question of state-court jurisdic-

## II

We start from the premise that the Union's picketing on Sears' property after the request to leave was a continuing trespass in violation of state law.[8] We note, however, that the scope of the controversy in the state court was limited. Sears asserted no claim that the picketing itself violated any state or federal law. It sought simply to remove the pickets from its property to the public walkways, and the injunction issued by the state court was strictly confined to the relief sought. Thus, as a matter of state law, the location of the picketing was illegal but the picketing itself was unobjectionable.

As a matter of federal law, the legality of the picketing was unclear. Two separate theories would support an argument by Sears that the picketing was prohibited by § 8 of the NLRA, and a third theory would support an argument by the Union that the picketing was protected by § 7. Under each of these theories the Union's purpose would be of critical importance.

If an object of the picketing was to force Sears into assigning the carpentry work away from its employees to Union members

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tion over peaceful trespassory activity. For cases in addition to this one in which pre-emption was found, see, *e. g., Reece Shirley & Ron's, Inc.* v. *Retail Store Employees,* 222 Kan. 373, 565 P. 2d 585 (1977); *Freeman* v. *Retail Clerks,* 58 Wash. 2d 426, 363 P. 2d 803 (1961). For cases reaching a contrary conclusion, see, *e. g., May Department Stores Co.* v. *Teamsters,* 64 Ill. 2d 153, 355 N. E. 2d 7 (1976); *People* v. *Bush,* 39 N. Y. 2d 529, 349 N. E. 2d 832 (1976); *Hood* v. *Stafford,* 213 Tenn. 684, 378 S. W. 2d 766 (1964).

[8] The State Superior Court and the Court of Appeal concluded that the Union's activity violated state law. Because it concluded that the state courts lacked jurisdiction to entertain the state trespass claim, the California Supreme Court did not address the merits of the lower court rulings. The Union contends that those rulings were incorrect. Though we regard the state-law issue as foreclosed in this Court, there is of course nothing in our decision on the pre-emption issue which bars consideration of the Union's arguments by the California Supreme Court on remand.

dispatched from the hiring hall, the picketing may have been prohibited by § 8 (b)(4)(D).[9] Alternatively, if an object of the picketing was to coerce Sears into signing a prehire or members-only type agreement with the Union, the picketing was at least arguably subject to the prohibition on recognitional picketing contained in § 8 (b)(7)(C).[10] Hence, if Sears had filed an unfair labor practice charge against the Union, the Board's concern would have been limited to the question whether the Union's picketing had an objective proscribed by the Act; the location of the picketing would have been irrelevant.

On the other hand, the Union contends that the sole objective of its action was to secure compliance by Sears with

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[9] Section 8 (b)(4)(D) provides in part that it shall be an unfair labor practice for a labor organization or its agents—

"to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

. . . . . .

"forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." 29 U. S. C. § 158 (b)(4)(D).

There are two provisos to § 8 (b)(4) which exempt certain conduct from its prohibitions, but they appear to have no application in this case.

[10] Section 8 (b)(7)(C) provides in part that "[i]t shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees:

. . . . . .

"where such picketing has been conducted without a petition . . . [for a representation election] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . ." 29 U. S. C. § 158 (b)(7)(C).

area standards, and therefore the picketing was protected by § 7. *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195. Thus, if the Union had filed an unfair labor practice charge under § 8 (a)(1) when Sears made a demand that the pickets leave its property, it is at least arguable that the Board would have found Sears guilty of an unfair labor practice.

Our second premise, therefore, is that the picketing was both arguably prohibited and arguably protected by federal law. The case is not, however, one in which "it is clear or may fairly be assumed" that the subject matter which the state court sought to regulate—that is, the location of the picketing—is either prohibited or protected by the Federal Act.

## III

In *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, the Court made two statements which have come to be accepted as the general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of state regulation of activity touching upon labor-management relations. The first related to activity which is clearly protected or prohibited by the federal statute.[11] The second articulated a more sweeping prophylactic rule:

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations

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[11] As to conduct clearly protected or prohibited by the federal statute, the Court stated:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U. S., at 244.

> Board if the danger of state interference with national policy is to be averted." *Id.*, at 245.

While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.[12] As the Court noted last Term:

> "Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer* v. *Carpenters,* 430 U. S. 290, 302.

Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion.[13] This refusal demonstrates that

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[12] This sensitivity to the consequences of pre-emption is undoubtedly attributable, at least in part, to the way in which the labor pre-emption doctrine has evolved. The doctrine is to a great extent the result of this Court's ongoing effort to decipher the presumed intent of Congress in the face of that body's steadfast silence. Mr. Justice Frankfurter aptly described the difficulty of this never-completed task: "The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *Machinists* v. *Gonzales,* 356 U. S. 617, 619. And it is "because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, [that] the Court has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . .'" *Farmer* v. *Carpenters,* 430 U. S. 290, 295–296 (citation omitted).

[13] "We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . .

"the decision to pre-empt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting the state court to proceed. *Vaca* v. *Sipes,* 386 U. S. 171, 180.[14]

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[or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' . . . We also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.'" *Id.,* at 296–297.

The Court's rejection of an inflexible pre-emption approach is reflected in other situations as well. Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the *Garmon* rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co.* v. *Marine Engineers,* 382 U. S. 181. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," *San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 246, the court may properly do so and proceed to adjudicate the state cause of action. Permitting the state court to proceed under these circumstances deprives the litigant of the argument that the Board should reverse its position, or, perhaps, that precedent is not as compelling as one adversary contends.

[14] "In addition to the judicially developed exceptions referred to in [n. 13, *supra*], Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases. Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, 29 U. S. C. § 187, authorizes anyone injured in his business or property by activity violative of § 8 (b) (4) of the NLRA, 61 Stat. 140, as amended, 29 U. S. C. § 158 (b) (4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters* v. *Morton,* 377 U. S. 252 (1964). Section 301 of the LMRA, 29 U. S. C. § 185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith* v. *Evening News Assn.,* 371 U. S. 195 (1962). Section 14 (c) (2) of the NLRA, as added by Title VII, § 701 (a) of the

With this limitation in mind, we turn to the question whether pre-emption is justified in a case of this kind under either the arguably protected or the arguably prohibited branch of the *Garmon* doctrine. While the considerations underlying the two categories overlap, they differ in significant respects and therefore it is useful to review them separately. We therefore first consider whether the arguable illegality of the picketing as a matter of federal law should oust the state court of jurisdiction to enjoin its trespassory aspects. Thereafter, we consider whether the arguably protected character of the picketing should have that effect.

## IV

The enactment of the NLRA in 1935 marked a fundamental change in the Nation's labor policies. Congress expressly recognized that collective organization of segments of the labor force into bargaining units capable of exercising economic power comparable to that possessed by employers may produce benefits for the entire economy in the form of higher wages, job security, and improved working conditions. Congress decided that in the long run those benefits would outweigh the occasional costs of industrial strife associated with the organization of unions and the negotiation and enforcement of collective-bargaining agreements. The earlier notion that union activity was a species of "conspiracy" and that strikes and picketing were examples of unreasonable restraints of trade was replaced by an unequivocal national declaration of policy establishing the legitimacy of labor unionization and encouraging the practice of collective bargaining.[15]

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Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U. S. C. § 164 (c)(2), permits state agencies and state courts to assert jurisdiction over 'labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.'" *Farmer* v. *Carpenters, supra,* at 297 n. 8.

[15] For a brief summary of the development of this national policy, see R. Gorman, Labor Law 1–6 (1976).

The new federal statute protected the collective-bargaining activities of employees and their representatives and created a regulatory scheme to be administered by an independent agency which would develop experience and expertise in the labor relations area. The Court promptly decided that the federal agency's power to implement the policies of the new legislation was exclusive and the States were without power to enforce overlapping rules.[16] Accordingly, attempts to apply provisions of the "Little Wagner Acts" enacted by New York [17] and Wisconsin [18] were held to be pre-empted by the potential conflict with the federal regulatory scheme. Consistently with these holdings, the Court also decided that a State's employment relations board had no power to grant relief for violation of the federal statute.[19] The interest in uniform development of the new national labor policy required that matters which fell squarely within the regulatory jurisdiction of the federal Board be evaluated in the first instance by that agency.

The leading case holding that when an employer grievance against a union may be presented to the National Labor Rela-

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[16] "Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant.

. . . . .

"We therefore conclude that it is beyond the power of New York State to apply its policy to these appellants as attempted herein." *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U. S. 767, 775–777.

[17] See n. 16, *supra*.

[18] *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Bd.*, 336 U. S. 18, 24–26.

[19] *Plankinton Packing Co.* v. *Wisconsin Employment Relations Bd.*, 338 U. S. 953.

tions Board it is not subject to litigation in a state tribunal is *Garner* v. *Teamsters*, 346 U. S. 485. *Garner* involved peaceful organizational picketing which arguably violated § 8 (b) (2) of the federal Act.[20] A Pennsylvania equity court held that the picketing violated the Pennsylvania Labor Relations Act and therefore should be enjoined. The State Supreme Court reversed because the union conduct fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices.

This Court affirmed because Congress had "taken in hand this particular type of controversy . . . [i]n language almost identical to parts of the Pennsylvania statute," 346 U. S., at 488. Accordingly, the State, through its courts, was without power to "adjudge the same controversy and extend its own form of relief." *Id.*, at 489. This conclusion did not depend on any surmise as to "how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body." *Ibid.* The precise conduct in controversy was arguably prohibited by federal law and therefore state jurisdiction was pre-empted. The reason for pre-emption was clearly articulated:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same

[20] The apparent objective of the picketing was to pressure an employer into coercing employees into joining the union.

> reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261." *Id.*, at 490–491 (footnote omitted). "The conflict lies in remedies . . . . [W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent." *Id.*, at 498–499.

This reasoning has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer.[21] It may also apply to certain laws of general applicability which are occasionally invoked in connection with a labor dispute.[22] Thus, a State's antitrust law may not be invoked to enjoin collective activity which is also arguably prohibited by the federal Act. *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.[23] In each case, the pertinent inquiry is whether

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[21] This Court has summarily reversed several cases in which the state court purported to regulate labor union activities under provisions of state labor laws comparable to the prohibitions of the federal Act. See, *e. g.*, *Pocatello Building & Constr. Trades Council* v. *C. H. Elle Constr. Co.*, 352 U. S. 884, rev'g 78 Idaho 1, 297 P. 2d 519 (1956); *Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U. S. 969, rev'g 201 Tenn. 329, 299 S. W. 2d 8 (1957).

[22] As the Court noted recently in *Farmer* v. *Carpenters:* "[I]t is well settled that the general applicability of a state cause of action is not *sufficient* to exempt it from pre-emption. '[I]t [has not] mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.' . . . Instead, the cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." 430 U. S., at 300 (emphasis added).

[23] As Professor Cox has noted:

"[A]n antitrust statute is not the kind of general law [which should avoid the reach of the pre-emption doctrine]. Such statutes are based

the two potentially conflicting statutes were "brought to bear on precisely the same conduct." *Id.*, at 479.[24]

On the other hand, the Court has allowed a State to enforce

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upon a view of policy towards combinations and collective action in the market place which is the very subject addressed by Congress in the NLRA. That the state laws primarily apply to business combinations and merely sweep collective action by employees within the same rule does not sufficiently lessen the narrowness of focus." Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1357 (1972).

[24] "Respondent argues that Missouri is not prohibiting the IAM's conduct for any reason having to do with labor relations but rather because that conduct is in contravention of a state law which deals generally with restraint of trade. It distinguishes *Garner* on the ground that there the State and Congress were both attempting to regulate labor relations as such.

"We do not think this distinction is decisive. In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct." 348 U. S., at 479.

*Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, reaffirmed the notion that state regulation of activity arguably prohibited by the federal Act cannot avoid pre-emption simply because it is pursuant to a law of general application. In *Lockridge*, a union member who failed to pay his monthly dues was suspended from membership in the union and discharged from employment at union request. The union's conduct in securing Lockridge's discharge was arguably prohibited by §§ 8 (b) (1) (A) and 8 (b) (2) or protected by § 7. But rather than filing an unfair labor practice charge with the Labor Board, Lockridge brought suit in state court on a breach-of-contract theory. He alleged that the union breached a promise implicit in the union constitution that it would not secure his discharge pursuant to the union security clause in the collective-bargaining agreement for missing one month's dues.

The Court noted that both the state court and the Board would "inquire into the proper construction of union regulations in order to ascertain whether the union properly found [Lockridge] to have been derelict in his dues-paying responsibilities, where his discharge was procured on the asserted grounds of nonmembership in the union." 403 U. S., at 293. The Court further noted that the "possibility that, in defining the scope of the union's duty to [Lockridge], the state courts would directly and

certain laws of general applicability even though aspects of the challenged conduct were arguably prohibited by § 8 of the NLRA. Thus, for example, the Court has upheld state-court jurisdiction over conduct that touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 244. See *Construction Workers* v. *Laburnum Constr. Corp.,* 347 U. S. 656 (threats of violence); *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (violence); *Automobile Workers* v. *Russell,* 356 U. S. 634 (violence); *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (libel); *Farmer* v. *Carpenters,* 430 U. S. 290 (intentional infliction of mental distress).

In *Farmer,* the Court held that a union member, who alleged that his union had engaged in a campaign of personal abuse and harassment against him, could maintain an action for damages against the union and its officers for the intentional infliction of emotional distress. One aspect of the alleged campaign was discrimination by the union in hiring hall refer-

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consciously implicate principles of federal law . . . was real and immediate. . . . Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which . . . federal concern is pervasive and its regulation complex." *Id.,* at 296. Pre-emption was required in the Court's view because the state court was exercising jurisdiction over a controversy which was virtually identical to that which could have been presented to the Board. Permitting the state court to exercise jurisdiction pursuant to a law of general application in these circumstances would have entailed a "'real and immediate' potential for conflict with the federal scheme. . . ." *Farmer* v. *Carpenters,* 430 U. S., at 301 n. 10.

An identical result would undoubtedly obtain were an employer subjected to recognitional or secondary picketing to seek injunctive relief in state court on the theory that the union was tortiously interfering with his freedom to contract. Cf. *Retail Clerks* v. *J. J. Newberry Co.,* 352 U. S. 987, summarily rev'g 78 Idaho 85, 298 P. 2d 375 (1956).

rals. Although such discrimination was arguably prohibited by §§ 8 (b)(1)(A) and 8 (b)(2) of the NLRA and therefore an unfair labor practice charge could have been filed with the Board, the Court permitted the state action to proceed.

The Court identified those factors which warranted a departure from the general pre-emption guidelines in the "local interest" cases. Two are relevant to the arguably *prohibited* branch of the *Garmon* doctrine.[25] First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, although the challenged conduct occurred in the course of a labor dispute and an unfair labor practice charge could have been filed, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies

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[25] One of the factors identified by the Court was that the conduct giving rise to the state cause of action (*e. g.*, violence, libel, or intentional infliction of emotional distress), if proved, would not be protected by § 7 of the NLRA, and therefore there existed no risk that state regulation of the conduct *alleged in the complaint* would result in prohibition of conduct protected by the federal Act. To this extent, the instant case is not controlled by the decision in *Farmer*. Sears' state cause of action was for trespass, and some trespassory union activity may be protected under the federal Act. See Part V, *infra*. However, two points must be made regarding the apparent distinction between *Farmer* and the case at bar. First, *Farmer* itself involved some risk that protected conduct would be regulated; for, while the complaint *alleged* outrageous conduct, there remained a possibility that the plaintiff would only have been able to *prove* a robust intra-union dispute and that the state tribunal would have found that sufficient to support recovery. Second, the distinction between this case and *Farmer*, to the extent that it exists, has significance only with respect to the arguably *protected* branch of the *Garmon* doctrine, which we discuss in Part V; it does not detract from the support *Farmer* provides for our conclusion with respect to pre-emption under the arguably *prohibited* branch of the doctrine.

presented to the state and federal forums would not have been the same.[26]

The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.[27]

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[26] As the Court explained:

"If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay union dues. . . . Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the 'merits' of the underlying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. . . . The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.

"On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." 430 U. S., at 304–305.

[27] While the distinction between a law of general applicability and a law expressly governing labor relations is, as we have noted, not disposi-

In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred.[28] Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices.

The reasons why pre-emption of state jurisdiction is normally appropriate when union activity is arguably prohibited by federal law plainly do not apply to this situation; they therefore are insufficient to preclude a State from exercising jurisdiction limited to the trespassory aspects of that activity.

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tive for pre-emption purposes, it is of course apparent that the latter is more likely to involve the accommodation which Congress reserved to the Board. It is also evident that enforcement of a law of general applicability is less likely to generate rules or remedies which conflict with federal labor policy than the invocation of a special remedy under a state labor relations law.

[28] Moreover, decision of that issue would not necessarily have determined whether the picketing could continue. For the Board could conclude that the *picketing* was not prohibited by either § 8 (b) (4) (D) or § 8 (b) (7) (C) without reaching the question whether it was protected by § 7. If the Board had concluded that the picketing was not prohibited, Sears would still have been confronted with picketing which violated state law and was arguably protected by federal law. Thus, the filing of an unfair labor practice charge could initiate complex litigation which would not necessarily lead to a resolution of the problem which led to this litigation.

## V

The question whether the arguably protected character of the Union's trespassory picketing provides a sufficient justification for pre-emption of the state court's jurisdiction over Sears' trespass claim involves somewhat different considerations.

Apart from notions of "primary jurisdiction," [29] there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct prohibited by the federal Act. But there is a constitutional objection to state-court interference with conduct actually protected by the Act.[30]

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[29] In this opinion, the term "primary jurisdiction" is used to refer to the various considerations articulated in *Garmon* and its progeny that militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board. This use of the term should not be confused with the doctrine of primary jurisdiction, which has been described by Professor Davis as follows:

"The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.

"The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." 3 K. Davis, Administrative Law Treatise § 19.01, p. 3 (1958) (emphasis in original).

While the considerations underlying *Garmon* are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the *Garmon* doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act.

[30] Although it is clear that a state court may not exercise jurisdiction over protected conduct, it is important to note that the word "protected" may refer to two quite different concepts: union conduct which the State may not prohibit and against which the employer may not retaliate because it is covered by § 7 or conduct which a State may not prohibit even

Considerations of federal supremacy, therefore, are implicated to a greater extent when labor-related activity is protected than when it is prohibited. Nevertheless, several considerations persuade us that the mere fact that the Union's trespass was *arguably* protected is insufficient to deprive the state court of jurisdiction in this case.

The first is the relative unimportance in this context of the "primary jurisdiction" rationale articulated in *Garmon*. In theory, of course, that rationale supports pre-emption regardless of which section of the NLRA is critical to resolving a controversy which may be subject to the regulatory jurisdiction of the NLRB. Indeed, at first blush, the primary-jurisdiction rationale provides stronger support for pre-emption in this case when the analysis is focused upon the arguably protected, rather than the arguably prohibited, character of the Union's conduct. For to the extent that the Union's picketing was arguably protected, there existed a potential overlap between the controversy presented to the state court

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though it is not covered by § 7 of the Act. The Court considered protected conduct in the latter sense in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132. There, the Court relied on a line of pre-emption analysis "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971)." *Id.*, at 140.

The Union does not claim that trespassory picketing is protected from state interference under this doctrine. We merely identify this line of pre-emption analysis in order to make it perfectly clear that it is unaffected by our consideration of the significance of the status of the picketing as arguably protected under § 7 of the Act. We also note, however, that in the cases in which pre-emption exists even though neither § 7 nor § 8 of the Act is even arguably applicable, there is, by hypothesis, no opportunity for the National Labor Relations Board to make the initial evaluation of the controversy. In these cases, the pre-emption issue is necessarily addressed in the first instance by a state tribunal, and that tribunal must decide whether or not the conduct is actually privileged from governmental regulation.

and that which the Union might have brought before the NLRB.[31] Prior to granting any relief from the Union's continuing trespass, the state court was obligated to decide that the trespass was not actually protected by federal law, a determination which might entail an accommodation of Sears' property rights and the Union's § 7 rights. In an unfair labor practice proceeding initiated by the Union, the Board might have been required to make the same accommodation.[32]

Although it was theoretically possible for the accommodation issue to be decided either by the state court or by the Labor Board, there was in fact no risk of overlapping jurisdiction in this case. The primary-jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. Such a Board determination could have been obtained only if the Union had filed an unfair labor practice charge alleging that Sears had interfered with the Union's § 7 right to engage in peaceful picketing on Sears' property. By demanding that the Union remove its pickets from the store's property, Sears in fact pursued a course of action which gave the Union

[31] As noted in Part IV, *supra*, the primary-jurisdiction rationale of *Garmon* did not require pre-emption of state jurisdiction over the Union's picketing insofar as it may have been prohibited by § 8, since the controversy presented to the state court was not the same controversy which Sears could have presented to the Board. In deciding the state-law issue, the Court had no occasion to interpret or enforce the prohibitions in § 8 of the federal Act; in deciding the unfair labor practice question, the Board's sole concern would have been the objective, not the location, of the challenged picketing.

[32] That accommodation would have been required only if the Board first found that the object of the picketing was to maintain area standards. Of course, if Sears had initiated the proceeding before the Board, the location of the picketing would have been entirely irrelevant and no question of accommodation would have arisen. See n. 31, *supra*.

the opportunity to file such a charge. But the Union's response to Sears' demand foreclosed the possibility of having the accommodation of § 7 and property rights made by the Labor Board; instead of filing a charge with the Board, the Union advised Sears that the pickets would only depart under compulsion of legal process.

In the face of the Union's intransigence, Sears had only three options: permit the pickets to remain on its property; forcefully evict the pickets; or seek the protection of the State's trespass laws. Since the Union's conduct violated state law, Sears legitimately rejected the first option. Since the second option involved a risk of violence, Sears surely had the right—perhaps even the duty—to reject it. Only by proceeding in state court, therefore, could Sears obtain an orderly resolution of the question whether the Union had a federal right to remain on its property.

The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board.[33] We are therefore persuaded that the primary-jurisdiction rationale does not provide a *sufficient* justification for pre-empting state jurisdiction over arguably protected conduct when the party who

[33] Even if Sears had elected the self-help option, it could not have been assured that the Union would have invoked the jurisdiction of the Board. The Union may well have decided that the likelihood of success was remote and outweighed by the cost of the effort and the probability that Sears in turn would have charged the Union with violating § 8 (b) (4) (D) or § 8 (b) (7) (C) of the Act. Moreover, if Sears had elected this option, and the pickets were evicted with more force than reasonably necessary, it might have exposed itself to tort liability under state law. We are unwilling to presume that Congress intended to require employers to pursue such a risky course in order to ensure that issues involving the scope of § 7 rights be decided only by the Labor Board.

could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so.[34]

This conclusion does not, however, necessarily foreclose the possibility that pre-emption may be appropriate. The danger of state interference with federally protected conduct is the principal concern of the second branch of the *Garmon* doctrine. To allow the exercise of state jurisdiction in certain contexts might create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct. In those circumstances, it might be reasonable to infer that Congress preferred the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction. Thus, the acceptability of "arguable protection" as a justification for pre-emption in a given class of cases is, at least in part, a function of the strength of the argument that § 7 does in fact protect the disputed conduct.

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[34] "If the National Labor Relations Act provided an effective mechanism whereby an employer could obtain a determination from the National Labor Relations Board as to whether picketing is protected or unprotected, I would agree that the fact that picketing is 'arguably' protected should require state courts to refrain from interfering in deference to the expertise and national uniformity of treatment offered by the NLRB. But an employer faced with 'arguably protected' picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB. The employer may not himself seek a determination from the Board and is left with the unsatisfactory remedy of using 'self-help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice.

"So long as employers are effectively denied determinations by the NLRB as to whether 'arguably protected' picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), should be reconsidered." *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201–202 (WHITE, J., concurring).

The Court has held that state jurisdiction to enforce its laws prohibiting violence,[35] defamation,[36] the intentional infliction of emotional distress,[37] or obstruction of access to property [38] is not pre-empted by the NLRA. But none of those violations of state law involves protected conduct. In contrast, some violations of state trespass laws may be actually protected by § 7 of the federal Act.

In *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, for example, the Court recognized that in certain circumstances nonemployee union organizers may have a limited right of access to an employer's premises for the purpose of engaging in organization solicitation.[39] And the Court has indicated that *Babcock* extends to § 7 rights other than organizational activity, though the "locus" of the "accommodation of § 7 rights and private property rights . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Hudgens* v. *NLRB*, 424 U. S. 507, 522.

For purpose of analysis we must assume that the Union could have proved that its picketing was, at least in the absence of a trespass, protected by § 7. The remaining question is whether under *Babcock* the trespassory nature of the

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[35] *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131; *Construction Workers* v. *Laburnum*, 347 U. S. 656.

[36] *Linn* v. *Plant Guard Workers*, 383 U. S. 53.

[37] *Farmer* v. *Carpenters*, 430 U. S. 290.

[38] *Automobile Workers* v. *Russell*, 356 U. S. 634.

[39] As the Court stated:

"The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U. S., at 112.

See also *Central Hardware Co.* v. *NLRB*, 407 U. S. 539.

picketing caused it to forfeit its protected status. Since it cannot be said with certainty that, if the Union had filed an unfair labor practice charge against Sears, the Board would have fixed the locus of the accommodation at the unprotected end of the spectrum, it is indeed "arguable" that the Union's peaceful picketing, though trespassory, was protected. Nevertheless, permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected. For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.

Experience with trespassory organizational solicitation by nonemployees is instructive in this regard. While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.[40] That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.[41]

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[40] As the Court noted in *Babcock & Wilcox:*

"It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U. S., at 112.

[41] In the absence of discrimination, the union's asserted right of access for organizational activity has generally been denied except in cases involv-

Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation,[42] it would be unprotected in most instances. While there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum. Whatever risk of an erroneous state-court adjudication does exist is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the

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ing unique obstacles to nontrespassory methods of communication with the employees. See, *e. g., NLRB* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26 (CA2 1967); *NLRB* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (CA6 1948).

[42] This assumption, however, is subject to serious question. Indeed, several factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation. First, the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right. *Hod Carriers Local 41 (Calumet Contractors Assn.)*, 133 N. L. R. B. 512 (1961). Second, *Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property. The Court indicated that "no . . . obligation is owed nonemployee organizers"; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively. Area-standards picketing, on the other hand, has no such vital link to the employees located on the employer's property. While such picketing may have a beneficial effect on the compensation of those employees, the rationale for protecting area-standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.

protection issue in those cases in which the disputed conduct is least likely to be protected by § 7.

If there is a strong argument that the trespass is protected in a particular case, a union can be expected to respond to an employer demand to depart by filing an unfair labor practice charge; the protection question would then be decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers in the context of a labor dispute. But if the argument for protection is so weak that it has virtually no chance of prevailing, a trespassing union would be well advised to avoid the jurisdiction of the Board and to argue that the protected character of its conduct deprives the state court of jurisdiction.

As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal. In this case the Union failed to invoke the jurisdiction of the Labor Board,[43] and Sears had no right to invoke that jurisdiction and could not even precipitate its exercise without resort to self-help. Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.[44]

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[43] Not only could the Union have filed an unfair labor practice charge pursuant to § 8 (a) (1) of the Act at the time Sears demanded that the pickets leave its property, but the Board's jurisdiction could have been invoked and the protection of its remedial powers obtained even after the litigation in the state court had commenced or the state injunction issued. See *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501; *NLRB* v. *Nash-Finch Co.,* 404 U. S. 138.

[44] The fact that Sears demanded that the Union discontinue the trespass before it initiated the trespass action is critical to our holding. While it appears that such a demand was a precondition to commencing a trespass action under California law, see 122 Cal. Rptr. 449 (1975), in order to

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

*It is so ordered.*

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add three observations:

1. The problem of a no-man's land in regard to trespassory picketing has been a troubling one in the past because employers have been unable to secure a Labor Board adjudication whether the picketing was "actually protected" under § 7 of the National Labor Relations Act except by resorting to self-help to expel the pickets and thereby inducing the union to file an unfair labor practice charge. The unacceptable possibility of precipitating violence in such a situation called into serious question the practicability there of the *Garmon* preemption test, see *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 202 (1970) (WHITE, J., concurring), despite the virtues of the *Garmon* test in ensuring uniform application of the standards of the NLRA.

In this case, however, the NLRB as *amicus curiae* has taken a position that narrows the no-man's land in regard to trespassory picketing, namely, that an employer's mere act of informing nonemployee pickets that they are not permitted

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avoid a valid claim of pre-emption it would have been required as a matter of federal law in any event.

The Board has taken the position that "a resort to court action . . . does not violate § 8 (a) (1)." *NLRB* v. *Nash-Finch Co., supra,* at 142. If the employer were not required to demand discontinuation of the trespass before proceeding in state court and the Board did not alter its position in cases of this kind, the union would be deprived of an opportunity to present the protection issue to the agency created by Congress to decide such questions. While the union's failure to invoke the Board's jurisdiction should not be a sufficient basis for pre-empting state jurisdiction, the employer should not be permitted to deprive the union of an opportunity to do so.

on his property "would constitute a sufficient interference with rights arguably protected by Section 7 to warrant the General Counsel, had a charge been filed by the Union, in issuing a Section 8 (a)(1) complaint" against the employer. Brief for NLRB as *Amicus Curiae* 18. Hence, if the union, once asked to leave the property, files a § 8 (a)(1) charge, there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence.

In this case, as the Court notes, the Union failed to file an unfair labor practice charge after being asked to leave. In such a situation pre-emption cannot sensibly obtain because the "risk of an erroneous state-court adjudication . . . is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue." *Ante,* at 206–207. It should be made clear, however, that the logical corollary of the Court's reasoning is that if the union *does* file a charge upon being asked by the employer to leave the employer's property and continues to process the charge expeditiously, state-court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board, applying the standards of *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105 (1956), rules against the union and holds the picketing to be unprotected. Similarly, if a union timely files a § 8 (a)(1) charge, a state court would be bound to stay any pending injunctive or damages suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7. As the Court also notes, *ante,* at 202, the primary-jurisdiction rationale articulated in *Garmon* "unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." Once the no-man's land has been bridged, as it is once a union files a charge, the importance of

deferring to the Labor Board's case-by-case accommodation of employers' property rights and employees' § 7 rights mandates pre-emption of state-court jurisdiction.*

2. The opinion correctly observes, *ante,* at 205, that in implementing this Court's decision in *Babcock* the NLRB only occasionally has found trespassory picketing to be protected under § 7. That observation is important, as is noted,

*MR. JUSTICE POWELL's concern, *post,* at 213, that there is an unacceptable delay in waiting for the General Counsel to act is answered in main part by this Court's previous holdings that any obstructive picketing or threatening conduct may be directly regulated by the State. See *Electrical Workers* v. *Wisconsin Employment Relations Bd.,* 315 U. S. 740 (1942); *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (1957); cf. *Automobile Workers* v. *Russell,* 356 U. S. 634 (1958). There was no hint of such a problem in this case. As the California Supreme Court notes: "It is not disputed that at all times . . . the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic." 17 Cal. 3d 893, 896, 553 P. 2d 603, 606 (1976). There is no claim made that the pickets annoyed members of the public who wished to patronize the store of petitioner Sears; such conduct would be enjoinable, *Youngdahl, supra,* if it had occurred. And, of course, under current NLRB law, pickets would have no right to carry on their activity within a store. *Marshall Field & Co.* v. *NLRB,* 200 F. 2d 375 (CA7 1953). With respect, I do not see what "danger of violence" remains in such a situation, any more than for a business that fronts upon a public sidewalk.

The possibility of delay to which my Brother POWELL adverts is a double-edged sword. The question really is upon whom the burden of delay should be placed. If it takes the General Counsel "weeks" to decide whether to issue a § 8 (a) (1) complaint, by the same token there would be no relief available against an erroneous state-court injunction interfering with protected picketing for an equal length of time. Section 10 (j) permits the Board to seek injunctive relief only after the issuance of a complaint. The Board arguably might seek dissolution of a state-court order under *NLRB* v. *Nash-Finch Co.,* 404 U. S. 138 (1971), but that remedy, too, would encompass some delay. It is worth noting that here by November 12, 1973, the picketing, confined to the public sidewalks by the California Superior Court's temporary restraining order, was abandoned as ineffective. Delay in remedy is desired by neither party in a labor dispute.

*ante,* at 203, in that even the existence of a no-man's land may not justify departure from *Garmon*'s pre-emption standard if the exercise of state-court jurisdiction portends frequent interference with actually protected conduct. But in its conclusion that trespassory picketing has been found in "experience under the Act" to be only "rare[ly]" protected and "far more likely to be unprotected than protected," *ante,* at 205, I take the opinion merely to be observing what the Board's past experience has been, not as glossing how the Board must treat the *Babcock* test in the future, either in regard to organizational picketing or other sorts of protected picketing. The *Babcock* test provides that "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property [is] required to yield to the extent needed to permit communication of information on the right to organize." 351 U. S., at 112. A variant of that test has been applied by the Board when communication with consumers is at stake. See *Scott Hudgens,* 230 N. L. R. B. 414 (1977). The problem of applying the test in the first instance is delegated to the Board, as part of its "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *Weingarten, Inc.,* 420 U. S. 251, 266 (1975); *Hudgens* v. *NLRB,* 424 U. S. 507, 523 (1976). When, for a number of years, the First Amendment holding of *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), overruled in *Hudgens* v. *NLRB,* diverted the Board from any need to consider trespassory picketing under the statutory test of *Babcock,* it would be unwise to hold the Board confined to its earliest experience in administering the test.

3. The acceptability of permitting state-court jurisdiction over "arguably protected" activities where there is a jurisdictional no-man's land depends, as the Court notes, on whether the exercise of state-court jurisdiction is likely to interfere frequently with actually protected conduct. The

likelihood of such interference will depend in large part on whether the state courts take care to provide an adversary hearing *before* issuing any restraint against union picketing activities. In this case, Sears filed a verified complaint seeking an injunction against the picketing on October 29, 1973. The Superior Court of California entered a temporary restraining order that day. So far as the record reveals, the Union was not accorded a hearing until November 16, on the order to show cause why a preliminary injunction should not be entered. The issue of a prompt hearing was apparently not raised before the Superior Court and was not raised on appeal, and hence does not enter into our judgment here approving the exercise of state-court jurisdiction. But it may be remiss not to observe that in labor-management relations, where *ex parte* proceedings historically were abused, see F. Frankfurter & N. Greene, The Labor Injunction 60, 64–66 (1930), it is critical that the state courts provide a prompt adversary hearing, preferably before any restraint issues and in all events within a few days thereafter, on the merits of the § 7 protection question. Labor disputes are frequently short lived, and a temporary restraining order issued upon *ex parte* application may, if in error, render the eventual finding of § 7 protection a hollow vindication.

MR. JUSTICE POWELL, concurring.

Although I join the Court's opinion, MR. JUSTICE BLACKMUN's concurrence prompts me to add a word as to the "no-man's land" discussion with respect to trespassory picketing. MR. JUSTICE BLACKMUN, relying on the *amicus* brief of the National Labor Relations Board, observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence," *ante*, at 209, if the union—having been requested to leave the property—files a § 8 (a)(1) charge.

With all respect, this optimistic view overlooks the realities of the situation. Trespass upon private property by pickets,

to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive—without initial violence—of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is inherent in many—though certainly not all—situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree. It is because of these factors that, absent the availability of an equivalent remedy under the National Labor Relations Act, a state court should have the authority to protect the public and private interests by granting preliminary relief.

In the context of trespassory picketing not otherwise violative of the Act, the Board has no comparable authority. If a § 8 (a)(1) charge is filed, nothing is likely to happen "in a timely fashion." The Board cannot issue, or obtain from the federal courts, a restraining order directed at the picketing. And it may take weeks for the General Counsel to decide whether to issue a complaint. Meanwhile, the "no-man's land" prevents all recourse to the courts, and is an open invitation to self-help. I am unwilling to believe that Congress intended, by its silence in the Act, to create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation.*

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*It is true that under this Court's decisions, state courts are not precluded from providing relief against actual or threatened violence. But in light of the "danger of violence" inherent in many instances of sustained trespassory picketing, relief often may come too late to prevent interference with the operation of the target business. Cf. *People* v. *Bush,* 39 N. Y. 2d 529, 349 N. E. 2d 832 (1976). Moreover, as Mr. Justice Clark noted for the Court in *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 64 n. 6 (1966), "[t]he fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands." The "imminent threat of violence [that] exists whenever an employer is required to resort to self-help in order to vindicate his property rights," has prompted at least one state court to retain jurisdiction to enjoin trespassory picket-

I do not minimize the possibility that the Board may find that trespassory activity under certain circumstances is necessary to facilitate the exercise of § 7 rights by employees of the target employer. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972). The Union's conduct in this case, however, involved a publicity campaign maintained by nonemployees and directed at the general public. Such "area standards" trespassory picketing is certainly not at the core of the Act's protective ambit. In any event, it is open to the Board upon the issuance of a complaint to seek temporary relief under § 10 (j) of the Act, 29 U. S. C. § 160 (j), against the employer's interference with § 7 rights. Cf. *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501 (1954). Moreover, it is not an unreasonable assumption that state courts will be mindful of the determination of an expert federal agency that there is probable cause to believe that conduct restrained by state process is protected under the Act. But I find no warrant in the Act to compel the employer to endure the creation, especially by nonemployees, of a temporary easement on his property pending the outcome of the General Counsel's action on a charge.

In sum, I do not agree with MR. JUSTICE BLACKMUN that "the logical corollary of the Court's reasoning" in its opinion today is that state-court jurisdiction is pre-empted forthwith upon the filing of a charge by the union. I would not join the Court's opinion if I thought it fairly could be read to that effect.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

The Court concedes that both the objective and the location of the Union's peaceful, nonobstructive picketing of

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ing even after the filing of an unfair labor practice charge with the Board. *May Department Stores Co.* v. *Teamsters*, 64 Ill. 2d 153, 162–163, 355 N. E. 2d 7, 10–11 (1976).

Sears' store may have been protected under the National Labor Relations Act.[1] Therefore, despite the Court's transparent effort to disguise it, faithful application of the principles of labor law pre-emption established in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959),[2] would compel the conclusion that the California Superior Court was powerless to enjoin the Union from picketing on Sears' property: that the trespass was arguably protected is determinative of the state court's lack of jurisdiction, whether or not pre-emption limits an employer's remedies. See *Longshoremen* v. *Ariadne Shipping Co.,* 397 U. S. 195, 200–201 (1970); *Garmon, supra; Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U. S. 20 (1957); *Guss* v. *Utah Labor Relations Bd.,* 353 U. S. 1 (1957).[3]

By holding that the arguably protected character of union activity will no longer be sufficient to pre-empt state-court jurisdiction, the Court creates an exception of indeterminate dimensions to a principle of labor law pre-emption that has been followed for at least two decades. Now, when the em-

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[1] See *infra,* at 225–226.

[2] *Garmon* announced the following test of labor law pre-emption:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [Act] or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . . [And] [w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S., at 244–245.

This rule, which was implicit in earlier decisions, has been repeatedly reaffirmed. See, *e. g., Farmer* v. *Carpenters,* 430 U. S. 290 (1977); *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, 138–139 (1976); *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 (1971).

[3] Although the Court also misapplies the "arguably prohibited" prong of the *Garmon* test, see n. 12, *infra,* I concentrate on its modification of the "arguably *protected*" prong because this aspect of the decision has far greater significance.

ployer lacks a "reasonable opportunity" to have the Board consider whether the challenged *aspect* of the employee conduct is protected and when employees having that opportunity have not invoked the Board's jurisdiction, a state court will have jurisdiction to enjoin arguably protected activity if the "risk of an erroneous . . . adjudication [by it does not outweigh] the anomalous consequence [of denying a remedy to the employer]." *Ante,* at 206. In making this rather amorphous determination, the lower courts apparently are to consider the strength of the argument that § 7 in fact protects the arguably protected activity, their own assessments of their ability correctly to determine the underlying labor law issue, and the strength of the state interest in affording the employer an opportunity to have a state court restrain the arguably protected conduct.

This drastic abridgment of established principles is unjustified and unjustifiable. The *Garmon* test, itself fashioned after some 15 years of judicial experience with jurisdictional conflicts that threatened national labor policy, see *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 290–291 (1971), has provided stability and predictability to a particularly complex area of the law for nearly 20 years. Thus, the most elementary notions of *stare decisis* dictate that the test be reconsidered only upon a compelling showing, based on actual experience, that the test disserves important interests. Emphatically, that showing has not been and cannot be made. Rather, the *Garmon* test has proved to embody an entirely acceptable, and probably the best possible, accommodation of the competing state-federal interests. That an employer's remedies in consequence may be limited, while anomalous to the Court, produces no positive social harm; on the contrary, the limitation on employer remedies is fully justified both by the ease of application of the test by thousands of state and federal judges and by its effect of averting the danger that state courts may interfere with national labor policy. In

sharp contrast, today's decision creates the certain prospect of state-court interference that may seriously erode § 7's protections of labor activities. Indeed, the most serious objection to the decision today is not that it is contrary to the teachings of *stare decisis* but rather that the Court's attempt to create a narrow exception to the principles of *Garmon* promises to be applied by the lower courts so as to disserve the interests protected by the national labor laws.

## I

It is appropriate to recall the considerations that have shaped the development of the doctrine of labor law preemption. The National Labor Relations Act (Act), of course, changed the substantive law of labor relations. Prior to its enactment many courts treated concerted labor activities of employees as tortious conspiracies or restraints of trade to be enjoined unless the activities related to a specific benefit sought by the employees from their employer; activity directed at strengthening the union was, for these courts, impermissible. See F. Frankfurter & N. Greene, The Labor Injunction 26–29 (1930) (hereafter Frankfurter & Greene). While some courts regarded peaceful picketing as permissible if intended to attain lawful objectives, others regarded picketing as always enjoinable. *Id.*, at 30–46. Section 7 abrogated these state laws. It declares that "concerted activities for the purpose of collective bargaining or other mutual aid or protection," including specific types and forms of picketing, are protected from interference from any source. Section 7 further provides that employers no longer have an absolute right to prohibit concerted activities occurring on their properties; unwilling employers frequently are required to suffer the presence of organizational activities on their premises. See *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945).

But the Act did more than displace certain state laws. Section 8 (a) of the Act declares that it is an unfair labor practice for an employer to interfere with employee exercise of § 7 rights, and § 8 (b) of the Act provides that certain forms of employee activity, including several types of picketing, are unfair labor practices. Congress created the National Labor Relations Board to administer these provisions and prescribed a detailed procedure for the imposition of restraint on any conduct that is violative of the Act: charge and complaint, notice and hearing, and an order pending judicial review.

The animating force behind the doctrine of labor law preemption has been the recognition that nothing could more fully serve to defeat the purposes of the Act than to permit state and federal courts, without any limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board. See *Motor Coach Employees* v. *Lockridge, supra,* at 286. Congress created the centralized expert agency to administer the Act because of its conviction—generated by the historic abuses of the labor injunction, see Frankfurter & Greene—that the judicial attitudes, court procedures, and traditional judicial remedies, state and federal, were as likely to produce adjudications incompatible with national labor policy as were different rules of substantive law. See *Garner* v. *Teamsters,* 346 U. S. 485, 490–491 (1953). Although Congress could not be understood as having displaced "all local regulation that touches or concerns in any way the complex interrelationships between employers, employees, and unions," *Motor Coach Employees* v. *Lockridge, supra,* at 289, the legislative scheme clearly embodies an implicit prohibition of those state- and federal-court adjudications that might significantly interfere with those interests that are a central concern to national labor policy.

The Act's treatment of picketing illustrates the nature of the generic problem, and at the same time highlights the issue in this case. While this Court has never held that the prescrip-

tion of detailed procedures for the restraint of specific types of picketing and the provision that other types of picketing are protected implies that picketing is to be free from all restraint under state law, see, *e. g., Automobile Workers* v. *Russell,* 356 U. S. 634 (1958) (state courts may restrain violent conduct on picket lines), it by the same token necessarily is true that to permit local adjudications, without limitation, of the legality of picketing would threaten intolerable interference with the interests protected by the Act. As the Court recognizes, the nature of the threatened interference differs depending on whether the picketing implicates the Act's prohibitions or its protections. See *ante,* at 190. As to arguably prohibited picketing, there is a risk that the state court might misinterpret or misapply the federal prohibition and restrain conduct that Congress may have intended to be free from governmental restraint.[4] But even when state courts can be depended upon accurately to determine whether conduct is in fact prohibited, local adjudication may disrupt the congressional scheme by resulting in different forms of relief than would adjudication by the NLRB. By providing that an expert, centralized agency would administer the Act, Congress quite plainly evidenced an intention that, ordinarily at least, this expert agency should, on the basis of its experience with labor matters, determine the remedial implications of violations of the Act. If state courts were permitted to administer all the Act's prohibitions, the divergences in relief would add up to significant departures from federal policy. These considerations led the Court to fashion the rule, announced in *Garmon,* 359 U. S., at 245, that

[4] One danger, of course, is that a state court's misinterpretation of the federal prohibition may result in restraining conduct that in fact is protected by the Act. The "arguably protected" prong of *Garmon* addresses this risk. A second danger is that the state court's misconception or misapplication of the law may result in the imposition of restraints on conduct that is neither protected nor prohibited by the Act, but which Congress intended to be free from government control. See *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976).

state courts have no jurisdiction over "arguably prohibited" conduct.

This aspect of *Garmon* has never operated as a flat prohibition.[5] There are circumstances in which state courts can be depended upon accurately to determine whether the underlying conduct is prohibited and in which Congress cannot be assumed to have intended to oust state-court jurisdiction. Illustrative are decisions holding that States may regulate mass picketing, obstructive picketing, or picketing that threatens or results in violence. See *Automobile Workers* v. *Russell, supra; Automobile Workers* v. *Wisconsin Employment Relations Bd.*, 351 U. S. 266 (1956); *Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656 (1954); *Electrical Workers* v. *Wisconsin Employment Relations Bd.*, 315 U. S. 740, 749 (1942). Because violent tortious conduct on a picket line is prohibited by § 8 (b) and because state courts can reliably determine whether such conduct has occurred without considering the merits of the underlying labor dispute, allowing local adjudications of these tort actions could neither fetter the exercise of rights protected by the Act nor otherwise interfere with the effective administration of the federal scheme. And the possible inconsistency of remedy is not alone a sufficient reason for pre-empting state-court jurisdic-

[5] There are several arguably discrete exceptions to *Garmon*, all sharing a common characteristic. Each applies only in circumstances in which local adjudications will not threaten important interests protected by the Act: *e. g.*, when a state court can ascertain the actual legal significance of particular conduct by reference to "compelling precedent applied to essentially undisputed facts," *Garmon*, 359 U. S., at 246; when the rule to be invoked before the state tribunal is "so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the [Act]," *Motor Coach Employees* v. *Lockridge*, 403 U. S., at 297–298; "where the activity regulated was merely a peripheral concern of the [Act or] . . . touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon, supra*, at 243–244.

tion. In view of the historic state interest in "such traditionally local matters as public safety and order," *Electrical Workers* v. *Wisconsin Employment Relations Bd., supra,* at 749, the Act could not, in the absence of a clear statement to the contrary, be construed as precluding the imposition of different, even harsher, state remedies in such cases. See *Automobile Workers* v. *Russell, supra,* at 641–642. Indeed, in view of the delay attendant upon resort to the Board, it could well produce positive harm to prohibit state jurisdiction in these circumstances. Our decisions leave no doubt that exceptions to the *Garmon* principle are to be recognized only in comparable circumstances. See *Farmer* v. *Carpenters,* 430 U. S. 290, 297–301 (1977); *Vaca* v. *Sipes,* 386 U. S. 171 (1967); *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966).

When, on the other hand, the underlying conduct may be *protected* by the Act, the risk of interference with the federal scheme is of a different character. The danger of permitting local adjudications is not that timing or form of relief might be different from what the Board would administer, but rather that the local court might restrain conduct that is in fact protected by the Act. This might result not merely from attitudinal differences but even more from unfair procedures or lack of expertise in labor relations matters. The present case illustrates both the nature and magnitude of the danger. Because the location of employee picketing is often determinative of the meaningfulness of the employees' ability to engage in effective communication with their intended audience, employees often have the right to engage in picketing at particular locations, including the private property of another. See *Hudgens* v. *NLRB,* 424 U. S. 507 (1976); *Scott Hudgens,* 230 N. L. R. B. 414, 95 LRRM 1351 (1977); cf. *NLRB v. Babcock & Wilcox Co.,* 351 U. S. 105 (1956). The California Superior Court here entered an order, *ex parte,* broad enough to prohibit all effective picketing of Sears' store for a period of 35 days. See opinion of my Brother BLACKMUN, *ante,* at 212.

Since labor disputes are usually short lived, see *ibid.*, this possibly erroneous order may well have irreparably altered the balance of the competing economic forces by prohibiting the Union's use of a permissible economic weapon at a crucial time. Obviously it is not lightly to be inferred that a Congress that provided elaborate procedures for restraint of prohibited picketing and that failed to provide an employer with a remedy against otherwise unprotected picketing could have contemplated that local tribunals with histories of insensitivity to the organizational interests of employees be permitted effectively to enjoin protected picketing.

In recognition of this fact, this Court's efforts in the area of labor law pre-emption have been largely directed to developing durable principles to ensure that local tribunals not be in a position to restrain protected conduct. Because the Court today appears to have forgotten some of the lessons of history, it is appropriate to summarize this Court's efforts. The first approach to be tried—and abandoned—was for this Court to proceed on a case-by-case basis and determine whether each particular final state-court ruling "does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy," *Motor Coach Employees* v. *Lockridge*, 403 U. S., at 289–291; see *Automobile Workers* v. *Wisconsin Employment Relations Bd.*, 336 U. S. 245 (1949). Not surprisingly, such an effort proved institutionally impossible. Because of the infinite combinations of events that implicate the central protections of the Act, this Court could not, without largely abdicating its other responsibilities, hope to determine on an ad hoc, generic-situation-by-generic-situation basis whether applications of state laws threatened national labor policy. In any case, such an approach necessarily disserved national labor policy because decision by this Court came too late to repair the damage that an erroneous decision would do to the congressionally established balance of power and was no substitute for decision in the first instance by the Board. The

Court soon concluded that protecting national labor policy from disruption or defeat by conflicting local adjudications demanded broad principles of labor law pre-emption, easily administered by state and federal courts throughout the Nation, that would minimize, if not eliminate entirely, the possibility of decisions of local tribunals that irreparably injure interests protected by § 7. The only rule [6] satisfying these dual requirements was *Garmon*'s flat prohibition: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the . . . Board." 359 U. S., at 245.

While there is some unavoidable uncertainty concerning the arguably *prohibited* prong of *Garmon,* I emphasize that it has heretofore been absolutely clear that there is no state power to deal with conduct that is a central concern of the Act [7] and arguably *protected* by it, see *Longshoremen* v. *Ariadne Shipping Co.,* 397 U. S. 195 (1970); *Garmon, supra; Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U. S. 20 (1957); *Guss* v. *Utah Labor Relations Bd.,* 353 U. S. 1 (1957). As the Court itself recognizes, see *ante,* at 194–197 and 204, none of the *Garmon* exceptions have ever been or could ever be applied to local attempts to restrain such conduct. But the *Garmon* approach to "arguably protected" activity does not "swee[p] away state-court jurisdiction over conduct traditionally subject to

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[6] A second approach was suggested and rejected by *Garmon* itself: that state-court jurisdiction be pre-empted only when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the . . . Act." 359 U. S., at 244. This Court recognized that state and federal courts, quite simply, lack the familiarity and requisite sensitivity to labor law matters to be counted on accurately to determine which combinations of facts could "fairly be assumed" to fall within the ambit of § 7.

[7] If an activity were merely a "peripheral concern" of the Act, state and federal courts presumably may restrain it even if arguably protected. See *Garmon,* 359 U. S., at 246.

state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Ante,* at 188. Quite the contrary, such careful consideration is subsumed by the determination whether the underlying conduct may be protected by § 7. By enacting § 7, Congress necessarily intended to pre-empt certain state laws: *e. g.,* those prohibiting concerted activities as conspiracies or unlawful restraints of trade. In any instance in which it can seriously be maintained that the congressionally established scheme protects the employee activity, the assessment of the relative weight of the competing state and federal interests has to be regarded as having been made by Congress. By drafting the statute so as to permit a Board determination that the underlying conduct is in fact within the ambit of § 7's protections, Congress necessarily indicated its view that the historic state interest in regulating the conduct, however defined, may have to yield to the attainment of other objectives and that the state interest thus must be regarded as less than compelling. And, of course, there is necessarily a possibility that to permit state-court jurisdiction over arguably protected conduct could fetter the exercise of rights protected by the Act and otherwise interfere with the congressional scheme. A local tribunal could recognize an activity as arguably protected, yet, given its attitude toward organized labor, lack of expertise in labor matters, and insensitive procedures, misapply or misconceive the Board's decisional criteria and restrain conduct that is within the ambit of § 7.

## II

The present case illustrates both the necessity of this flat rule and the danger of even the slightest deviation from it. The present case, of course, is a classic one for pre-emption. The question submitted to the state court was whether the Union had a protected right to locate peaceful nonobstructive pickets on the privately owned walkway adjacent to Sears'

retail store or on the privately owned parking lot a few feet away.

A

That the trespass was arguably protected could scarcely be clearer. *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S., at 112, indicates that trespassory § 7 activity is protected when "reasonable efforts . . . through other available channels" will not enable the union to reach its intended audience. This standard, which was developed in the context of a rather different factual situation, is but an application of more general principles. "[T]he basic objective under the Act [is the] accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.' The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Hudgens* v. *NLRB*, 424 U. S., at 522, quoting *NLRB* v. *Babcock & Wilcox Co., supra*, at 112; see *Scott Hudgens*, 230 N. L. R. B., at 417, 95 LRRM, at 1354.

Here, it can seriously be contended that the locus of the accommodation should be on the side of permitting the trespass. The § 7 interest is strong: The object of the picketing was arguably protected on one of two theories—as "area standards" [8] or as "recognitional" [9] picketing—and the record suggests that the relocation of the picketing to the nearest public area—a public sidewalk 150 to 200 feet away—may have so

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[8] See *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195 (1970).

[9] The Act provides that recognitional picketing is prohibited if no representation petition is filed within a reasonable time, not to exceed 30 days. See *ante*, at 186, and n. 10. Although the Board has never held that recognitional picketing is *protected* at the outset and for up to 30 days thereafter, this conclusion would seem to follow from its holding that "area standards" picketing is protected. See *Hod Carriers (Calumet Contractors Assn.)*, 133 N. L. R. B. 512 (1961).

diluted the picketing's impact as to make it virtually meaningless.[10] The private property interest, in contrast, was exceedingly weak. The picketing was confined to a portion of Sears' property which was open to the public and on which Sears had permitted solicitations by other groups.[11] Thus, while Sears to be sure owned the property, it resembled public property in many respects. Indeed, while Sears' legal position would have been quite different if the lot and walkways had been owned by the city of Chula Vista, it is doubtful that Sears would have been any less angered or upset by the picketing if the property had in fact been public.

But the Court refuses to follow the simple analysis that has been sanctioned by the decisions of the last 20 years. Its reasons for discarding prior teachings, apparently, is a belief that faithful application of *Garmon* to the generic situation presented by this case causes positive social harm. I disagree.

It bears emphasizing that *Garmon* only partially pre-empts an employer's remedies against unlawful trespassory picketing. A state court may, of course, enjoin any picketing that is clearly unprotected by the Act: *e. g.*, peaceful, nonobstructive picketing occurring within a retail store. See Brief for Respondent 30 n. 14, citing *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939); *Marshall Field & Co.* v. *NLRB*, 200 F. 2d 375 (CA7 1953); Brief for NLRB as *Amicus Curiae* 15 n. 9. And, as already indicated, state courts have jurisdiction over picket-

[10] Although the matter is disputed, a Union representative testified that picketing from the public sidewalk adjacent to the outer perimeters of Sears' parking lot was totally ineffective and that, for this reason, the California Superior Court's temporary restraining order required the Union to abandon the picketing. App. 28.

[11] Sears permitted solicitation and distribution of literature on its property in the cases of the Lion's Club white cane drive, the Salvation Army at Christmas time, and the League of Women Voters for voter registration. *Id.*, at 14. The fact of prior solicitation simply confirms what would have been clear in any case: that the Union picketing was not incompatible with the retail operations.

ing that is obstructive, or involves large groups of persons, or otherwise entails a serious threat of violence. *Automobile Workers* v. *Russell; Construction Workers* v. *Laburnum Constr. Corp.; Automobile Workers* v. *Wisconsin Employment Relations Bd.; Electrical Workers* v. *Wisconsin Employment Relations Bd.* These decisions constitute an almost dispositive answer to my Brother POWELL's suggestion that state trespass laws should be allowed full play, see *ante,* at 213: most of the factual situations that concern him fall within a recognized *Garmon* exception. Finally, an employer may file an unfair labor practice charge under § 8 (b) and obtain a "cease and desist" order from the Board where the picketing has an objective prohibited by § 8 (b).

Thus, pre-emption of state-court jurisdiction to deal with trespassory picketing has been largely, if not entirely, confined to situations such as presented in this case, *i. e.,* in which the interest of the employer in preventing the picketing is weak, the § 7 interest in picketing on the employer's property strong, and the picketing peaceful and nonobstructive. In this circumstance, I think the denial to the employer of a remedy is an entirely acceptable social cost for the benefits of a pre-emption rule that avoids the danger of state-court interference with national labor policy. The Court's arguments to the contrary are singularly unpersuasive. Because an employer's remedies are only pre-empted in the narrow circumstances of a case such as the present one, any suggestion that the faithful application of *Garmon* creates a "no-man's land" which results in a substantial risk of violence, see opinion of my Brother BLACKMUN, *ante,* at 208; opinion of my Brother POWELL, *ante,* at 213; cf. opinion of the Court, *ante,* at 202, can be dismissed as the most unfounded speculation. An employer like Sears may be angered or outraged by the presence of peaceful, nonobstructive picketing close to its retail store. But the Act requires the employer's toleration of peaceful picketing when § 7 affords the union the right to engage in this form of

economic pressure. There is simply no basis whatsoever for a conclusion that the risk of violence is any greater when an employer is told by a state court that *Garmon* bars his state trespass action than when he is told either that § 7 protects picketing on a public area immediately adjacent to his business, cf. *Longshoremen* v. *Ariadne Shipping Co.*, or that § 7 in fact privileges the entry onto his property. Cf. *Scott Hudgens*.

In apparent recognition of this indisputable fact, the Court places no great reliance on the likelihood of violence. But the only other reason advanced for a conclusion that *Garmon* produces socially intolerable results is that it is "anomalous" to deny an employer a trespass remedy. Since the Act extensively regulates the conditions under which an employer's proprietary rights must yield to the exercise of § 7 rights, I am at a loss as to why the anomaly here is any greater than that which results from the pre-emption of state remedies against tortious conspiracies, compare § 7 of the Act with Frankfurter & Greene 26–39, or from the pre-emption of state remedies against nonmalicious libels. See *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966).

B

That this Court's departure from *Garmon* creates a great risk that protected picketing will be enjoined is amply illustrated by the facts of this case and by the task that was assigned to the California Superior Court. To decide whether the location of the Union's picketing rendered it unlawful, the state court here had to address a host of exceedingly complex labor law questions, which implicated nearly every aspect of the Union's labor dispute with Sears and which were uniquely within the province of the Board. Because it had to assess the "relative strength of the § 7 right," see *Hudgens* v. *NLRB*, 424 U. S., at 522, its first task necessarily was to determine the nature of the Union's picketing. This picketing could have

been characterized in one of three ways: as protected area-standards picketing, see opinion of the Court, *ante,* at 186–187; as prohibited picketing to compel a reassignment of work, see *ante,* at 185–186, and n. 9; or as recognitional picketing that is protected at the outset but prohibited if no petition for a representative election is filed within a reasonable time, not to exceed 30 days. See *supra,* at 225 n. 9; *ante,* at 186, and n. 10. Notably, if the state court concluded that the picketing was prohibited by § 8 (b)(4)—or unprotected by § 7 on any other theory—that determination would have been conclusive against respondent: Whether or not the state court agreed with the Union's contention that effective communication required that picketing be located on Sears' premises, the court would enjoin the trespassory picketing on the ground that no protected § 7 interest was involved. Obviously, since even the Court admits that the characterization of the picketing "entail[s] relatively complex factual and legal determinations," see *ante,* at 198, there is a substantial danger that the state court, lacking the Board's expertise and specialized sensitivity to labor relations matters, would err at the outset and effectively deny respondent the right to engage in any effective § 7 communication.[12]

But even if the state court correctly assesses the § 7 interest, there are a host of other pitfalls. A myriad of factors are or

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[12] Since the whole premise for an order effectively terminating all picketing of the Sears store could be the state court's conclusion that the picketing was prohibited by § 8 (b), it is difficult to understand how the Court can assert that this is a case in which the "arguably prohibited" prong of the *Garmon* test is not implicated. Even if the Court is correct that the crucial consideration under that aspect of *Garmon* is whether the controversy in the state court would be the same as that which would have been presented to the NLRB, see *ante,* at 197, the test surely is satisfied here. More fundamentally, to permit a state court to enter an order which, in law and fact, prohibits picketing because of an interpretation of § 8 (b) entails a substantial risk of interference with the objectives Congress sought to achieve by giving the Board exclusive jurisdiction to enforce § 8 (b).

could be relevant to determining whether § 7 protected the trespass: *e. g.*, whether and to what extent relocating the picketing on the nearest public property 150 feet away would have diluted its impact; whether the picketing was characterized as recognitional or area standards; whether or the extent to which Sears had opened the property up to the public or permitted similar solicitation on it; whether it mattered that the pickets did not work for Sears, etc. And if relevant, each of these factors would suggest a number of subsidiary inquiries.

It simply cannot be seriously contended that the thousands of judges, state and federal, throughout the United States can be counted upon accurately to identify the relevant considerations and give each the proper weight in accommodating the respective rights. Indeed, the actions of the California courts illustrate the danger. Not only was the *ex parte* order of the California Superior Court entered under conditions precluding careful consideration of all relevant considerations, even the Court of Appeal, presumably able to devote more time and deliberation to isolate the correct decisional criteria, failed properly to appreciate the significance of a criterion critical to the application of national law: that the distance of the picketing from a store entrance is largely determinative of its effectiveness. Cf. *Scott Hudgens,* 230 N. L. R. B., at 417, 95 LRRM, at 1354 ("a message announced . . . by picket sign . . . a [substantial] distance from the focal point would be too greatly diluted to be meaningful"). Nothing better demonstrates the wisdom of the heretofore settled rule that "the primary responsibility for making [the] accommodation [between § 7 rights and private property rights] must rest with the Board in the first instance." *Hudgens* v. *NLRB, supra,* at 522.

The Court does not deny that its decision may well result in state-court decisions erroneously prohibiting or curtailing conduct in fact protected by § 7. But it identifies two con-

siderations that persuade it that the risk of interference is minimal and that, in any case, the risk does not outweigh the anomalous consequence of denying the employer a remedy.

The first is its belief that the generic type of activity—which the Court characterizes as trespassory organizational activity by nonemployees—is more likely to be unprotected than protected. *Ante,* at 205–206. In so concluding, the Court relies on *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105 (1956), for the proposition that there is a strong presumption against permitting trespasses by nonemployees. But the Court overlooks a critical distinction between *Babcock* and the case at bar. *Babcock* involved a trespass on industrial property which the employer had fenced off from the public at large, and it is a grave error to treat *Babcock* as having substantial implications for the generic situation presented by this case. To permit trespassory § 7 activities in the *Babcock* fact pattern entails far greater interference with an employer's business than does allowing peaceful nonobstructive picketing on a parking lot which is open to the public and which has been used for other types of solicitation. As my Brother BLACKMUN's concurring opinion notes, this Court's short-lived holding that picketing at shopping centers is protected by the Fourteenth Amendment, see *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), overruled in *Hudgens* v. *NLRB, supra,* has resulted in a situation where neither this Court nor the Board has considered, in any comprehensive fashion, the quite different question of the conditions under which union representatives may enter privately owned areas of shopping centers to engage in protected activities such as peaceful picketing. But the Court's own opinion in *Hudgens* v. *NLRB, supra,* and the Board's decision in *Scott Hudgens, supra,*[13] both suggest that

[13] In *Scott Hudgens,* the Board held that warehouse employees of a shoe company had a § 7 right to engage in protected picketing on a privately owned shopping mall that contained one of the shoe company's retail outlets. Since the warehouse employees were no more "rightfully

trespasses in such circumstances will often be protected. Quite apart from the fact the Court has no basis for blithely assuming that all private property is fungible, that this Court would fail to appreciate so possibly vital a distinction in assessing the strength of a § 7 claim illustrates the danger of permitting lower courts, which lack even this Court's exposure to labor law, to rule on the question whether trespassory picketing by nonemployees is protected.

The Court's second reason is more problematic still. It urges that the risk that local adjudications will interfere with protected § 7 activity is "minimized by the fact that in the cases in which the argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum." *Ante,* at 206. That, with all respect, betrays ignorance of the conduct of adversaries in the real world of labor disputes. Whether a union will seek the protection of a Board order will depend upon whether that tactic will best serve its self-interest, and that determination will depend in turn on whether the employer's request inhibits or interferes with the union's ability to engage in protected conduct. A request that a trespass cease may or may not so threaten the union as to lead it to go to the trouble and expense of attempting to invoke the Board's jurisdiction, and the strength of the argument that the conduct is protected will frequently be a factor of no relevance. For example, if the union perceives the employer's request as a hollow threat or believes that the employer's legal position in any case has no merit, the union will have no reason to turn to the Board.

It might, on the other hand, be the case that the union

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on the employer's premises" than were the pickets in the present case, see *Hudgens* v. *NLRB,* 424 U. S., at 521–522, n. 10, *Scott Hudgens* at least indicates that the fact that an individual has no right to be on the premises is not a factor of any special significance in the context of shopping center picketing. It would be a small step to conclude that the fact the pickets were nonemployees did not, standing alone at least, counsel strongly against a finding that the trespass was unprotected.

would have more of an incentive to file a § 8 (a)(1) charge if it believed that resort to the Board were necessary to protect itself against adjudications by hostile state tribunals. Of course, even then, the union may not believe that invocation of the Board's jurisdiction is worth the trouble and expense in those instances in which it believes its own legal position unassailable. But there is no point in conjecturing on this score. The Court assiduously avoids holding that resort to the Board will oust a state court's jurisdiction [14] and is divided on this question. Compare opinion of my Brother BLACKMUN, *ante,* at 208–210, with opinion of my Brother POWELL, *ante,* p. 212. The Court cannot have it both ways: Unless and until the Court decides that the filing of a charge pre-empts adjudications by local tribunals, speculation as to the conditions under which there would or would not be a failure to file is an idle exercise.[15]

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[14] The Court leaves open a host of questions concerning the availability of state-court remedies to the precise type of trespassory picketing that here occurred: Is state-court jurisdiction pre-empted when a § 8 (a)(1) charge is filed before the institution of state suit? What if the § 8 (a)(1) charge is filed after the employer files the state-court complaint, or after the state court has issued temporary, preliminary, or final relief; must the state-court action and state-court order be stayed pending the Board proceedings or is it up to the Board to take action to protect its jurisdiction? Since the generic situation is one in which there is no realistic possibility of violence, I think my Brother BLACKMUN's logic in answering some of these questions is unassailable, see *ante,* at 208–210. Indeed, I would think the Court would be compelled to extend it to a situation my Brother BLACKMUN does not address: when the state court has entered final relief. But especially in light of my Brother POWELL's differing views, see *ante,* p. 212, it can safely be predicted that the state and federal courts around the country will answer these questions in a variety of ways. A consequence surely will be that erroneous determinations of non-pre-emption will occur and rights and interests protected by the Act will be irreparably damaged before any corrective action can be taken by this Court.

[15] It should be apparent that to require employees to file § 8 (a)(1) charges to avoid hostile local adjudications itself would entail a certain

## III

But what is far more disturbing than the specific holding in this case is its implications for different generic situations. Whatever the shortcomings of *Garmon,* none can deny the necessity for a rule in this complex area that is capable of uniform application by the lower courts. The Court's new exception to *Garmon* cannot be expected to be correctly applied by those courts and thus most inevitably will threaten erosion of the goal of uniform administration of the national labor laws. Even though the Court apparently intends to create only a very narrow exception to *Garmon*—largely if not entirely limited to situations in which the employer first requested the nonemployees engaged in area-standards picketing on the employer's property to remove the pickets from the employer's land and the union did not respond by filing § 8 (a)(1) unfair labor practice charges—the approach the Court today adopts cannot be so easily cabined and thus threatens intolerable disruption of national labor policy.

Because § 8 (b) only affords an employer a remedy against certain types of unprotected employee activity, there necessarily will be a myriad of circumstances in which an employer will be confronted with possibly unprotected employee or union conduct, and yet be unable directly to invoke the Board's processes to receive a determination of the protected

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disruption of the congressional scheme. Section 8 (a)(1) was intended to afford employees a remedy in those circumstances in which they felt it was in their self-interest to seek protection by the Board. Congress by the same token plainly intended not to afford employers a remedy before the Board whenever they were confronted with arguably unprotected conduct. If the Court takes the position that employees can avoid hostile state-court adjudications of their rights only by filing § 8 (a)(1) charges whenever employers threaten interference with arguably protected activity, the effect would be to stand the congressional scheme on its head. The employers would in effect be invoking the Board's jurisdiction under conditions in which the employees have no interest in obtaining the Board's protection.

character of the conduct. Today's decision certainly opens the door to a conclusion by state and federal courts that the Court's new exception applies in any situation where the employer has requested that the labor organization cease what the employer claims is unprotected conduct and the union has not responded by filing a § 8 (a)(1) charge. In that circumstance, today's decision sanctions a three-step process by the state or federal court.

First, the court must inquire whether the employer had a "reasonable opportunity" to force a Board determination. What constitutes a "reasonable opportunity"? I have to assume from today's decision that the employer can never be deemed to have an acceptable opportunity when nonemployees are engaged in the arguably protected activity. But what if employees are involved? Will the fact that the employer can provoke the filing of an unfair labor practice charge by disciplining the employee always constitute an acceptable alternative? Perhaps so, but the Court provides no guidance that can help the local judges. Some may believe that the fact that any discipline will enhance the seriousness of the unfair labor practice renders that course unacceptable. Similarly, what of the instances in which employer discipline might not, under the circumstances, provoke the filing of a charge: *e. g.*, if an economic strike were in progress?

Second, if the lower court concludes that the employer did not have an acceptable means of placing the protection issue before the Board, it must then proceed to inquire whether, in light of its assessment of the strength of the argument that § 7 might protect the generic type of conduct involved, there is a substantial likelihood that its adjudication will be incompatible with national labor policy. This is a particularly onerous task to assign to judges having no special expertise or specialized sensitivity in the application of the federal labor laws, and it is not clairvoyant to predict that many local tribunals will misconceive the relevant criteria and erroneously

conclude that they are capable of correctly applying the labor laws. With all respect, the Court's opinion proves my point. As I have already observed, in concluding that peaceful picketing upon Sears' walkway was more likely to be unprotected than protected, the Court makes an entirely unfounded assumption concerning the approach the Board is likely to apply to the organizational activities of nonemployees at shopping centers. Since the great majority of state and federal judges around the Nation rarely, if ever, have this Court's exposure to the federal labor laws, local tribunals surely will commit far more grievous errors in assessing the likelihood that its adjudication will subvert national labor policy. But the final step in the Court's new pre-emption inquiry is the most troublesome: The range of circumstances in which local tribunals might conclude that the anomaly of denying an employer a remedy outweighs the risk of erroneous determinations by the state courts is limitless. Many erroneous determinations of non-pre-emption are certain to occur, and the local adjudications of the protection issues will inevitably often be inconsistent and contrary to national policy.

This prospect should give the Court more concern than its opinion reflects. It is no answer that errors remain correctible while this Court sits. The burden that will be thrown upon this Court finally to decide, on an ad hoc, generic-situation-by-generic-situation basis, whether the employer had a "reasonable opportunity" to obtain a Board determination and, if not, whether the risk of interference outweighs the anomaly of denying the employer a remedy, should give us pause. Inconsistency and error in decisions below may compel review of an inordinate number of cases, lest lower court adjudications threaten irretrievable injury to interests protected by § 7. Indeed, the experience of 30 years ago should, I would have thought, taught us the folly of such an approach. And our burden will be even greater if, as my Brother BLACKMUN suggests, *ante*, at 211–212, this Court must fashion a code of

"labor law due process" to minimize the risk of erroneous state-court determinations of protection questions.

I do not doubt that this Court could, if it wished, minimize the deleterious consequences of today's unfortunate decision. But the Court cannot prevent it from introducing inconsistency and confusion that will threaten the fabric of national labor policy and from imposing new and unnecessary burdens on this Court. Adherence to *Garmon* would spare us and the Nation these burdens. Because the Court has not demonstrated that *Garmon* produces an unacceptable accommodation of the conflicting state and federal interests, I respectfully dissent.

# SLODOV *v.* UNITED STATES

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

No. 76-1835. Argued February 22, 1978—Decided May 22, 1978

Petitioner assumed control of three corporations at a time when a delinquency existed for unpaid federal taxes withheld from employees' wages, while the specific funds withheld but not paid had been dissipated by predecessor officers and when the corporations had no liquid assets with which to pay the overdue taxes. During the six-month period of petitioner's control the corporations acquired funds sufficient to pay the taxes, but petitioner used the funds to pay employees' wages, rent, suppliers and other creditors, and to meet current business expenses. On petitioner's withdrawal from the corporations' business, he instituted a bankruptcy proceeding, in which the Internal Revenue Service filed a claim, including the delinquent back taxes, under § 6672 of the Internal Revenue Code of 1954, which imposes personal liability for taxes on "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof . . . ." The Court of Appeals held that petitioner was personally liable for the unpaid taxes under § 6672. While petitioner concedes liability for the collection, accounting, and payment of taxes required to be withheld during the period of his control, he disclaims responsibility with respect to taxes withheld prior thereto, arguing that its conjunctive phrasing made § 6672 inapplicable to him since he was clearly under no duty to collect and account for taxes incurred before that period. The Government maintains that the statutory language could be construed as describing in terms of their general responsibilities the persons potentially liable under the statute without regard to the fulfillment of all the duties with respect to specific tax dollars, and that § 6672 imposed liability on petitioner as a "responsible person" because sums received during the period of his control were impressed with a trust in favor of the Government for the satisfaction of the overdue taxes and petitioner's willful use of such sums to pay other creditors violated the statute's "pay over" obligation. Though relying primarily on § 6672 for its trust theory of liability, the Government suggests as also applicable § 7501, which

provides that "[w]henever a person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of the tax . . . shall be held to be a special fund in trust for the United States [which] shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose." *Held:*

1. The phrase "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title" was meant to limit § 6672 to persons responsible for paying over taxes that require collection (third-party taxes) and not to limit it to persons in a position to perform all three functions with respect to the specific taxes as to which the employer is delinquent. Petitioner's construction could lead to ready evasion of responsibility under § 6672, and is thus at odds with the statute's purpose of assuring payment by third parties of withheld taxes. Pp. 246–250.

2. Neither § 6672 nor § 7501 impresses a trust on the after-acquired funds of an employer for payment of overdue withholding taxes absent tracing of those funds to taxes collected, and petitioner therefore was not liable under § 6672 for using those funds for purposes other than payment of the overdue withholding taxes. Pp. 253–259.

(a) Section 6672 was not intended to impose an absolute liability without personal fault for failure to "pay over" amounts that should have been collected and paid over so that petitioner could not be liable unless he failed to pay funds held in trust for the United States. Pp. 253–254.

(b) Nothing in the language or legislative history of § 6672 suggests that the effect of the "pay over" requirement was to impress a trust on the corporations' after-acquired cash, and the history of § 7501 makes clear that it was not. Since the very reason for adding § 7501 to the Code was that under existing law the liability of the person collecting and withholding the taxes was *merely a debt*, § 6672, whose predecessor was enacted while the debt concept of liability prevailed, hardly could have been intended to impose a trust on after-acquired cash. Although the trust concept of § 7501 may inform the scope of the duty imposed by § 6672, the language of § 7501 makes clear that there must be a nexus between the funds collected and the trust created. Pp. 254–256.

(c) A construction of §§ 7501 and 6672 as imposing a trust on all after-acquired property without regard to the interests of others in those funds would conflict with the priority rules applicable to the collection

of back taxes, which give secured parties interests in certain proceeds superior to tax liens. Pp. 256–259.

552 F. 2d 159, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 260. WHITE, J., filed an opinion dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 261.

*Bennet Kleinman* argued the cause for petitioner. With him on the briefs was *Laurence Glazer*.

*Deputy Solicitor General Barnett* argued the cause for the United States. On the brief were *Acting Solicitor General Friedman, Assistant Attorney General Ferguson, Stuart A. Smith,* and *William A. Friedlander*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner, an orthodontist by profession, on January 31, 1969, purchased the stock and assumed the management of three corporations engaged in the food vending business. The corporations were indebted at the time of the purchase for approximately $250,000 of taxes, including federal wage and Federal Insurance Contribution Act (FICA) taxes withheld from employees' wages prior to January 31. The sums withheld had not been paid over when due, however, but had been dissipated by the previous management before petitioner acquired the businesses. After petitioner assumed control, the corporations acquired funds sufficient to pay the taxes, but petitioner used the funds to pay employees' wages, rent, suppliers, and other creditors, and to meet other day-to-day expenses incurred in operating the businesses. The question to be decided is whether, in these circumstances, petitioner is personally liable under § 6672 of the Internal Revenue Code of 1954, 26 U. S. C. § 6672—which imposes personal liability for taxes on "[a]ny person required to collect, truthfully account

for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof . . ."—for the corporations' unpaid taxes withheld from wages prior to his assumption of control. The Court of Appeals for the Sixth Circuit held that petitioner was personally liable under § 6672 for the unpaid taxes. 552 F. 2d 159 (1977). We granted certiorari.[1] 434 U. S. 817 (1977). We reverse.

## I

The case arose from the filing by the Internal Revenue Service (IRS) of a claim for the taxes in a proceeding instituted by petitioner in July 1969 for a real property arrangement under Chapter XII of the Bankruptcy Act. The facts determined after hearing by the bankruptcy judge, 74–2 USTC ¶ 9719 (ND Ohio 1974), are not challenged. Petitioner purchased and assumed managerial control of the Tas-Tee Catering, Tas-Tee Vending, and Charles Corporations on January 31, 1969. When he bought the stock, petitioner understood, and the purchase agreement reflected, that the corporations had an outstanding obligation for taxes in the amount of $250,000 due for payment on January 31, including withheld employee wage and FICA taxes (hereinafter trust-fund taxes). During the purchase negotiations, the sellers represented to petitioner that balances in the various corporate checking accounts were sufficient to pay these taxes as well as bills due other creditors. Relying on the representation, petitioner, on Saturday, February 1, sent four checks to the IRS in payment of the taxes.

[1] In the Court of Appeals, petitioner appealed from a decision of the District Court holding him liable for withholding taxes for the period February 1 to July 15, 1969. The Court of Appeals reversed, 552 F. 2d, at 161–163, and review of that holding was not sought here. Only the decision on the Government's cross-appeal holding petitioner liable for withholding taxes collected prior to January 31 is before us. *Id.*, at 163–165.

On Monday, February 3, petitioner discovered that the accounts were overdrawn and stopped payment on the checks. Thus, at the time that petitioner assumed control, the corporations had no liquid assets, and whatever trust-fund taxes had been collected prior to petitioner's assumption of control had been dissipated.

Petitioner immediately advised the IRS that the corporations had no funds with which to pay the taxes, and solicited guidance concerning how the corporations should proceed. App. 36. There was evidence that IRS officials advised petitioner that they had no objection to his continuing operations so long as current tax obligations were met, and that petitioner agreed to do so and to endeavor to pay the arrearages as soon as possible. Tr. 37–38. The IRS never represented that it would hold petitioner harmless under § 6672 for the back taxes, however.

To continue operations, petitioner deposited personal funds in the corporate acount, and, to obtain inventory, agreed with certain suppliers to pay cash upon delivery. During petitioner's tenure, from January 31 to July 15, 1969, the corporations' gross receipts approximated $130,000 per week for the first few months but declined thereafter. The corporations "established a system of segregating funds for payment of withheld taxes and did, in fact, pay withheld taxes during the period February 1, 1969, to July 15, 1969." App. 30. The bankruptcy judge found, and the IRS concedes, that the $249,212 in taxes paid during this period was approximately sufficient to defray current tax obligations. No taxes owing for periods prior to February 1, were paid, however, and in July 1969 the corporations terminated operations and filed for bankruptcy.

## II

Several provisions of the Internal Revenue Code require third persons to collect taxes from the taxpayer. Among the more important are 26 U. S. C. §§ 3102 (a) and 3402 (a) (1970

ed. and Supp. V) which respectively require deduction from wages paid to employees of the employees' share of FICA taxes, and the withholding tax on wages applicable to individual income taxes. The withheld sums are commonly referred to as "trust fund taxes," reflecting the Code's provision that such withholdings or collections are deemed to be a "special fund in trust for the United States." 26 U. S. C. § 7501 (a). There is no general requirement that the withheld sums be segregated from the employer's general funds, however, or that they be deposited in a separate bank account until required to be paid to the Treasury. Because the Code requires the employer to collect taxes as wages are paid, § 3102 (a), while requiring payment of such taxes only quarterly,[2] the funds accumulated during the quarter can be a tempting source of ready cash to a failing corporation beleaguered by creditors.[3] Once net wages are paid to the employee, the taxes withheld are credited to the employee regardless of whether they are paid by the employer, so that the IRS has recourse only against the employer for their payment.[4]

An employer who fails to pay taxes withheld from its employees' wages is, of course, liable for the taxes which should have been paid, §§ 3102 (b) and 3403. The IRS has several means at its disposal to effect payment of the taxes so withheld.

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[2] See Treas. Regs. §§ 31.6011 (a)–1 (a)(1) and 31.6011 (a)–4, 26 CFR §§ 31.6011 (a)–1 (a)(1) and 31.6011 (a)–4 (1977), regarding return filing requirements. Treasury Reg. § 31.6151 (a), 26 CFR § 31.6151 (a) (1977), requires that the tax be paid when the return is due for filing. Treasury Reg. § 31.6011 (a)–5, 26 CFR § 31.6011 (a)–5 (1977), provides that monthly returns may be required in lieu of quarterly returns at the direction of the District Director. See also 26 U. S. C. § 7512 (b).

[3] See *United States* v. *Sotelo, post,* at 277–278, n. 10.

[4] See *Moore* v. *United States,* 465 F. 2d 514, 517 (CA5 1972); *Dillard* v. *Patterson,* 326 F. 2d 302, 304 (CA5 1963); *United States Fidelity & Guaranty Co.* v. *United States,* 201 F. 2d 118, 120 (CA10 1952). This at the least is the administrative practice. See Brief for United States 10–11.

First, once it has been determined that an employer has been inexcusably delinquent, the IRS, upon giving hand-delivered notice, may require the employer, thereafter, and until further notice, to deposit withheld taxes in a special bank trust account within two banking days after collection, to be retained there until required to be paid to the Treasury at the quarter's end. § 7512. Second, with respect to trust funds past due prior to any such notification, the amount collected or withheld "shall be held to be a special fund in trust for the United States [and] [t]he amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose." 26 U. S. C. § 7501. Thus there is made applicable to employment taxes withheld but not paid the full range of collection methods available for the collection of taxes generally. After assessment, notice, and demand,[5] the IRS may, therefore, create a lien upon the property of the employer, § 6321, and levy, distrain, and sell the employer's property in satisfaction. §§ 6331 to 6344 (1970 ed. and Supp. V).

Third, penalties may be assessed against the delinquent employer. Section 6656 of the Code imposes a penalty of 5% of the underpayment of any tax required to be deposited, and 26 U. S. C. §§ 7202 and 7215 provide criminal penalties respectively for willful failure to "collect or truthfully account for and pay over" trust-fund taxes, and for failure to comply with the requirements of § 7512, discussed *supra*, regarding special accounting requirements upon notice by the Secretary.

Finally, as in this case, the officers or employees of the employer responsible for effectuating the collection and pay-

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[5] Assessment is made by recording the liability of the taxpayer in the office of the Secretary of the Treasury, 26 U. S. C. § 6203, and notice of the assessment and demand for payment generally are required to be made within 60 days of the assessment. 26 U. S. C. § 6303 (a).

ment of trust-fund taxes who willfully fail to do so are made personally liable to a "penalty" equal to the amount of the delinquent taxes. Section 6672 provides, *inter alia:*

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . ."

Section 6671 (b) defines "person," for purposes of § 6672, as including "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Also, § 7202 of the Code,[6] which tracks the wording of § 6672, makes a violation punishable as a felony subject to a fine of $10,000, and imprisonment for 5 years. Thus, an employer-official or other employee responsible for collecting and paying taxes who willfully fails to do so is subject to both a civil penalty equivalent to 100% of the taxes not collected or paid, and to a felony conviction. Only the application to petitioner of the civil penalty provision, § 6672, is at issue in this case.

## III

When the same individual or individuals who caused the delinquency in any tax quarter are also the "responsible per-

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[6] Section 7202 provides:

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

sons" [7] at the time the Government's efforts to collect from the employer have failed, and it seeks recourse against the "responsible employees," see IRS Policy Statement P–5–60, IRS Manual, MT 1218–56 (Feb. 25, 1976), there is no question that § 6672 is applicable to them. It is the situation that arises when there has been a change of control of the employer enterprise, here corporations, prior to the expiration of a tax quarter, or at a time when a tax delinquency for past quarters already exists that creates the question for our decision. In this case, petitioner assumed control at a time when a delinquency existed for unpaid trust-fund taxes, while the specific funds withheld but not paid had been dissipated by predecessor officers and when the corporations had no liquid assets with which to pay the overdue taxes.

A

Petitioner concedes that he was subject to personal liability under § 6672 as a person responsible for the collection, accounting, and payment of employment taxes required to be withheld between January 31, 1969, when he assumed control of the corporations, and July 15, 1969, when he resigned. Tr. of Oral Arg. 8. His contention is that he was not, however, a responsible person within § 6672 with respect to taxes withheld prior to his assumption of control and that § 6672 consequently imposed no duty upon him to pay the taxes collected by his predecessors. Petitioner argues that this construction of § 6672 follows necessarily from the statute's limitation of personal liability to "[a]ny person required to collect, truthfully account for *and* pay over any tax imposed by this title," who willfully fails to discharge those responsibilities (emphasis added). He argues that since the obligations are phrased in

[7] The cases which have been decided under § 6672 generally refer to the "person required to collect, truthfully account for, and pay over any tax imposed by this title" by the shorthand phrase "responsible person." We use that phrase without necessarily adopting any of the constructions placed upon it in the decisions.

the conjunctive, a person can be subject to the section only if all three duties—(1) to collect, (2) truthfully account for, *and* (3) pay over—were applicable to him with respect to the tax dollars in question. See *McCullough* v. *United States,* 462 F. 2d 588 (CA5 1972). On the other hand, as the Government argues, the language could be construed as describing, in terms of their general responsibilities, the persons potentially liable under the statute, without regard to whether those persons were in a position to perform all of the duties with respect to the specific tax dollars in question. Although neither construction is inconsistent with the language of the statute, we reject petitioner's as inconsistent with its purpose.

Sections 6672 and 7202 were designed to assure compliance by the employer with its obligation to withhold and pay the sums withheld, by subjecting the employer's officials responsible for the employer's decisions regarding withholding and payment to civil and criminal penalties for the employer's delinquency. If § 6672 were given petitioner's construction, the penalties easily could be evaded by changes in officials' responsibilities prior to the expiration of any quarter. Because the duty to *pay over* the tax arises only at the quarter's end, a "responsible person" who willfully failed to *collect* taxes would escape personal liability for that failure simply by resigning his position, and transferring to another the decisionmaking responsibility prior to the quarter's end.[8] Ob-

[8] Petitioner argues that his construction of the statute is consistent with imposition of § 6672 liability upon a "responsible person" removed before the end of the quarter, explaining that in such case § 6672 liability would attach because "[w]hile the taxpayer was removed as a responsible officer before the time payment was required *to be made,* he nevertheless came under the *requirement* of making the payment when he collected the taxes." Brief for Petitioner 9 (emphasis in original). "All three elements required to charge the taxpayer with the penalty . . . did in fact converge." *Ibid.* If that is so, we fail to see why all three elements did not "converge" when petitioner assumed control. In both circumstances liability is asserted under the statute as to a person not in a position to fulfill each of the duties with respect to the specific tax dollars in question. More-

versely, a "responsible person" assuming control prior to the quarter's end could, without incurring personal liability under § 6672, willfully dissipate the trust funds collected and segregated by his predecessor.[9]

That this result, obviously at odds with the statute's purpose to assure payment of withheld taxes, was not intended is buttressed by the history of the provision. The predecessor of § 6672, § 1308 (c), Revenue Act of 1918, 40 Stat. 1143, provided, *inter alia:* "Any person who willfully refuses to pay, collect, or truly account for and pay over [taxes enumerated in § 1308 (a)] shall . . . be liable to a penalty of the amount of the tax evaded or not paid, collected, or accounted for and paid over . . . ." [10] The statute remained unchanged in this respect until 1954 when the successor section to § 1308 (c) [11]

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over, apart from any illogic from which that argument suffers, it is highly dubious that Congress intended the words of the statute to create the almost metaphysical distinction suggested by petitioner's argument between a choate duty to perform all three functions upon one in control at the start of a tax quarter and an inchoate duty as to one assuming control in mid-quarter.

[9] Although petitioner argues that neither § 6672 nor any other provision of the Code imposes liability in this situation, he suggested at oral argument that liability might lie under ordinary trust principles. Tr. of Oral Arg. 14, 20–21.

[10] As introduced in the House, H. R. 12863, 65th Cong., 2d Sess., § 1308 (1918), § 1308 was a re-enactment of existing law. Revenue Act of 1917, ch. 63, § 1004, 40 Stat. 325–326. The Senate Finance Committee completely rewrote the section, adding the major penalty provisions which have since continuously existed in the Code. The Committee Reports do not shed any light on the problem at hand, however. Between 1918 and 1954, the only change in § 1308 (c), other than renumbering in the various Codes, see n. 11, *infra,* was that effected by the Revenue Act of 1924, ch. 234, § 1017 (d), 43 Stat. 344, which changed the word "refuses" in the 1918 Act to "fails," and which in § 1017 (b), the predecessor of Internal Revenue Code of 1954, 26 U. S. C. § 7202, changed the penalty from a misdemeanor to a felony.

[11] Under the 1939 Code, the successor provisions to § 1308 (c) were separately codified with each of the third-party collection taxes to which

was revised to its present form. Both before and after the 1954 revision the "person" potentially liable under the statute was defined in a separate provision, § 1308 (d), succeeded by present § 6671 (b), as, including "an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." When, in 1954, Congress added the phrase modifying "person"—"Any person required to collect, truthfully account for, and pay over any tax imposed by this title"—it was not seeking further to describe the class of persons defined in § 6671 (b) upon whom fell the responsibility for collecting taxes, but was attempting to clarify the type of tax to which the penalty section was applicable. Since under the 1954 amendment the penalty would otherwise be applicable to "any tax imposed by this title," the phrase modifying "person" was necessary to insure that the penalty provided by that section would be read as applicable only to failure to pay taxes which *require collection,* that is, third-party taxes, and not failure to pay "*any* tax imposed by this title," which, of course, would include *direct* taxes such as employer FICA and income taxes. As both the House and Senate Committees expressed it, "the application of this penalty is limited only to the collected or withheld taxes which are imposed on some person other than the person who is required to collect, account for and pay over, the tax." [12] Thus, by adding the

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they were applicable. 26 U. S. C. § 2557 (b)(4) (1952 ed.) (narcotics); 26 U. S. C. § 2707 (a) (1952 ed.) (firearms); 26 U. S. C. § 1821 (a)(3) (1952 ed.) (documents); 26 U. S. C. § 1718 (c) (1952 ed.) (admissions and dues).

[12] S. Rep. No. 1622, 83d Cong., 2d Sess., 596 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A420 (1954). The complete text of the Senate Report's discussion of § 6672 is as follows:

"This section is identical with that of the House bill.

"This section is similar to certain sections of existing law which prescribe

phrase modifying "person," Congress was attempting to clarify the type of tax to which the penalty section was applicable, perhaps inartfully, by reference to the duty of the person required to collect them. This view is supported by the fact that the Commissioner of Internal Revenue issued a regulation shortly after the amendment, limiting the application of the § 6672 penalty to third-party taxes. 22 Fed. Reg. 9148 (1957), now codified as Treas. Reg. § 301.6672–1, 26 CFR § 301.6672–1 (1977).

We conclude therefore that the phrase "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title" was meant to limit § 6672 to persons responsible for collection of third-party taxes and not to limit it to those persons in a position to perform all three of the enumerated duties with respect to the tax dollars in question.[13]

We turn then to the Government's contention that petitioner was subject to personal liability under § 6672 when during the period in which he was a responsible person, the corporations generated gross receipts sufficient to pay the back taxes, but used the funds for other purposes.

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a penalty equal to the total amount of the tax evaded, not collected, or not accounted for and paid over, in the case of willful failure to collect, or to truthfully account for and pay over, any tax imposed by this title, or willful attempt in any manner to evade or defeat such tax. *However, the application of this penalty is limited only to the collected or withheld taxes which are imposed on some person other than the person who is required to collect, account for and pay over, the tax.* Under existing law this penalty is not applicable in any case in which the additions to the tax in the case of delinquency or fraud are applicable. Under this section the additions to the tax provided by section 6653, relating to negligence or fraud, shall not be applied for any offense to which this section is applicable." (Emphasis added.)

The House Report is nearly identical.

[13] See *Rubin* v. *United States*, 380 F. Supp. 1176, 1179 (WD Pa. 1974), aff'd, 515 F. 2d 507 (CA3 1975); *Louisville Credit Men's Assn., Inc.* v. *United States*, 73–2 USTC ¶ 9740 (ED Ky. 1970); *Tiffany* v. *United States*, 228 F. Supp. 700 (NJ 1963).

B

Although at the time petitioner became a responsible person the trust-fund taxes had been dissipated and the corporations had no liquid assets, the Government contends that § 6672 imposed civil liability upon petitioner because sums received from sales in carrying on the businesses after January 31, 1969, were impressed with a trust in favor of the United States for the satisfaction of overdue employment taxes, and petitioner's willful use of those funds to pay creditors other than the United States, violated the obligation to "pay over" imposed by § 6672. The Government does not argue that the statute requires a "responsible person" to liquidate corporate assets to pay the back taxes upon assuming control, however; it argues only that a trust was impressed on all cash received by the corporations. Tr. of Oral Arg. 26, 28–29, 30–31, 32. We think that that construction of § 6672 would not advance the statute's purpose and, moreover, is inconsistent with the context and legislative history of the provision and its relation to the Code's priority rule applicable to collection of back taxes.

(1)

The Government argues that its construction of the statute is necessary to effectuate the congressional purpose to assure collection and payment of taxes. Although that construction might in this case garner tax dollars otherwise uncollectible, its long-term effect arguably would more likely frustrate than aid the IRS's collection efforts.

At the time petitioner assumed control, the corporations owed back taxes, were overdue on their supplier accounts, and had no cash. To the extent that the corporations had assets unencumbered by liens superior to a tax lien, the IRS could satisfy its claim by levy and sale. But as will often be the case, the corporations here apparently did not have such assets. The

Government admits that in such circumstances, the IRS's practice is to be "flexible," Tr. of Oral Arg. 27, 28, 32, 48, and does not insist that the corporation discontinue operations, thereby substituting for certain loss at least the potential of recovering back taxes if the corporation makes a financial recovery. It argues nevertheless that the "responsible person" renders himself personally liable to the § 6672 penalty by using gross receipts to purchase inventory or pay wages, or even by using personal funds for those purposes,[14] so long as any third-party employment tax bill remains unpaid.[15]

Thus, although it is in the IRS's interest to encourage the responsible person to continue operation with the hope of receiving payment of the back taxes, if the attempt fails and the taxes remain unpaid, the IRS insists that the § 6672 personal-liability penalty attached upon payment of the first dollar to a supplier. The practical effect of that construction of the statute would be that a well-counseled person contemplating

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[14] See, *e. g.*, *Sorenson* v. *United States*, 521 F. 2d 325, 327 (CA9 1975). The court reasoned that payment of creditors from personal funds is a willful failure to pay because when personal funds are used for corporate purposes they become corporate funds, and any payment of them to creditors other than the United States is an unlawful preference. That reasoning was unnecessary to the result reached in the case, however. The responsible person there had used personal funds to pay net wages to employees. The finding of liability therefore could have been founded on the failure to collect and withhold taxes as wages were paid. Cf. 26 U. S. C. § 3505.

[15] Indeed, the IRS's policy is to augment the personal liability of the responsible person by earmarking the taxes he collects and pays from *current* wages first to the past due *direct* corporate employment tax, that is, the *employer's* share of FICA taxes, thus rendering him liable for trust-fund taxes he thought were paid, but which the Government does not credit as paid. This policy prevails unless the Government is notified in writing that the taxes are to be credited solely to current employment taxes. When payment results from enforced collection methods, however, the IRS nevertheless refuses to honor the designation. IRS Policy Statement P–5–60, IRS Manual, MT 1218–56 (Feb. 25, 1976).

assuming control of a financially beleaguered corporation owing back employment taxes would recognize that he could do so without incurring personal civil and criminal penalties only if there were available sufficient borrowed or personal funds fully to pay all back employment taxes before doing *any* business. If that course is unattractive or unavailable to the corporation, the Government will be remitted to its claim in bankruptcy. When an immediate filing for bankruptcy means a total loss, the Government understandably, as it did here, does not discourage the corporation from continuing to operate so long as current taxes are paid. As soon as the corporation embarks upon that course, however, the "responsible person" is potentially liable to heavy civil and criminal penalties not for doing anything which compromised the Government's collection efforts, but for doing what the Government regards as maximizing its chances for recovery. As construed by the Government, § 6672 would merely discourage changes of ownership and management of financially troubled corporations and the infusion of equity or debt funding which might accompany it without encouraging employer compliance with tax obligations or facilitating collection of back taxes. Thus, recovery of employer taxes would likely be limited to the situation in which the prospective purchaser or management official is ignorant of § 6672.[16]

(2)

As noted in the previous section, § 6672 as construed by the Government would, in effect, make the responsible person

[16] There might be cases in which a person would undertake to continue operations knowing of the risk of personal liability, but confident that the prospects for profitability make that risk acceptable. The fact that such risk-taking might occur in marginal cases would not, however, justify a construction of the statute as requiring the risk when to impose it does not further the overall deterrent and tax collection goals of the statute.

assuming control of a business a guarantor for payment of the delinquent taxes simply by undertaking to continue operation of the business. That construction is precluded by the history and context of § 6672 and cognate provisions of the Code.

Section 6672 cannot be read as imposing upon the responsible person an absolute duty to "pay over" amounts which should have been collected and withheld. The fact that the provision imposes a "penalty" and is violated only by a "willful failure" is itself strong evidence that it was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice. The Government's concession—that § 6672 does not impose a duty on the responsible officer to use personal funds or even to liquidate corporate assets to satisfy the tax obligations—recognizes that the "pay over" requirement does not impose an absolute duty on the responsible person to pay back taxes.

Recognizing that the statute cannot be construed to impose liability without fault, the Government characterizes petitioner's use of gross receipts for payment of operating expenses as a breach of trust, arguing that a trust was impressed on all after-acquired cash. Nothing whatever in § 6672 or its legislative history suggests that the effect of the requirement to "pay over" was to impress a trust on the corporation's after-acquired cash, however. Moreover, the history of a related section, 26 U. S. C. § 7501,[17] makes clear that it was not.

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[17] Section 7501 provides:

"(a) General rule.

"Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to

Section 7501 of the Code provides, *inter alia*, that the "amount of tax . . . collected or withheld shall be held to be a special fund in trust for the United States [which] shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose." This section was enacted in 1934. Act of May 10, 1934, ch. 277, § 607, 48 Stat. 768, 26 U. S. C. § 3661 (1952 ed.). The provision was added to H. R. 7835, 73d Cong., 2d Sess., by the Senate Finance Committee, which explained:

> "Under existing law the liability of the person collecting and withholding the taxes to pay over the amount is merely a debt, and he cannot be treated as a trustee or proceeded against by distraint. Section [607] of the bill as reported impresses the amount of taxes withheld or collected with a trust and makes applicable for the enforcement of the Government's claim the administrative provisions for assessment and collection of taxes." S. Rep. No. 558, 73d Cong., 2d Sess., 53 (1934).

Since the very reason for adding § 7501 was, as the Senate Report states, that "the liability of the person collecting and withholding the taxes . . . is *merely a debt*" (emphasis added), § 6672, whose predecessor section was enacted in 1919 while the *debt* concept prevailed, hardly could have been intended to impose a *trust* on after-acquired cash.

We further reject the argument that § 7501, whose trust concept may be viewed as having modified the duty imposed under § 6672,[18] can be construed as establishing a fiduciary

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the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

"(b) Penalties.

"For penalties applicable to violations of this section, see sections 6672 and 7202."

[18] Although the Government primarily relies upon § 6672, it suggests that liability would attach under § 7501, as well, for a breach of the trust

obligation to pay over after-acquired cash unrelated to the withholding taxes. The language of § 7501 limits the trust to "the amount of the taxes *withheld* or *collected*." (Emphasis added.) Comparing that language with § 6672, which imposes liability for a willful failure to *collect* as well as failure to pay over, makes clear that under § 7501 there must be a nexus between the funds collected and the trust created. That construction is consistent with the accepted principle of trust law requiring tracing of misappropriated trust funds into the trustee's estate in order for an impressed trust to arise. See D. Dobbs, Handbook on the Law of Remedies 424–425 (1973). Finally, for the reasons discussed in the next section, a construction of § 7501 or § 6672 as imposing a trust on all after-acquired corporate funds without regard to the interests of others in those funds would conflict with the priority rules applicable to the collection of back taxes.

(3)

We developed in Part II, *supra,* that the Code affords the IRS several means to collect back taxes, including levy, distraint, and sale. But the IRS is not given the power to levy on property in the hands of the taxpayer beyond the extent of the taxpayer's interest in the property,[19] and the Code

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established by that section. Brief for United States 18 n. 6. Petitioner, on the other hand, argues that § 7501 is applicable only to employers, since the applicable definitional section, 26 U. S. C. § 7701 (a)(1), defines "person" as "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation," while that applicable to § 6672 defines "person" as including "an officer or employee of a corporation . . . ." 26 U. S. C. § 6671 (b). Since we do not decide whether § 7501 establishes a basis of liability applicable to responsible persons independent of § 6672, we need not address these contentions. We decide only that § 7501 properly may be regarded as informing the scope of the duty imposed by § 6672.

[19] Section 6321 provides that the lien shall be applicable to "all property and rights to the property, whether real or personal, *belonging* to such per-

specifically subordinates tax liens to the interests of certain others in the property, generally including those with a perfected security interest in the property.[20] For example, the Code and established decisional principles subordinate the tax lien to perfected security interests arising before the filing of the tax lien,[21] to certain perfected security interests in certain collateral, including inventory, arising after the tax lien filing when pursuant to a security agreement entered into before the filing,[22] and to collateral which is the subject of a purchase-

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son." (Emphasis added.) We have held that the extent of the tax debtor's interest in the property is determined by state law, and that the lien cannot attach when the debtor has no interest. *Aquilino* v. *United States,* 363 U. S. 509 (1960); *United States* v. *Durham Lumber Co.,* 363 U. S. 522 (1960).

[20] The basic priority rules for tax liens are established by 26 U. S. C. § 6323, which, in addition to subordinating the federal tax lien to certain perfected security interests, makes superior to the lien, interests of persons who, without actual knowledge of the lien, acquire interests in personal property purchased from retail dealers in the ordinary course of trade, personal property (less than $250) purchased in casual sales, securities, motor vehicles, and real property by virtue of a lien for certain local real property and special assessment taxes, or for mechanic's liens. §§ 6323 (b)(1) to (7).

[21] Section 6323 (a) provides:

"The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary."

[22] Section 6323 (c) provides that a tax lien is subordinate to a security interest which came into existence *after* the tax lien filing but which is a "commercial transactions financing agreement . . . protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation." §§ 6323 (c)(1)(A)(i) and (c)(1)(B). (A commercial transactions financing agreement includes accounts receivable and inventory, § 6323 (c)(2)(C).)

The local law applicable is, in 49 States and the District of Columbia, the Uniform Commercial Code (UCC); and 26 U. S. C. § 6323, as amended by the Federal Tax Lien Act of 1966, Pub. L. No. 89–719, § 101, 80 Stat. 1125, was in large part adopted in order to "conform the lien pro-

money mortgage regardless of whether the agreement was entered into before or after filing of the tax lien.[23] As a consequence, secured parties often will have interests in certain proceeds superior to the tax lien, and it is unlikely, moreover, that corporations in the position of those involved here could continue in operation without making some payments to se-

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visions of the internal revenue laws to the concepts developed in [the] Uniform Commercial Code." H. R. Rep. No. 1884, 89th Cong., 2d Sess., 1 (1966).

Under the UCC, a perfected security interest is superior to a judgment lien creditor's claim in the property, see UCC §§ 9–301, 9–312. Perfection of a security interest in inventory or accounts receivable occurs only when a financing statement is filed, UCC § 9–302, and when it has attached. UCC § 9–303 (1). Attachment requires an agreement, value given by the secured party, and that the debtor have rights in the collateral. UCC § 9–204. Thus when a security agreement exists and filing has occurred prior to the filing of a tax lien to secure advances made after the tax filing, perfection is, at the least, achieved when the secured party makes the advance. When that occurs after the tax lien has been filed, § 6323 (d) protects the secured party from the federal tax lien if the advance is made not later than 45 days after the filing of the tax lien or upon receipt of actual notice of the tax lien filing, whichever is sooner. For a more detailed explanation of these provisions see Coogan, The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code, 81 Harv. L. Rev. 1369, 1403–1413 (1968).

[23] Decisional law has long established that a purchase-money mortgagee's interest in the mortgaged property is superior to antecedent liens prior in time, see *United States* v. *New Orleans R. Co.*, 12 Wall. 362 (1871), and, therefore, a federal tax lien is subordinate to a purchase-money mortgagee's interest notwithstanding that the agreement is made and the security interest arises after notice of the tax lien. The purchase-money mortgage priority is based upon recognition that the mortgagee's interest merely reflects his contribution of property to the taxpayer's estate and therefore does not prejudice creditors who are prior in time.

In enacting the Federal Tax Lien Act of 1966, Congress intended to preserve this priority, H. R. Rep. No. 1884, 89th Cong., 2d Sess., 4 (1966), and the IRS has since formally accepted that position. Rev. Rul. 68–57, 68–1 Cum. Bull. 553; see also IRS General Counsel's Op. No. 13–60, 7 CCH 1961 Stand. Fed. Tax Rep. ¶ 6307 (1960).

cured creditors under the terms of security agreements. Those payments may well take the form of cash or accounts receivable, which like other property may be subject to a security interest, when, for example, the security agreement covers the proceeds of inventory the purchase of which is financed by the secured party, or the security agreement requires the debtor to make payments under a purchase-money mortgage by assigning accounts receivable which are the proceeds of inventory financed by the mortgage.[24] Thus, although the IRS is powerless to attach assets in which a secured party has a superior interest, it would impose a penalty under § 6672 if the responsible person fails to divert the secured party's proceeds to the Treasury without regard to whether the secured party's interests are superior to those of the Government. Surely Congress did not intend § 6672 to hammer the responsible person with the threat of heavy civil and criminal penalties to pay over proceeds in which the Code does not assert a priority interest.

## IV

We hold that a "responsible person" under § 6672 may violate the "pay over" requirement of that statute by willfully failing to pay over trust funds collected prior to his accession to control when at the time he assumed control the corporation has funds impressed with a trust under § 7501, but that § 7501 does not impress a trust on after-acquired funds, and that the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there were no

[24] A security interest in accounts may be perfected by filing, UCC § 9–302, while a security interest in cash, except as hereafter noted, can be perfected only by possession. UCC § 9–304 (1). When the secured party perfects a security interest in inventory and proceeds, the security interest in accounts which are proceeds is continuously perfected. UCC § 9–306 (3) (a). The identifiable cash proceeds are also perfected, but only for a 10-day period. UCC § 9–306 (3).

funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute.[25] That portion of the judgment of the Court of Appeals on the Government's cross-appeal holding petitioner liable under § 6672 for wage withholding and FICA taxes required to be collected from employees' wages prior to January 31, 1969, is

*Reversed.*

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion and write separately only to emphasize that part of it which I think is critical to the disposition of this case. Both petitioner and the Government have available to them arguments, based upon two different clauses of § 6672, which, if accepted, would enable them to prevail on the literal language of the clause alone without further consideration of other factors. Petitioner argues with considerable cogency that the portion of § 6672 phrased *conjunctively, ante,* at 245, fails to include him within the class of persons liable for the penalty imposed by that section. If his argument were to be accepted, that would be the end of the case. I agree with the Court that his argument should be rejected, because its appeal based on the literal language of the clause is more than outweighed by the fact that the clause was added in 1954 very probably to narrow the class of

[25] The basis for the dissent's contrary construction is that "it is difficult to comprehend why the United States should be precluded from looking to what is probably its best source, the flow of funds coming into business entities, merely because a change in ownership or management has occurred subsequent to the time when the amounts in question were withheld from employees." *Post,* at 262. We agree that the *employer's* liability is unaffected by changes in management, and the Government may, under various Code provisions, enforce its lien against any employer asset including the flow of incoming cash. But that does not answer the question before us which is whether § 6672 imposes a penalty on a responsible person for failing to pay over withheld taxes when those taxes had been dissipated before he acceded to control.

persons who might be subject to the predecessor penalty provisions which were phrased in the *disjunctive.*

Having won this point the Government could then rely on the disjunctive literal language of the statute and its predecessors and argue that petitioner, a responsible corporate official at some point in time, is liable for all taxes which he failed to collect or, as is the case here, pay over. But the Government does not advance this argument, realizing, no doubt, that it is foreclosed largely for the reasons given by the Court in Part III–B (2) of its opinion. I fully agree with the Court's conclusion in this respect, stressing in addition only the fact that both the language and history of § 6672 make it perfectly clear that liability for this penalty cannot be imposed in the absence of a willful failure and the word "willful," used as it is in this context in conjunction with the word "penalty," requires some action that tends to impede collection of the corporation's trust-fund taxes before liability can attach. For example, even the Government concedes that a responsible officer need not use personal funds or liquidate corporate assets to satisfy past tax obligations which have arisen under the withholding provisions before the official assumed responsibility. *Ante,* at 254. It should be apparent from the Court's opinion, however, that this notion of "fault" may have little to do with other sections of the Tax Code. Its importation into § 6672 is compelled by the normal canons of statutory construction, but those canons may speak differently as to the meaning of the word "willful" or the concept of "fault" in other sections of the Code. Indeed, the interpretation of § 6672 we adopt today is limited by the very factors which caused us to adopt it.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting in part.

The Court recognizes, as even petitioner concedes, that 26 U. S. C. § 6672 makes those individuals who are "required to

collect, truthfully account for, and pay over any tax imposed by this title" ("responsible persons") personally liable for the failure to use available corporate funds to pay to the IRS amounts equal to sums withheld from employees during those periods in which they were "responsible persons." It also holds, and I agree, that the obligations of a "responsible person" under § 6672 are not limited to liabilities incurred during the period during which he occupied such a position but that he "violate[s] the 'pay over' requirement of that statute by willfully failing to pay over trust funds collected prior to his accession to control when at the time he assumed control the corporation has funds impressed with a trust under § 7501 . . . ." *Ante,* at 259. From this conclusion it would seem to follow automatically that one who becomes a "responsible person" subsequent to the collection of withholding tax payments from employees is, for purposes of § 6672, in the same shoes as one who was a "responsible person" at the time of collection. After all, as the Court recognizes, the purpose of § 6672 is to assure the collection and payment of taxes, and it is difficult to comprehend why the United States should be precluded from looking to what is probably its best source, the flow of funds coming into business entities, merely because a change in ownership or management has occurred subsequent to the time when the amounts in question were withheld from employees. Moreover, there is absolutely nothing in the language or legislative history of § 6672 which distinguishes between the obligations of "responsible persons" on the basis of when they assumed such a position. Indeed, this is the thrust of Part III–A of the Court's opinion. Inexplicably, however, and in disregard of these controlling principles, the Court holds that a "responsible person" does not violate § 6672 by willfully using funds acquired by the corporation after his accession for purposes other than the satisfaction of withholding tax claims of the United States arising from duties imposed by law prior to his accession.

I

Although the Court concedes that the construction of § 6672 adopted by the Court of Appeals in this case and urged by the United States "might . . . garner tax dollars otherwise uncollectible" in cases such as this, *ante,* at 251, it rejects this construction in favor of one which permits corporations to escape their tax obligations through change of ownership or management primarily because of its belief that the free enterprise system is best promoted by the use of tax funds to subsidize the takeover of financially beleaguered companies. The majority deems it desirable to encourage "changes of ownership and management of financially troubled corporations and the infusion of equity or debt funding," *ante,* at 253, and construes the statute in a manner it believes to be consistent with this goal. Apparently, in the Court's view, tax funds are better used to subsidize such takeovers than to meet other social needs for which Congress has specifically appropriated tax funds. But I believe that the Court exceeds its mandate by construing the statute so as to conform to its conclusions concerning the best use of tax dollars collected from American employees. Section 6672 is not an appropriations statute or even a law, like the bankruptcy statute, designed to accomplish substantive ends. The statute lends no support to the Court's conclusion that an insolvent corporation with unpaid withholding taxes should be permitted to continue its business under the aegis of a successor officer, even at the cost of the United States' tax claim. It is, purely and simply, a tax collection statute which is designed to do nothing more than assure that taxes withheld from employees find their way to the United States to be spent for those purposes defined by Congress. In my view, it is error to construe the statute in a way which permits the diversion of these funds from the uses determined by Congress to be in the public interest to ends which in the Court's view would better promote the general welfare.

The Court relies upon the fact that the IRS often applies a flexible approach and does not always insist that financially troubled concerns use all available funds to pay back taxes if such payment would require the corporation to discontinue operations. For present purposes, I assume that the IRS may properly so exercise its discretion and may, where it deems it appropriate, even waive any resort to § 6672 if the company should ultimately fail. What this establishes, however, is that the Court's construction of § 6672 is totally unnecessary even given its perception that a rigid application of the statute to successor employers would in the long run damage the economy and hinder IRS collection efforts. It is one thing to conclude that there are some circumstances in which the IRS might decide that the rigid application of § 6672 is not in its own interests but quite another matter to prevent the IRS from using this valuable collection tool in connection with successor employers and managers where it is convinced that its application will effectuate the collection of taxes.

Moreover, it is far from clear that permitting employers to use funds acquired subsequent to their assumption of control for purposes other than the satisfaction of the withholding tax claims of the United States will serve primarily as an aid to financially troubled concerns rather than as an invitation to defraud the Treasury. The Court holds that a person who assumes control must satisfy the business' pre-existing trust-fund tax obligations if the concern has funds available at the time he assumes control. Apparently, neither it nor the IRS would require the sale of the business' assets in order to meet such obligations. It is clear, however, that there will be a great number of companies which do not have cash available at the time of a change in ownership and management but are nevertheless viable, ongoing enterprises not in need of Government subsidization. Furthermore, any businessman with a minimum of acumen could in most circumstances make sure that the financial affairs of the company are so arranged

that there are no uncommitted funds available at the moment of his accession to control. Finally, there can be little doubt that the Court's ruling today will result in changes in management and ownership which are in fact nothing but subterfuges to avoid using the company's funds to pay outstanding trust-fund tax obligations. The investors in any corporation seriously in arrears will also have a strong incentive to arrange changes of management, whether sham or real, in order to permit funds acquired by the corporation to be used for purposes other than satisfying its tax obligations without exposing its managers to personal liability. In addition, changes of ownership, often more formal than real, will frequently be arranged for no purpose other than to permit the concern to use future funds without regard to its pre-existing tax obligations.

II

The Court next makes the remarkable suggestion that § 6672 cannot be read as imposing an absolute duty upon "responsible persons" to use after-acquired funds to pay over amounts which should have been withheld because to do so would be to impose liability without personal fault which, according to the Court, is precluded by the statutory requirement of a "willful failure." As the concurring opinion of MR. JUSTICE REHNQUIST suggests, the term "willful" in our jurisprudence, particularly in connection with tax matters, normally connotes nothing more than a conscious act or omission which violates a known legal duty. In this case, there can be no doubt that petitioner acted willfully because with full knowledge that the corporations in question had outstanding tax obligations he chose to apply gross receipts received subsequent to his purchase to purposes other than payment of these taxes. It may be that the Court believes that the requirement of a "willful failure" is satisfied only by a showing of conduct which is immoral in some undefined sense. This view, however, is not only unsupported by evidence of legisla-

tive intent but would also prove far too much because even in instances where there is continuity of ownership and, under the Court's view, § 6672 is fully applicable, it will often be the case that "responsible persons" are not morally at fault for the failure to pay over in a timely fashion.

Ultimately, the Court is reduced to arguing that nothing in the legislative history of § 6672 indicates that the statute requires "responsible persons" to pay over after-acquired cash to meet outstanding tax obligations. *Ante,* at 254. I would have supposed that the burden of proof for a statutory construction as extraordinary as that adopted by the Court today is at the very least on its proponents. All that the Court is able to offer, however, is a brief excerpt from the legislative history of an entirely separate statute enacted some 15 years after the predecessor of § 6672 which, with all respect, has nothing to do with the question to be decided.

## III

Finally, the Court purports to find support for its construction of § 6672 from the fact that priority rules applicable to the collection of back taxes in some cases subordinate tax liens to certain other interests in the property. Although this discussion may be of some educational value, it has absolutely nothing to do with the case at hand or the proper construction of § 6672. In the first place, as petitioner conceded at oral argument, the funds which came into his corporations subsequent to his assumption of control were unencumbered by liens. Tr. of Oral Arg. 4–5. Moreover, the conclusion which the Court draws from its exploration of priority rules for tax liens that "Congress did not intend § 6672 to hammer the responsible person with the threat of heavy civil and criminal penalties to pay over proceeds in which the Code does not assert a priority interest," *ante,* at 259, again proves far too much. If the mere possibility that others might have interests superior to a tax lien in proceeds which should under

§ 6672 be paid over to the United States is sufficient to render the statute inapplicable despite the fact that the funds in question are unencumbered, the section, for all practical purposes, has been judicially deleted from the United States Code. Even where there is no change in "responsible persons" or there are corporate funds available to a successor to make back payments of trust-fund tax claims, situations in which the Court would apply § 6672, there will be many occasions in which a tax lien would not have priority over all other hypothetical interests in funds which must be paid over to the United States under the statute. The fact is, of course, as the Court recognizes earlier in its opinion, *ante,* at 243–245, that the tax lien is merely one of several remedies which the IRS has at its disposal to effect the collection of taxes withheld by employers from employees and § 6672 was clearly not designed to be superfluous, but rather independent of and a supplement to other means of collecting trust-fund taxes from employers.

Because I believe that the Court has, without justification, created yet another means of impeding the collection of taxes for purposes designated by Congress, I dissent from Parts III–B and IV of the Court's opinion.

# UNITED STATES *v.* SOTELO ET UX.

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

No. 76–1800. Argued February 22, 1978—Decided May 22, 1978

Section 6672 of the Internal Revenue Code of 1954 provides that "[a]ny person required to collect, truthfully account for, and pay over" federal taxes who "willfully fails" to do so, shall be liable to a "penalty" equal to the amount of the taxes in question. Section 17a (1) (e) of the Bankruptcy Act makes nondischargeable in bankruptcy "taxes . . . which the bankrupt has collected or withheld from others . . . but has not paid over." Respondents, husband and wife, were adjudicated bankrupt, as was a corporation in which he was the principal officer and majority stockholder. The bankruptcy court found respondent husband (hereafter respondent) personally liable to the Government under § 6672 for his failure to pay over taxes withheld from employees of the corporation. Subsequently, in proceedings by the Government to collect from respondent on his § 6672 liability, the bankruptcy judge, rejecting respondent's contention that such liability was a "penalty" and as such had been discharged, reasoned that although § 6672 liability was denominated a "penalty," it was in substance a tax, and thus was nondischargeable under § 17a (1), and more particularly § 17a (1) (e). The District Court affirmed. The Court of Appeals reversed. Though recognizing respondent's § 6672 liability, the court held that § 17a (1) (e) was inapplicable because it was not respondent himself but his corporation that was obligated to collect and withhold the taxes, and because in any event the money involved constituted a "penalty," whereas § 17a (1) (e) renders only "taxes" nondischargeable. *Held:* Respondent's liability under § 6672 is nondischargeable in bankruptcy under § 17a (1) (e). Pp. 273–282.

(a) That respondent was found liable under § 6672 necessarily means that he was "required to collect, truthfully account for, and pay over" the withholding taxes, and that he willfully failed to meet one or more of these obligations. P. 274.

(b) Since the taxes in question were "collected or withheld" from the corporation's employees and have not been "paid over" to the Government, respondent's § 6672 liability was imposed not for his failure to collect taxes but for his failure to pay over taxes that he was required both to collect and to pay over, and therefore he "collected or withheld" the taxes within the meaning of § 17a (1) (e). P. 275.

(c) The "penalty" language of § 6672 is not dispositive of the status of respondent's debt under § 17a (1)(e), since the funds involved were unquestionably "taxes" at the time they were "collected or withheld from others," and it is this time period that § 17a (1)(e), with its modification of "taxes" by the phrase "collected or withheld," treats as the relevant one. That the funds due are referred to as a "penalty" when the Government later seeks to recover them does not alter their essential character as taxes for purposes of the Bankruptcy Act, at least where, as here, the § 6672 liability is predicated on a failure to pay over, rather than a failure initially to collect, the taxes. P. 275.

(d) The legislative history of § 17a (1)(e) indicates not only that Congress intended to make nondischargeable the withholding tax obligations of persons in respondent's situation, but also that it meant to ensure post-bankruptcy liability for such taxes in corporate bankruptcy situations (where a corporation's tax liabilities are rendered uncollectible because of its dissolution). Pp. 275–279.

(e) The overall policy of the Bankruptcy Act of giving a bankrupt a "fresh start" cannot override Congress' specific intent in § 17a (1)(e) to make a liability like respondent's nondischargeable, especially since the contrary result would create an inequity between corporate officers and individual entrepreneurs. Pp. 279–281.

551 F. 2d 1090, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN, STEWART, and STEVENS, JJ., joined, *post,* p. 282.

*Stuart A. Smith* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Crombie J. D. Garrett,* and *Wynette J. Hewett.*

*Bruce L. Balch* argued the cause and filed a brief for respondents.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves the interaction of sections of the Internal Revenue Code of 1954 and the Bankruptcy Act. Respondent Onofre J. Sotelo was found personally liable to the Govern-

ment for his failure to pay over taxes withheld from employees of the corporation in which he was the principal officer. The question presented is whether this liability is dischargeable in bankruptcy.

I

In mid-1973, respondents Onofre J. and Naomi Sotelo were adjudicated bankrupts, as was their corporation, O. J. Sotelo & Sons Masonry, Inc. The individual bankruptcy proceedings of the two Sotelos were consolidated. In November 1973, the Internal Revenue Service filed against respondents' estate a claim in the amount of $40,751.16 "for internal revenue taxes" that had been collected from the corporation's employees but not paid over to the Government. Respondents were alleged to be personally liable for these taxes under Internal Revenue Code § 6672, 26 U. S. C. § 6672, as corporate officers who had a duty "to collect, truthfully account for, and pay over" the taxes and who had "willfully fail[ed]" to make the requisite payments.[1] Respondents objected to the Government's claim, arguing that they should not be held personally liable for "taxes of the corporation." Memorandum Opinion of Bankruptcy Court (Nov. 29, 1974).

In upholding the Government's claim to the extent of $32,840.71, the bankruptcy court found that Onofre Sotelo

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[1] Internal Revenue Code § 6672, 26 U. S. C. § 6672, provides:

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Section 6671 (b) of the Code makes clear that "[t]he term 'person,' as used in [§ 6672], includes an officer or employee of a corporation . . . who . . . is under a duty to perform the act in respect of which the violation occurs." Section 6671 (a) states that the § 6672 penalty "shall be assessed and collected in the same manner as taxes."

had formerly operated the masonry business as a sole proprietorship and that, since the formation of the corporation, he had been its president, director, majority stockholder, and chief executive officer. Naomi Sotelo, on the other hand, though named the corporation's secretary, "did not take an active part in the business." *Id.*, at 1. The court concluded that Onofre Sotelo was personally liable to the Government under Internal Revenue Code § 6672, since he "was charged with the duty and responsibility to see that the [withheld] taxes were paid." Memorandum Opinion, *supra*, at 3.[2] The record does not reflect any appeal of this ruling.

In October 1975 the Government, seeking to collect part of the money owed by Onofre Sotelo under § 6672, served a notice of levy on respondents' trustee with regard to $10,000 that belonged to respondents and was not available for general distribution to creditors in bankruptcy.[3] Respondents objected to the levy, in part on the ground that the liability is described in § 6672 itself as a "penalty" and as such had been discharged in bankruptcy.[4] The Government argued that, to

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[2] Naomi Sotelo was found not to be liable, but the bankruptcy judge noted that this finding was "immaterial" in view of the merger of the estates. Memorandum Opinion of Bankruptcy Court 3 (Nov. 29, 1974).

[3] This $10,000 was derived from the trustee's sale of real estate held by respondents as joint tenants, and would have been payable to one or both of respondents had it not been for the Government's claim. The trustee set aside the $10,000 as a "homestead exemption" for Onofre Sotelo only, apparently pursuant to Illinois law. Respondents argued below that the entire $10,000 belonged to Naomi Sotelo, who did not have any § 6672 liability, see n. 2, *supra*. In response to this contention, the bankruptcy court stated: "[T]he law is clearly established in Illinois that where a husband and wife own property as joint tenants and reside together on the premises . . . the husband . . . alone is entitled to the Homestead Exemption." 76–1 USTC ¶ 9435, p. 84,156 (SD Ill. 1976). The bankruptcy court upheld this Illinois rule against respondents' constitutional attack. *Id.*, at 84,157–84,158.

[4] Respondents' theory apparently was that the § 6672 penalty is compensatory in nature. The Government does not here dispute that a

the contrary, the liability was for "taxes," which § 17a (1) of the Bankruptcy Act, 30 Stat. 550, as amended, 11 U. S. C. § 35 (a)(1) (1976 ed.), makes nondischargeable. The bankruptcy judge agreed with the Government, reasoning that, "[t]hough denominated a 'penalty,' [the § 6672 liability] is in substance a tax." 76–1 USTC ¶ 9435, p. 84,157 (SD Ill. 1976). The judge also noted, *ibid.*, that subdivision (e) of Bankruptcy Act § 17a (1) makes specifically nondischargeable "taxes . . . which the bankrupt has collected or withheld from others . . . but has not paid over." 11 U. S. C. § 35 (a)(1)(e) (1976 ed.). Respondents appealed to the United States District Court for the Southern District of Illinois, which affirmed on the opinion of the bankruptcy court.

The United States Court of Appeals for the Seventh Circuit reversed. *In re Sotelo*, 551 F. 2d 1090 (1977). It first noted that "Sotelo does not challenge his liability under 26 U. S. C. § 6672 . . . [but] only argues that the liability should have been discharged by his personal bankruptcy petition." *Id.*, at 1091. The court then held that the liability had been discharged, finding persuasive the fact that § 6672 terms the liability a "penalty" and rejecting the Government's argument with respect to the specific language referring to withholding taxes in Bankruptcy Act § 17a (1)(e). 551 F. 2d, at 1092.[5]

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compensatory penalty is generally dischargeable. See Brief for United States 26–27, and n. 16. See generally Bankruptcy Act § 57j, 11 U. S. C. § 93 (j); 8 H. Remington, A Treatise on the Bankruptcy Law of the United States § 3304 (6th ed. J. Henderson 1955).

[5] Respondents raised their homestead exemption argument, see n. 3, *supra*, in the Court of Appeals, but that court believed that it did not have to reach the issue in view of its holding that the entire § 6672 liability was dischargeable, 551 F. 2d, at 1093 n. 3. The Government contends here that the issue should have been reached regardless of the dischargeability holding, because Bankruptcy Act § 17a (1) makes a discharge irrelevant to the Government's right to proceed "against the exemption of the bankrupt allowed by law and duly set apart to him," 11 U. S. C. § 35 (a)(1) (1976 ed.). Brief for United States 33–34, n. 23. In view of our holding that the § 6672 liability is not dischargeable, we need not

The court recognized that its ruling was in conflict with "an uncontroverted line of cases." *Id.*, at 1091.[6]

We granted certiorari, 434 U. S. 816 (1977), and we now reverse.

II

Section 17a of the Bankruptcy Act, as amended, 80 Stat. 270, provides in pertinent part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except such as
>
> "(1) are taxes which became legally due and owing by the bankrupt to the United States or to any State . . . within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes . . . (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State . . . but has not paid over . . . ." 11 U. S. C. § 35 (a) (1976 ed.).

Relying on this statutory language, the Government presents what it views as two independent grounds for holding the § 6672 liability of Onofre Sotelo (hereinafter respondent) to be nondischargeable. The Government's primary argument is based on the specific language relating to withholding in § 17a (1)(e); alternatively, it argues that respondent's liability, although called a "penalty," IRC § 6672, is in fact a "tax" as that term is used in § 17a (1).[7]

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address this contention. On remand, of course, the Court of Appeals may consider respondents' argument that some or all of the homestead exemption belongs to Naomi Sotelo.

[6] In addition to several District Court cases, the Court of Appeals cited the conflicting holding of the Fifth Circuit in *Murphy* v. *U. S. Internal Revenue Service,* 533 F. 2d 941 (1976). The *Murphy* decision was followed by the Fourth Circuit in *Lackey* v. *United States,* 538 F. 2d 592 (1976).

[7] The Government contends, and respondent does not disagree, that the three-year limitation in Bankruptcy Act § 17a (1) would not bar any

Regardless of whether these two grounds are in fact independent,[8] § 17a (1)(e) leaves no doubt as to the nondischargeability of "taxes . . . which the bankrupt has collected or withheld from others as required by the laws of the United States or any State . . . but has not paid over." The Court of Appeals viewed this provision as inapplicable here for two reasons: first, because "it was not Sotelo himself, but his employer-corporation, that was obligated by law to collect and withhold the taxes"; and second, because in any event the money involved constituted a "penalty," whereas § 17a (1)(e) "renders only 'taxes' nondischargeable." 551 F. 2d, at 1092. We believe that the first reason is inconsistent with the Court of Appeals' recognition of respondent's undisputed liability under Internal Revenue Code § 6672, and that the second is inconsistent with the language of § 17a (1)(e).

The fact that respondent was found liable under § 6672 necessarily means that he was "required to collect, truthfully account for, and pay over" the withholding taxes, and that he willfully failed to meet one or more of these obligations. IRC § 6672; see n. 1, *supra*.[9] Since the § 6672 "require[ment]" of collection presumably derives from federal or state law, both of which are referred to in Bankruptcy Act § 17a (1)(e), it is difficult to understand how the court below could have recognized respondent's § 6672 liability, see *supra*, at 272, and nonetheless have concluded that he was not "obligated by law

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part of the Government's claim in this case. Brief for United States 25–26, n. 15.

[8] The specific language of Bankruptcy Act § 17a (1)(e) is contained within a proviso that modifies the more general approach of § 17a (1). Both the general language and the proviso are aimed at making "taxes" nondischargeable, and there is no reason to believe that any "taxes" made nondischargeable by the specific terms of § 17a (1)(e) would not also be "taxes" as that word is used more generally in § 17a (1).

[9] As in the Court of Appeals, see *supra*, at 272, respondent does not here question his liability under Internal Revenue Code § 6672. Brief for Respondents 4.

to collect . . . the taxes," 551 F. 2d, at 1092. It is undisputed here, moreover, that the taxes in question were "collected or withheld" from the corporation's employees and that the taxes, though collected, have not been "paid over" to the Government. It is therefore clear that the § 6672 liability was not imposed for a failure on the part of respondent to collect taxes, but was rather imposed for his failure to pay over taxes that he was required both to collect and to pay over. Under these circumstances, the most natural reading of the statutory language leads to the conclusion that respondent "collected or withheld" the taxes within the meaning of Bankruptcy Act § 17a (1)(e).

We also cannot agree with the Court of Appeals that the "penalty" language of Internal Revenue Code § 6672 is dispositive of the status of respondent's debt under Bankruptcy Act § 17a (1)(e). The funds here involved were unquestionably "taxes" at the time they were "collected or withheld from others." § 17a (1)(e); see IRC §§ 3102 (a), 3402 (a). It is this time period that § 17a (1)(e), with its modification of "taxes" by the phrase "collected or withheld," treats as the relevant one. That the funds due are referred to as a "penalty" when the Government later seeks to recover them does not alter their essential character as taxes for purposes of the Bankruptcy Act, at least in a case in which, as here, the § 6672 liability is predicated on a failure to pay over, rather than a failure initially to collect, the taxes.

## III

The legislative history of Bankruptcy Act § 17a (1) provides additional support for the view that respondent's liability should be held nondischargeable. A principal purpose of the legislation, enacted in 1966 after several years of congressional consideration, was to establish a three-year limitation on the taxes that would be nondischargeable in bankruptcy; under former law, there was no such temporal limitation. See H. R. Rep. No. 372, 88th Cong., 1st Sess., 1–3 (1963) (hereafter

H. R. Rep. No. 372); S. Rep. No. 114, 89th Cong., 1st Sess., 2–3 (1965) (hereafter S. Rep. No. 114). The new section ensured the discharge of most taxes "which became legally due and owing" more than three years preceding bankruptcy. With regard to unpaid withholding taxes, however, the three-year limitation was made inapplicable by the addition of the provision that is today § 17a (1)(e).

This provision was added to the bill to respond to the Treasury Department's position that any discharge of liability for collected withholding taxes was undesirable. The Department's views were expressed in a letter to the Chairman of the House Judiciary Committee from Assistant Secretary of the Treasury Stanley S. Surrey, who indicated that persons other than employer-bankrupts were included within the scope of the Department's

> "concer[n] with the inequity of granting a taxpayer a discharge of his liability for payment of trust fund taxes which he has collected from his employees and the public in general. . . . The Department does not believe that it is equitable or administratively desirable to permit employers *and other persons* who have collected money from third parties to be relieved of their obligation to account for an[d] pay over such money to the Government . . . ." Quoted in H. R. Rep. No. 372, p. 6 (emphasis added).

Treasury's position was further explained in a letter from the same Department official to the Chairman of the Senate Judiciary Committee; the letter emphasized that it was "most undesirable to permit persons who are charged with the responsibility of paying over to the Federal Government moneys collected from third persons to be relieved of their obligations in bankruptcy when they have converted such moneys for their own use." Quoted in S. Rep. No. 114, p. 10.

In response to the Treasury Department's concern, the House Judiciary Committee added an amendment that

became § 17a (1)(e). H. R. Rep. No. 372, p. 1. According to the House Report, the amendment was specifically intended to meet "the objection of Treasury to the discharge of so-called trust fund taxes." *Id.*, at 5. In agreeing to the House amendment, the Senate Committee noted that Treasury's "opposition" to the bill, to the extent it was based on the fact that responsible persons would have been "relieved of their obligations" for unpaid withholding taxes, was eliminated by the provision that became § 17a (1)(e). S. Rep. No. 114, pp. 6, 10.

There is no reason to believe that Congress did not intend to meet Treasury's concerns in their entirety. While the Department may not have focused on the specific question presented here, it left no doubt as to its objection to the discharge of "persons . . . charged with the responsibility of paying over . . . moneys collected from third persons." Letter from Assistant Secretary Surrey to Chairman of Senate Judiciary Committee, *supra.* Respondent without question is such a person, a point essentially conceded here by virtue of the recognition of respondent's liability under Internal Revenue Code § 6672, see *supra,* at 274–275, and n. 9. Because Congress specifically contemplated that those with withholding-tax-payment obligations would remain liable after bankruptcy for their "conver[sion]" of the tax funds to private use, S. Rep. No. 114, p. 10,[10] we must conclude that the liability here involved is not dischargeable in bankruptcy.

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[10] See also Marsh, Triumph or Tragedy? The Bankruptcy Act Amendments of 1966, 42 Wash. L. Rev. 681, 694 (1967):

"It is a common phenomenon of business failure that even an 'honest' businessman, in attempting to salvage a business which appears headed for insolvency, will frequently 'borrow' money of other people without their consent if he can get his hands on it. The one fund which he is almost always able to lay his hands on is the taxes he has withheld and is currently withholding from his employees for the Government."

A recent statement to the same effect can be found in an opinion of the Comptroller General of the United States: "IRS considers delinquencies

Even without these indications of an intent to make nondischargeable the withholding tax obligations of persons in respondent's situation, moreover, Congress' perception of the consequences of corporate bankruptcy makes it most unlikely that the legislature intended § 17a (1)(e) to apply only to the corporation's liability for unpaid withholding taxes. Both the Committee reports and the floor debates contain repeated references to the fact that a corporation "normally ceases to exist upon bankruptcy," H. R. Rep. No. 372, p. 2; see S. Rep. No. 114, p. 2, thereby rendering "uncollectable" the corporation's tax liabilities, 112 Cong. Rec. 13818 (1966) (statement of Sen. Ervin). As one of the bill's principal sponsors observed, corporate dissolution has "the practical effect of discharging all debts including taxes," regardless of statutory declarations of nondischargeability. *Id.*, at 13821 (remarks of Sen. Hruska).[11] In view of this congressional assumption, the interpretation of § 17a (1)(e) adopted by the Court of Appeals is untenable, for the combination of corporate dissolution with the personal bankruptcies of those found liable under Internal Revenue Code § 6672 would leave no person within the corporation obligated to the Government for unpaid withholding taxes. Such a result would be directly inconsistent with Congress' declarations that the amendment which became § 17a (1)(e) met the Treasury Department's

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in the payment of these employment taxes a serious problem. In 1976 [congressional] testimony . . . , IRS officials expressed concern that employers use withheld taxes as low interest loans from the Federal Government." Opinion B–137762 (May 3, 1977), reprinted in 9 CCH 1977 Stand. Fed. Tax Rep. ¶ 6614, p. 71,438.

[11] See also, *e. g.*, 112 Cong. Rec. 13817 (1966) (remarks of Sen. Ervin); *id.*, at 13821 (letter to Senators from Sens. Ervin and Hruska); *id.*, at 13822 (remarks of Sen. Hruska); letter from Under Secretary of Commerce Edward Gudeman, reprinted in S. Rep. No. 114, p. 12; memorandum from W. Randolph Montgomery, Chairman of the National Bankruptcy Conference, reprinted *id.*, at 16; S. Rep. No. 1134, 88th Cong., 2d Sess., 2 (1964); H. R. Rep. No. 735, 86th Cong., 1st Sess., 2 (1959).

concern about ensuring post-bankruptcy liability for these taxes.

## IV

In light of this legislative history, little doubt remains as to the nondischargeability of respondent's liability under § 17a (1)(e). The Court of Appeals did not consider this history, but instead relied on more general policy factors. The court observed that an "inequit[y]" could arise from holding an individual "liable for a tax owed by a corporation" in cases where, because "[t]he corporate liability . . . vastly exceed[s] the individual's present or future resources," his "entire future earnings could be confiscated to compensate for the corporate liability." Such a result, in the court's view, "would contravene the Bankruptcy Act's basic policy of settling a bankrupt's past debts and providing a fresh economic start." 551 F. 2d, at 1092–1093.

However persuasive these considerations might be in a legislative forum, we as judges cannot override the specific policy judgments made by Congress in enacting the statutory provisions with which we are here concerned. The decision to hold an individual "liable for a tax owed by a corporation," even if there is a wide disparity between the corporation's liability and the individual's resources, was made when Internal Revenue Code § 6672 was passed, since it is that section which imposes the liability without regard for the individual's ability to pay.[12] And while it is true that a finding of

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[12] Rather than predicating liability on ability to pay, § 6672 is based on the premise that liability should follow responsibility. See n. 13, *infra*. In a recent survey of IRS practices with regard to § 6672, the Comptroller General of the United States wrote:

"IRS uses the 100-percent penalty only when all other means of securing the delinquent taxes have been exhausted. It is generally used against responsible officials of corporations that have gone out of business . . . . [I]t is IRS policy that the amount of the tax will be collected only once. After the tax liability is satisfied, no collection action is taken on the

nondischargeability prevents a bankrupt from getting an entirely "fresh start," this observation provides little assistance in construing a section expressly designed to make some debts nondischargeable. We are not here concerned with the entire Act's policy, but rather with what Congress intended in § 17a (1) and its subdivision (e). The statutory language and legislative history discussed in Parts II and III, *supra,* demonstrate an intention to make a liability like respondent's nondischargeable.[13]

The Court of Appeals' approach, moreover, would have the effect of allowing a corporation and its officers to escape all liability for unpaid withholding taxes, see *supra,* at 278–279,

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remaining 100-percent penalties." Opinion B–137762, *supra,* n. 10, at 71,438.

[13] Our dissenting Brethren appear uncomfortable with this legislative policy choice, expressing concern about "lifelong liability" being imposed on "a comptroller, accountant, or bookkeeper who reaped none of the fruits of entrepreneurial success." *Post,* at 290, 291. While we should not in any event be led by our sympathy to a result contrary to that intended by Congress, there is here little reason for concern. No corporate officer, regardless of title, can be held liable under Internal Revenue Code § 672 unless his position was sufficiently important that he was "required to collect, truthfully account for, and pay over" withholding taxes and unless he "willfully fail[ed]" to meet one or more of these obligations. In this case, for example, Onofre Sotelo, the chief executive officer exercising actual authority over the corporation's day-to-day affairs, was found liable under the section, while Naomi Sotelo was not, despite the fact that she held the position of corporate secretary. See *supra,* at 270–271, and n. 2.

The dissenting opinion as much as concedes, moreover, that there is no responsible corporate officer who can be said to reap *"none* of the fruits of entrepreneurial success," since all employees are dependent on the corporation for their "continued employment." *Post,* at 291 (emphasis added); see *post,* at 291–292, n. 3. The "continued employment" of a corporate officer is obviously a benefit of considerable significance to that officer and is generally dependent upon the success of the corporate enterprise. Hence an officer has a stake in "the fruits of entrepreneurial success" and, like a shareholder, may be tempted illegally to divert to the corporation those funds withheld from corporate employees for tax purposes.

while leaving liable for such taxes after bankruptcy those individuals who do business in the sole proprietorship or partnership, rather than the corporate, form.[14] In passing § 17a (1), however, Congress was expressly concerned about the fact that the operation of prior law was "unfairly discriminatory against the private individual or the unincorporated small businessman." H. R. Rep. No. 372, p. 2; see S. Rep. No. 114, pp. 2–3. As discussed above, Congress recognized that a bankrupt corporation "dissolves and goes out of business," 112 Cong. Rec. 13817 (1966) (remarks of Sen. Ervin), thereby avoiding IRS tax claims; it was thought inequitable that a sole proprietor or other individual would remain liable after bankruptcy for the same type of claims. See generally sources cited at 278, and n. 11, *supra*. This inequity between a corporate officer and an individual entrepreneur, both of whom have a similar liability to the Government, frequently would turn on nothing more than whether the individual was "sophisticated" enough "to, in effect, incorporate himself." 112 Cong. Rec. 13817 (1966) (remarks of Sen. Ervin).[15] Were we to adopt the Court of Appeals' approach, we would be instituting precisely the kind of "arbitrary discrimination" that § 17a (1) was designed to alleviate. 112 Cong. Rec. 13818 (1966) (statement of Sen. Ervin).[16]

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[14] Such individuals would be liable after bankruptcy for "taxes" which they, as employers, "collected or withheld from others . . . but [did] not pa[y] over." Bankruptcy Act § 17a (1)(e), 11 U. S. C. § 35 (a)(1)(e) (1976 ed.).

[15] Indeed, respondent's business was operated as a sole proprietorship prior to September 1970. See *supra*, at 270–271; Memorandum Opinion of Bankruptcy Court, *supra*, n. 2, at 1.

[16] The dissenting opinion recognizes, *post*, at 285 n. 1, Congress' unquestioned concern about eliminating corporations' "unfair" advantage over individual entrepreneurs. H. R. Rep. No. 372, p. 2; S. Rep. No. 114, pp. 2–3. Elsewhere our Brother REHNQUIST appears to concede that Congress meant "to ameliorate the lot" of only "some bankrupts" when it passed the 1966 amendment to the Bankruptcy Act. *Post*, at 282;

In terms of statutory language and legislative history, then, the liability of respondent under Internal Revenue Code § 6672 must be held nondischargeable under Bankruptcy Act § 17a (1)(e). The judgment of the Court of Appeals is, accordingly,

*Reversed and remanded.*

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, dissenting.

The Government undoubtedly needs the revenues it receives from taxes, but great as that need may be I cannot join the Court's thrice-twisted analysis of this particular statute to gratify it. The issue involved is the dischargeability in the corporate officer's bankruptcy proceedings of taxes which the corporation is obligated to collect and pay over to the Government. In order to conclude that the corporate officer remains liable for this corporate obligation the Court turns to an unlikely source indeed: a 1966 amendment to the Bankruptcy Act, the only apparent purpose of which was to ameliorate the lot of at least some bankrupts, see *infra,* at 284–285, and n. 1. The Court then proceeds to slog its way to its illogical conclusion by reading a proviso obviously intended to *limit* dischargeability of the debts of a bankrupt so as to *expand* that category of debts. It then attempts to bolster this inexplicable interpretation by construing not the

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see *post,* at 285. There is every indication that the 1966 amendment was not intended "to ameliorate the lot" of corporations and their principal officers, at least with regard to taxes collected from employees. And the dissenting opinion has not even attempted to explain how a Congress concerned about "discriminat[ion] against the private individual or the unincorporated small businessman," H. R. Rep. No. 372, p. 2; S. Rep. No. 114, pp. 2–3, could have thought it just to relieve corporate officers of § 6672 liability in bankruptcy, as the dissent's approach would do, while leaving other owners of "small family business[es]," *post,* at 291—those who happen to operate through noncorporate entities—subject to the same kind of liability.

legislation which Congress enacted but a letter from the Assistant Secretary of the Treasury not unnaturally opposing any expansion of the dischargeability in bankruptcy of tax-related liabilities. The net result of this perverse approach to an amendment to the Bankruptcy Act is to make nondischargeable a liability which might well have been dischargeable before Congress stepped in to alleviate some of the hardships resulting from the making of the debts of a bankrupt nondischargeable. In the background of this remarkable decision is § 6672 of the Internal Revenue Code which imposes a "penalty" upon a "person required to collect, truthfully account for, and pay over any tax imposed by this title." 26 U. S. C. § 6672. Perhaps recognizing that this provision not only does not support its conclusion but seriously undermines it, the Court not surprisingly attempts to keep this provision in the background, addressing it only obliquely in a footnote where it summarily concludes, again in a remarkable *tour de force* of linguistics and logic, that a penalty must mean the same thing as a tax. The underlying debt in this case is that of a third person to pay the tax liability of another. I would want far clearer language than can be found in this statute to reach the conclusion that this liability is not dischargeable in the bankruptcy proceedings of that third person. I therefore dissent.

As an initial matter, since § 17a (1)(e) of the Bankruptcy Act is a proviso to § 17a (1), I would have thought that respondent would have to fall within the terms of the latter before it is even appropriate to consider whether he falls within the terms of the former. That is, § 17a first provides that a "discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . ." 11 U. S. C. § 35 (a) (1976 ed.). It then excepts in § 17a (1) through § 17a (8) eight different categories of debts which are *not* to be generally discharged, including "taxes which became legally due and owing by the bankrupt to the United States or to any State

or any subdivision thereof within three years preceding bankruptcy." 11 U. S. C. § 35 (a)(1) (1976 ed.). But this latter exception is itself in turn qualified in § 17a (1)(e): *"Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes . . . (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State . . . but has not paid over . . . ." 11 U. S. C. § 35 (a)(1)(e) (1976 ed.). Thus, the normal reading of § 17a (1) should be to limit the nondischargeability of taxes to only those taxes legally due and owing by the bankrupt *within the three years preceding bankruptcy,* and the subsections of § 17a (1), including § 17a (1) (e), are to be read as an exception to that limitation. That exception provides that certain of the taxes described in § 17a (1) will not be discharged even if more than three years old; they will be nondischargeable without regard to time. Normal statutory construction would thus suggest that the first inquiry should be whether the liability in question *is* a tax legally due and owing by the bankrupt. *Only* if it is, would it become necessary to consider whether it is also a tax collected from others but not paid over.

That this is the correct reading of the statute is further buttressed by the legislative history. All the Committees which reported on the 1966 amendment to § 17a stressed that its central purpose was to enable at least some bankrupts to more nearly achieve the fresh start promised by the Bankruptcy Act. The Senate Committee on Finance, for example, in discussing the purpose of the proposed amendment, agreed with the Committee on the Judiciary "that present law, by denying any discharge of taxes, presents a substantial deterrent to one fundamental policy of the Bankruptcy Act—effective rehabilitation of the bankrupt." S. Rep. No. 999, 89th Cong., 2d Sess., 9 (1966). The Senate Committee went on to suggest slightly different methods from those advanced by the Judiciary Committee to achieve this goal, but its Report, like the

others, leaves no doubt that the central purpose of the amendment was to make the Act more favorable to at least some bankrupts by limiting, with only a few specified exceptions, the nondischargeability of taxes to only those due for the prior three years.

This avowed legislative purpose only heightens the incongruity of the Court's interpretation. The statute's major purpose was to limit the nondischargeability of certain debts. And yet the Court holds today that the enactment of § 17a (1)(e) of that statute results in a nondischargeable debt without regard to whether that debt would have been totally nondischargeable before the passage of § 17a (1)(e)—that is, without the slightest attention to the question of whether it is a tax legally due and owing by the bankrupt within the meaning of § 17a (1). Thus, by passing a statute with a basically beneficent purpose, Congress has, according to the Court, not only made nondischargeable a liability which could potentially run into the hundreds of thousands of dollars but may have worsened, rather than bettered, the lot of the bankrupt.[1]

Finally, even if the language and the history of this statute were less clear, I would hesitate to depart from our long-

[1] The Court may well be correct in its observation that when Congress enacted these amendments it was "concerned about 'discriminat[ion] against the private individual or the unincorporated small businessman,' H. R. Rep. No. 372, p. 2; S. Rep. No. 114, pp. 2–3," *ante*, at 282 n. 16. And this observation in turn may support the conclusion that Congress, with an eye to reducing this supposed discrimination, intended to ameliorate the lot of *only* those individuals who operate through noncorporate entities. But I find absolutely nothing in the legislative history to indicate that Congress *also* intended to reduce this supposed discrimination between those who operate through corporations and those who do not by *affirmatively worsening* the lot of the former. Thus, I still search the Court's opinion in vain for any justification for reading an amendment which was intended to limit the dischargeability of the debts of bankrupts, albeit only a limited class of bankrupts, so as to expand that category of debts with respect to another class of bankrupts.

standing tradition of reading the Bankruptcy Act with an eye to its fundamental purpose—the rehabilitation of bankrupts. This has always led the Court, at least until today, to construe narrowly any exceptions to the general discharge provisions. See, *e. g., Gleason* v. *Thaw,* 236 U. S. 558, 562 (1915). Admittedly § 17a is not "a compassionate section for debtors," *Bruning* v. *United States,* 376 U. S. 358, 361 (1964), but even it must be read consistently with the doctrine of *Gleason, supra.* And I simply cannot see anything in this case which justifies the Court in departing from this tradition by straining to read into the statute an exception to the dischargeability provisions that was not clearly there before this amendment was passed, when the very purpose of the amendment which the Court is now construing was intended to be benevolent, at least from the bankrupt's perspective.

Thus, the initial question which should have been addressed by the Court today is whether the amounts for which respondent is liable are "taxes legally due and owing by the bankrupt." If they are not, then the further question of whether they are nondischargeable in their entirety under § 17a (1)(e) does not even arise. And I see nothing which persuades me that respondent's liability is a "tax" legally due and owing by him. Neither the Government nor the Court points to any section of the Internal Revenue Code which makes a corporate employee liable for the taxes which the corporate employer is required to withhold from the employees' paychecks. Sections 3102, 3402, or 3403 of the Internal Revenue Code certainly cannot be read to do this because by their unmistakable terms they impose a duty and liability only upon an "employer," which a corporate employee, regardless of his rank within the corporate heirarchy, clearly is not.

Neither can § 6672 of the Internal Revenue Code serve the purpose. The liability imposed therein is specifically denominated a "penalty" and, absent any indication to the contrary, Congress is presumed to know the meaning of the words it uses,

especially in highly complex and intricate statutory schemes. Indeed, in another letter sent by Assistant Secretary of Treasury Surrey to the Chairman of the House Committee on the Judiciary when that Committee was considering what eventually became § 17a (1), the following was specifically brought to the Committee's attention:

> "It is further believed by the Department that this bill is intended to discharge not only taxes but also penalties and interest. However, the bill makes reference only to taxes. In this connection, it is pertinent to point out that the U. S. Court of Appeals for the 10th Circuit in the case of *United States* v. *Mighell* (C. A. 10th, 1959) 273 F. 2d 682, held that the word 'taxes' in section 17 of the Bankruptcy Act (11 U. S. C. 35) does not include penalties and, by inference, interest. This apparent ambiguity could cause future litigation." H. R. Rep. No. 687, 89th Cong., 1st Sess., 7 (1965).

And yet Congress did not modify § 17a (1) to include penalties. (I normally would not accord such passing references any weight, but the contrary practice seems today *de rigueur*. *Ante,* at 276–277.)

The history of § 6672 further bears out the notion that this always has been considered by Congress to be a "penalty," and not a "tax." For example, § 1004 of the War Revenue Act of 1917, an early predecessor of § 6672, provided that anyone who failed to make a return required by the Act or otherwise evaded any tax imposed by the Act or failed to collect and pay over any such tax was subject to "a penalty of double the tax evaded" in addition to other penalties, such as a $1,000 fine and imprisonment. 40 Stat. 325. Indeed, even today the subchapter heading under which § 6672 is found is titled "Assessable Penalties."

Finally, the very existence of § 6672 bears testimony to the fact that there is no other section of federal law which makes the employee charged with the duty of collecting withholding

taxes liable for those "taxes." If there were such a section, § 6672 would be unnecessary. But it is the absence of such other provision which is dispositive of this case in my opinion.[2]

Instead of adopting the course which seems compelled by the structure and history of § 17a (1), however, the Court has chosen today a very different course. It does give a passing nod to the question of whether one might have to satisfy § 17a (1) before reaching § 17a (1)(e), but then dismisses it in rather desultory fashion in a footnote, noting only that "there is no reason to believe that any 'taxes' made nondischargeable by the specific terms of § 17a (1)(e) would not also be 'taxes' as that word is used more generally in § 17a (1)." *Ante,* at 274 n. 8. The Court then goes on to interpret § 17a (1) in light of its limiting provision, § 17a (1)(e), instead of the other way around, a *tour de force* which compels admiration if not agreement. The critical, and indeed only, question for the Court then becomes whether respondent was "required" to collect and pay over the taxes. Finding that respondent was so required within the meaning of § 6672 of

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[2] There are lower court cases to the contrary. See cases cited *ante,* at 273 n. 6. This line of authority can be traced to *Botta* v. *Scanlon,* 314 F. 2d 392 (CA2 1963), however, where the plaintiff sought an injunction against the Internal Revenue Service to restrain the collection of the penalty imposed under § 6672. The court denied the injunction on the authority of the Anti-Injunction Act, which provides in pertinent part: "[N]o suit for the purpose of restraining the . . . collection of any tax shall be maintained in any court . . . ." 26 U. S. C. § 7421 (a). The court held that this section applied to § 6672 penalties as well as taxes because § 6671 (a) of the Code provides: "[A]ny reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties . . . provided by this subchapter." 26 U. S. C. § 6671 (a). But while there is clear statutory authority for treating a § 6672 penalty as a tax for purposes of administering the Internal Revenue Code, there is no authority for treating such a penalty as a tax for purposes of the Bankruptcy Act. Indeed, the fact that Congress clearly recognized the need to specify that a penalty was a tax for purposes of the Internal Revenue Code strongly suggests that its failure to so specify with respect to the Bankruptcy Act was not an inadvertent omission.

the IRC, the Court concludes he falls within the language of § 17a (1)(e) and that is the end of the matter.

The justifications for engaging in this unorthodox method of statutory construction are supposedly threefold, but are, in my opinion, far from satisfactory. First, the Court asserts that respondent's liability is clearly encompassed within the plain terms of § 17a (1)(e). But as indicated above such liability is encompassed within the terms of § 17a (1)(e) only if we ignore both the structure and purpose of the statute and proceed directly to § 17a (1)(e) without considering whether § 17a (1) is first satisfied.

The Court next relies on certain concerns expressed by the Treasury Department in a letter from the Assistant Secretary to the Chairman of the House Judiciary Committee. No doubt § 17a (1)(e) was included partially in response to that letter. But there is certainly nothing contained in that or any other provision to indicate that in adding § 17a (1)(e) Congress also intended to extend the concept of "taxes" in § 17a (1) to include the 100% penalty imposed by § 6672 or to encompass a corporate official's responsibility (presumably under the corporate charter and state law) to collect and pay over federal withholding taxes. The Court emphasizes the phrase "and other persons" in the letter and then observes that "[t]here is no reason to believe that Congress did not intend to meet Treasury's concerns in their entirety." *Ante,* at 277. But emphasizing that phrase to the exclusion of the rest of the letter and the language and structure of the statute places a weight upon that phrase which it cannot bear. Indeed, one could reach a much different conclusion by simply emphasizing other parts of the letter, such as the Department's

> "concer[n] with the inequity of granting a taxpayer a discharge of his liability for payment of trust fund taxes which he has collected from *his* employees . . . ." (Emphasis supplied.) H. R. Rep. No. 372, 88th Cong., 1st Sess., 6 (1963).

And even the Court recognizes that "the Department may not have focused on the specific question presented here . . . ." *Ante,* at 277. But most importantly, when interpreting the Bankruptcy Act in general, with its fundamental goal of rehabilitating bankrupts, and when interpreting this provision in particular, with its avowed purpose of furthering that basic goal of the Act, the Court is not entitled to make the presumption that it does. Rather, in the absence of a clear congressional expression to the contrary, there is every reason to believe that Congress did not intend to make nondischargeable in the employee's bankruptcy proceedings a tax which is legally due and owing not by the bankrupt employee, but by the employer.

Finally, the Court emphasizes the fact that corporations often dissolve upon bankruptcy, thus making all corporate debts dischargeable in fact if not in form. *Ante,* at 278. Thus, reasons the Court, it is "most unlikely that the legislature intended § 17a (1)(e) to apply only to the corporation's liability for unpaid withholding taxes." *Ibid.* But clearly Congress, had it really intended to alleviate the problem to which the Court refers, could and hopefully would have used language more suited to the purpose. It is also incongruous to impute the intent to Congress to make this particular liability nondischargeable as to the employee because the corporation will dissolve upon bankruptcy and yet to make no other corporate liability nondischargeable as to the employee even though dissolution of the corporation is just as likely in those cases. Such a statutory scheme not only seems at odds with the basic notion of what a corporation is all about, *i. e.,* limited liability, but it also imposes a potentially crushing liability on corporate officials—a liability that is nondischargeable in its entirety and virtually in perpetuity. I certainly would not impute such an intent to Congress without a much clearer statutory directive.

While the lifelong liability which the Court imposes today

falls on the shoulders of one who was the chief executive officer of a small family business, there is unfortunately nothing in the Court's reasoning which would prevent the same liability from surviving bankruptcy in the case of a comptroller, accountant, or bookkeeper who reaped none of the fruits of entrepreneurial success other than continued employment in the corporation, and in some cases possibly not even that, see n. 3, *infra*. So long as the Government in its zeal for the collection of the revenue may persuade a bankruptcy court that a corporate employee comes within the Court's Delphic construction of 26 U. S. C. § 6672 and 11 U. S. C. § 35 (a)(1)(e) (1976 ed.), such a person will be denied the "fresh start" which Congress clearly intended to enhance by the 1966 amendments to the Bankruptcy Act.[3] Before the Government

[3] The Court's lack of concern for the potentially crushing liability it imposes on bankrupts is nowhere more evident than at 280 n. 13, *ante*, where the Court notes that "[n]o corporate officer, regardless of title, can be held liable under Internal Revenue Code § 6672 unless his position was sufficiently important that he was 'required to collect, truthfully account for, and pay over' withholding taxes and unless he 'willfully fail[ed]' to meet one or more of these obligations." While I certainly do not dispute that observation, it does absolutely nothing to allay my fear that this liability can be imposed on a variety of salaried corporate employees who enjoy none of the fruits of entrepreneurial success other than their continued employment. The Federal Reporter is replete with cases in which just such individuals have been held liable under § 6672. See, *e. g.*, *Adams* v. *United States*, 504 F. 2d 73 (CA7 1974) (the court held that an employee of a lending institution, who had been placed in charge of a corporation to which the institution had loaned money, could be liable under § 6672 for failure to pay over withholding taxes collected from the corporation's employees, regardless of the fact that he held no stock or other interest in the corporation); *Mueller* v. *Nixon*, 470 F. 2d 1348 (CA6 1972) (same); *Turner* v. *United States*, 423 F. 2d 448 (CA9 1970) (employee of a bank, who had been made an officer of a company as a condition of a loan made to the company, could be liable under § 6672 for failure to pay over withholding taxes collected from the company's employees). Indeed, it appears to be agreed by the Courts of Appeals that a person need not be a shareholder to be held accountable as a responsible person under § 6672. See,

may randomly sweep such persons into a net whereby they are denied a discharge, not of their own tax liability but of a penalty imposed upon them for failure to pay over taxes which had been withheld by another, I would at least insist on a statute which seemed to point in that direction, rather than in the opposite one.

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*e. g., Anderson* v. *United States,* 561 F. 2d 162, 165 (CA8 1977); *Hartman* v. *United States,* 538 F. 2d 1336, 1340 (CA8 1976); *Haffa* v. *United States,* 516 F. 2d 931, 935–936 (CA7 1975).

Syllabus

# PINKUS, DBA ROSSLYN NEWS CO. ET AL. *v.* UNITED STATES

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

No. 77–39. Argued February 28, 1978—Decided May 23, 1978

Petitioner was convicted of mailing obscene materials and advertising brochures for such materials in violation of 18 U. S. C. § 1461 (1976 ed.), and the Court of Appeals affirmed. Since the materials were mailed prior to 1973, he was tried under the standards of *Roth* v. *United States,* 354 U. S. 476, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, rather than under those of *Miller* v. *California,* 413 U. S. 15. He claims that the trial court's instructions to the jury were improper because they included children and sensitive persons within the definition of the community by whose standards obscenity was to be judged; charged that members of deviant sexual groups could be considered in determining whether the materials appealed to prurient interest in sex; and also charged that pandering could be considered in determining whether the materials were obscene. *Held:*

1. Children are not to be included as part of the "community" as that term relates to the "obscene materials" proscribed by § 1461, and hence it was error to instruct the jury that children are part of the relevant community. A jury conscientiously striving to define such community, the "average person," by whose standards obscenity is to be judged, might very well reach a much lower "average" when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults. Pp. 296–298.

2. However, inclusion of "sensitive persons" in the charge advising the jury of whom the community consists was not error. In the context of this case, the community includes all adults who compose it, and a jury can consider them all in determining the relevant community standards, the vice being in focusing upon the most susceptible or sensitive members rather than in merely including them, as the trial court did, along with all others in the community. Pp. 298–301.

3. Nor was the instruction as to deviant groups improper. Nothing prevents a court from giving an instruction on prurient appeal to such groups as part of an instruction pertaining to appeal to the average person when the evidence, as here, would support such a charge. Pp. 301–303.

4. The pandering instruction, which permitted the jury to consider the touting descriptions in the advertising brochures, along with the materials themselves, to determine whether the materials were intended to appeal to the recipient's prurient interest in sex, *i. e.*, whether they were "commercial exploitation of erotica solely for the sake of their prurient appeal," *Ginzburg* v. *United States,* 383 U. S. 463, 466, was proper in light of the evidence. To aid a jury in determining whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. Pp. 303–304.

551 F. 2d 1155, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 305. BRENNAN, J., filed a separate opinion, in which STEWART and MARSHALL, JJ., joined, *post,* p. 305. POWELL, J., filed a dissenting opinion, *post,* p. 306.

*Bernard A. Berkman* argued the cause for petitioner. With him on the briefs was *Larry S. Gordon.*

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

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

We granted certiorari in this case to decide whether the court's instructions in a trial for mailing obscene materials prior to 1973, and therefore tried under the *Roth-Memoirs* standards, could properly include children and sensitive persons within the definition of the community by whose standards obscenity is to be judged. We are also asked to determine whether the evidence supported a charge that members of deviant sexual groups may be considered in determining whether the materials appealed to prurient interest in sex; whether a charge of pandering was proper in light of the evidence; and whether comparison evidence proffered by petitioner should have been admitted on the issue of contemporary community standards.

Petitioner was convicted after a jury trial in United States District Court on 11 counts, charging that he had mailed obscene materials and advertising brochures for obscene materials in violation of 18 U. S. C. § 1461 (1976 ed.).[1] On appeal, his conviction was reversed on the grounds that the instructions to the jury defining obscenity had been cast under the standards established in *Miller* v. *California,* 413 U. S. 15 (1973), although the offenses charged occurred in 1971 when the standards announced in *Roth* v. *United States,* 354 U. S. 476 (1957), and particularized in *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966), were applicable. Accordingly, the case was remanded to the District Court for a new trial under the standards controlling in 1971. No. 73–2900 (CA9 Feb. 5, 1975, rehearing denied May 13, 1975); see *Marks* v. *United States,* 430 U. S. 188 (1977).

On retrial in 1976, petitioner was again convicted on the same 11 counts. He was sentenced to terms of four years' imprisonment on each count, the terms to be served concurrently, and fined $500 on each count, for a total fine of $5,500. The Court of Appeals affirmed. 551 F. 2d 1155 (CA9 1977).

I

The evidence presented by the Government in its case in chief consisted of materials mailed by the petitioner accompanied by a stipulation of facts which, among other things, recited that petitioner, knowing the contents of the mailings,[2] had "voluntarily and intentionally" used the mails on 11 occasions to deliver brochures illustrating sex books, maga-

[1] Title 18 U. S. C. § 1461 (1976 ed.) declares, in essence, that obscene materials are nonmailable and the Postal Service may not be used to convey them. It provides for fines and imprisonment upon conviction for its violation.

[2] Two of the 11 paragraphs of the stipulation, corresponding to the evidence relating to the 11 charges, do not recite that petitioner knew the contents of those two particular mailings. Neither party has made an issue of this apparent oversight and we believe it is without significance.

zines, and films, and to deliver a sex magazine (one count) and a sex film (one count), with the intention that these were for the personal use of the recipients. From the stipulation and the record, it appears undisputed that the recipients were adults who resided both within and without the State of California. Because of the basis of our disposition of this case, it is unnecessary for us to review the contents of the exhibits in detail.

The defense consisted of expert testimony and surveys offered to demonstrate that the materials did not appeal to prurient interest, were not in conflict with community standards, and had redeeming social value. Two films were proffered by the defense for the stated purpose of demonstrating that comparable material had received wide box office acceptance, thus demonstrating that the materials covered by the indictment were not obscene and complied with community standards.

As a rebuttal witness, the Government presented an expert who testified as to what some of the exhibits depicted and that in his opinion they appealed to the prurient interest of the average person and to that of members of particular deviant groups.

II

In this Court, as in the Court of Appeals, petitioner challenges four parts of the jury instructions and the trial court's rejection of the comparison films.

A. *Instruction as to Children*

Petitioner challenges that part of the jury instruction which read:

> "In determining community standards, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and *children,* from all walks of life." (Emphasis added.)

The Court of Appeals concluded that the inclusion of children was "unnecessary" and that it would "prefer that children be excluded from the court's [jury] instruction until the Supreme Court clearly indicates that inclusion is proper." 551 F. 2d, at 1158. It correctly noted that this Court had been ambivalent on this point, having sustained the conviction in *Roth, supra,* where the instruction included children, and having intimated later in *Ginzburg* v. *United States,* 383 U. S. 463, 465 n. 3 (1966), that it did not necessarily approve the inclusion of "children" as part of the community instruction.[3]

Reviewing the charge as a whole under the traditional standard of review, cogent arguments can be made that the inclusion of children was harmless error, see *Hamling* v. *United States,* 418 U. S. 87, 107 (1974); however, the courts, the bar, and the public are entitled to greater clarity than is offered by the ambiguous comment in *Ginzburg* on this score. Since this is a federal prosecution under an Act of Congress, we elect to take this occasion to make clear that children are not to be included for these purposes as part of the "community" as that term relates to the "obscene materials" proscribed by 18 U. S. C. § 1461 (1976 ed.). Cf. *Cupp* v. *Naughten,* 414 U. S. 141, 146 (1973).

Earlier in the same Term in which *Roth* was decided, the Court had reversed a conviction under a state statute which

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[3] Indeed, confusion over this issue might have been foreseen in light of Mr. Justice Harlan's separate opinion in *Roth* and its companion case, *Alberts* v. *California.* He observed that the correctness of the charge in *Roth* was not before the Court, but must be assumed correct. It was the constitutionality of the statute which was being decided. 354 U. S., at 499 n. 1, 507 n. 8. Simultaneously, he said that he "agree[d] with the Court, of course, that the books must be judged as a whole and in relation to the normal *adult* reader," *id.,* at 502 (emphasis added; referring to *Alberts*), but the "charge [in *Roth*] fail[ed] to measure up to the standards which I understand the Court to approve . . . ." *Id.,* at 507.

The trial judge tried to accommodate petitioner's demand that he be tried under *Roth-Memoirs,* and gave almost precisely the same instruction in this case as had apparently been approved in *Roth.*

made criminal the dissemination of a book "found to have a potentially deleterious influence on youth." *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957). The statute was invalidated because its "incidence . . . is to reduce the adult population . . . to reading only what is fit for children." *Ibid.* The instruction given here, when read as a whole, did not have an effect so drastic as the *Butler* statute. But it may well be that a jury conscientiously striving to define the relevant community of persons, the "average person," *Smith* v. *United States,* 431 U. S. 291, 304 (1977), by whose standards obscenity is to be judged, would reach a much lower "average" when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults. Cf. *Ginsberg* v. *New York,* 390 U. S. 629 (1968). There was no evidence that children were the intended recipients of the materials at issue here, or that petitioner had reason to know children were likely to receive the materials. Indeed, an affirmative representation was made that children were not involved in this case.[4] We therefore conclude it was error to instruct the jury that they were a part of the relevant community, and accordingly the conviction cannot stand.

B. *Instruction as to Sensitive Persons*

It does not follow, however, as petitioner contends, that the inclusion of "sensitive persons" in the charge advising the jury of whom the community consists was error. The District Court's charge was:

"Thus the brochures, magazines and film are not to be

[4] During *voir dire,* in response to a prospective juror's question, and after a bench conference with counsel for both sides, the District Judge said, "[I]n no way does [the case] involve any distribution of material of any kind to children, and that the evidence will, that there will be a stipulation even that there has been no exposure of any of this evidence to children."

Though the stipulation did not specifically state no children were involved, it could be so inferred upon reading it. The Government does not contend otherwise.

> judged on the basis of your personal opinion. Nor are they to be judged by their effect on a particularly *sensitive or insensitive* person or group in the community. You are to judge these materials by the standard of the hypothetical average person in the community, but in determining this average standard you must include the *sensitive and the insensitive,* in other words, you must include everyone in the community." (Emphasis added.)

Petitioner's reliance on passages from *Miller,* 413 U. S., at 33, and *Smith* v. *United States, supra,* at 304, for the proposition that inclusion of sensitive persons in the relevant community was error is misplaced. In *Miller* we said,

> "[T]he primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See *Roth* v. *United States, supra,* at 489."

This statement was essentially repeated in *Smith:*

> "[T]he Court has held that § 1461 embodies a requirement that local rather than national standards should be applied. *Hamling* v. *United States, supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. *Hamling* v. *United States, supra; Miller* v. *California, supra; Roth* v. *United States,* 354 U. S. 476 (1957). Both of these substantive limitations are passed on to the jury in the form of instructions." (Footnote omitted.)

The point of these passages was to emphasize what was an issue central to *Roth,* that "judging obscenity by the effect of isolated passages upon the most susceptible persons, might well

encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U. S., at 489.[5] But nothing in those opinions suggests that "sensitive" and "insensitive" persons, however defined, are to be excluded from the community as a whole for the purpose of deciding if materials are obscene. In the narrow and limited context of this case, the community includes all adults who constitute it, and a jury can consider them all in determining relevant community standards. The vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials, not in including them along with all others in the community. See *Mishkin* v. *New York,* 383 U. S. 502, 508–509 (1966).

Petitioner relies also on *Hamling* v. *United States,* 418 U. S. 87 (1974), to support his argument. Like *Miller* and *Smith, supra,* though, *Hamling* merely restated the by now familiar rule that jurors are not to base their decision about the materials on their "personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." 418 U. S., at 107. It is clear the trial court did not instruct the jury to focus on sensitive persons or groups. It explicitly said the jury should not use sensitive persons as a standard, and emphasized that in determining the "average person" standard the jury "must include the sensitive and the insensitive, in other words . . . everyone in the community."

The difficulty of framing charges in this area is well recognized. But the term "average person" as used in this charge means what it usually means, and is no less clear than "reasonable person" used for generations in other contexts. Cf. *Hamling* v. *United States, supra,* at 104–105. Cautionary instructions to avoid subjective personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical "aver-

[5] This rejected standard for judging obscenity was first articulated in *The Queen* v. *Hicklin,* [1868] L. R. 3 Q. B. 360.

age person" he is to determine the collective view of the community, as best as it can be done.

Simon E. Sobeloff, then Solicitor General, later Chief Judge of the United States Court of Appeals for the Fourth Circuit, very aptly stated the dilemma:

> "Is the so-called definition of negligence really a definition? What could be fuzzier than the instruction to the jury that negligence is a failure to observe that care which would be observed by a 'reasonable man'—a chimerical creature conjured up to give an aura of definiteness where definiteness is not possible. . . .
>
> "Every man is likely to think of himself as the happy exemplification of 'the reasonable man'; and so the standard he adopts in order to fulfill the law's prescription will resemble himself, or what he thinks he is, or what he thinks he should be, even if he is not. All these shifts and variations of his personal norm will find reflection in the verdict. The whole business is necessarily equivocal. This we recognize, but *we are reconciled to the impossibility of discovering any form of words that will ring with perfect clarity and be automatically self-executing. Alas, there is no magic push-button in this or in other branches of the law.*" (Emphasis added.) [6]

However one defines "sensitive" or "insensitive" persons, they are part of the community. The contention that the instruction was erroneous because it included sensitive persons is therefore without merit.

C. *Instruction as to Deviant Groups*

Challenge is made to the inclusion of "members of a deviant sexual group" in the charge which recited:

> "The first test to be applied, in determining whether a given picture is obscene, is whether the predominant

[6] Sobeloff, Insanity and the Criminal Law: From McNaghten to Durham, and Beyond, 41 A. B. A. J. 793, 796 (1955).

> theme or purpose of the picture, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group at the time of mailing.
>
> . . . . .
>
> "In applying this test, the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person, or a member of a deviant sexual group at the time they received the picture."

Examination of some of the materials could lead to the reasonable conclusion that their prurient appeal would be more acute to persons of deviant persuasions, but it is equally clear they were intended to arouse the prurient interest of any reader or observer. Nothing prevents a court from giving an instruction on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person when the evidence, as here, would support such a charge. See *Hamling* v. *United States, supra,* at 128–130. Many of the exhibits depicted aberrant sexual activities. These depictions were generally provided along with or as a part of the materials which apparently were thought likely to appeal to the prurient interest in sex of nondeviant persons. One of the mailings even provided a list of deviant sexual groups which the recipient was asked to mark to indicate interest in receiving the type of materials thought appealing to that particular group.

Whether materials are obscene generally can be decided by viewing them; expert testimony is not necessary. *Ginzburg* v. *United States,* 383 U. S., at 465; *Hamling* v. *United States, supra,* at 100; see *Jacobellis* v. *Ohio,* 378 U. S. 184, 197 (1964) (STEWART, J., concurring). But petitioner claims that to sup-

port an instruction on appeal to the prurient interest of deviants, the prosecution must come forward with evidence to guide the jury in its deliberations, since jurors cannot be presumed to know the reaction of such groups to stimuli as they would that of the average person. Concededly, in the past we have "reserve[d] judgment . . . on the extreme case . . . where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the [particular] prurient interest." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 56 n. 6 (1973). But here we are not presented with that "extreme" case because the Government did in fact present expert testimony on rebuttal which, when combined with the exhibits themselves, sufficiently guided the jury. This instruction, therefore, was acceptable.

D. *Instruction as to Pandering*

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Ginzburg* v. *United States, supra,* at 467, citing *Roth* v. *United States,* 354 U. S., at 495–496 (Warren, C. J., concurring). We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. *Splawn* v. *California,* 431 U. S. 595, 598 (1977); *Hamling* v. *United States,* 418 U. S., at 130. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation.

In this case the trial judge gave a pandering instruction to which the jury could advert if it found "this to be a close case" under the three part *Roth-Memoirs* test. This was not a so-called finding instruction which removed the jury's discretion; rather it permitted the jury to consider the touting descriptions along with the materials themselves to determine whether they were intended to appeal to the recipient's

prurient interest in sex, whether they were "commercial exploitation of erotica solely for the sake of their prurient appeal," *Ginzburg, supra,* at 466, if indeed the evidence admitted of any other purpose. And while it is true the Government offered no extensive evidence of the methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients, the evidence was sufficient to trigger the *Ginzburg* pandering instruction.

E. *Exclusion of Comparison Evidence*

At trial petitioner proffered, and the trial judge rejected, two films which were said to have had considerable popular and commercial success when displayed in Los Angeles and elsewhere around the country. He proffered this assertedly comparable material as evidence that materials as explicit as his had secured community tolerance. Apparently the theory was that display of such movies had altered the level of community tolerance.

On appeal the Court of Appeals began an inquiry into whether the comparison evidence should have been admitted. It held that exclusion of the evidence was proper as to the printed materials; but it abandoned the inquiry when, in reliance on the so-called concurrent-sentence doctrine, it concluded that even if the comparison evidence had been improperly excluded as to the count involving petitioner's film, the sentence would not be affected. It therefore exercised its discretion not to pass on the admissibility of the comparison evidence and hence did not review the conviction on the film count.[7]

However, the sentences on the 11 counts were not in fact fully concurrent; petitioner's 11 prison terms of four years each were concurrent but the $500 fines on each of the counts

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[7] The validity of the concurrent-sentence doctrine is not challenged here. See *Benton* v. *Maryland,* 395 U. S. 784, 791 (1969).

were cumulative, totaling $5,500, so that a separate fine of $500 was imposed on the film count. Petitioner thus had at least a pecuniary interest in securing review of his conviction on each of the counts.

In light of our disposition of the case the issue of admissibility of the comparison evidence is not before us, and we leave it to the Court of Appeals to decide whether or to what extent such evidence is relevant to a jury's evaluation of community standards.

Accordingly, the case is remanded to the Court of Appeals for further consideration consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE STEVENS, concurring.

If the Court were prepared to re-examine this area of the law, I would vote to reverse this conviction with instructions to dismiss the indictment. See *Marks* v. *United States,* 430 U. S. 188, 198 (STEVENS, J., concurring and dissenting); *Smith* v. *United States,* 431 U. S. 291, 311 (STEVENS, J., dissenting); *Splawn* v. *California,* 431 U. S. 595, 602 (STEVENS, J., dissenting); *Ward* v. *Illinois,* 431 U. S. 767, 777 (STEVENS, J., dissenting). But my views are not now the law. The opinion that THE CHIEF JUSTICE has written is faithful to the cases on which it relies. For that reason, and because a fifth vote is necessary to dispose of this case, I join his opinion.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join.

I concur in the judgment reversing petitioner's conviction. However, because I adhere to the view that this statute is "'clearly overbroad and unconstitutional on its face,'" see, *e. g., Millican* v. *United States,* 418 U. S. 947, 948 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito,* 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting), I would

not remand for further consideration but rather with direction to dismiss the indictment.

MR. JUSTICE POWELL, dissenting.

Although I agree with the Court that in a federal prosecution the instruction as to children should not have been given, on the facts of this case I view the error as harmless beyond a reasonable doubt. I therefore would affirm the judgment of the Court of Appeals.

Syllabus

# MARSHALL, SECRETARY OF LABOR, ET AL. *v.* BARLOW'S, INC.

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

No. 76–1143. Argued January 9, 1978—Decided May 23, 1978

Appellee brought this action to obtain injunctive relief against a warrantless inspection of its business premises pursuant to § 8 (a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. A three-judge District Court ruled in appellee's favor, concluding, in reliance on *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529, and *See* v. *Seattle,* 387 U. S. 541, 543, that the Fourth Amendment required a warrant for the type of search involved and that the statutory authorization for warrantless inspections was unconstitutional. *Held:* The inspection without a warrant or its equivalent pursuant to § 8 (a) of OSHA violated the Fourth Amendment. Pp. 311–325.

(a) The rule that warrantless searches are generally unreasonable applies to commercial premises as well as homes. *Camara* v. *Municipal Court, supra,* and *See* v. *Seattle, supra.* Pp. 311–313.

(b) Though an exception to the search warrant requirement has been recognized for "closely regulated" industries "long subject to close supervision and inspection," *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72, 74, 77, that exception does not apply simply because the business is in interstate commerce. Pp. 313–314.

(c) Nor does an employer's necessary utilization of employees in his operation mean that he has opened areas where the employees alone are permitted to the warrantless scrutiny of Government agents. Pp. 314–315.

(d) Insofar as experience to date indicates, requiring warrants to make OSHA inspections will impose no serious burdens on the inspection system or the courts. The advantages of surprise through the opportunity of inspecting without prior notice will not be lost if, after entry to an inspector is refused, an *ex parte* warrant can be obtained, facilitating an inspector's reappearance at the premises without further notice; and appellant Secretary's entitlement to a warrant will not depend on his demonstrating probable cause to believe that conditions on the premises

violate OSHA but merely that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Pp. 315–321.

(e) Requiring a warrant for OSHA inspections does not mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are unconstitutional, as the reasonableness of those provisions depends upon the specific enforcement needs and privacy guarantees of each statute. Pp. 321–322.

424 F. Supp. 437, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 325. BRENNAN, J., took no part in the consideration or decision of the case.

*Solicitor General McCree* argued the cause for appellants. With him on the briefs were *Deputy Solicitor General Wallace, Stuart A. Smith,* and *Michael H. Levin.*

*John L. Runft* argued the cause for appellee. With him on the brief was *Iver J. Longeteig.**

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**Warren Spannaus,* Attorney General of Minnesota, *Richard B. Allyn,* Solicitor General, and *Steven M. Gunn* and *Richard A. Lockridge,* Special Assistant Attorneys General, filed a brief for 11 States as *amici curiae* urging reversal, joined by the Attorneys General for their respective States as follows: *Frank J. Kelley* of Michigan, *William F. Hyland* of New Jerssey, *Toney Anaya* of New Mexico, *Rufus Edmisten* of North Carolina, *Robert P. Kane* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *M. Jerome Diamond* of Vermont, *Anthony F. Troy* of Virginia, and *V. Frank Mendicino* of Wyoming. Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Michael R. Sherwood* for the Sierra Club et al.

Briefs of *amici curiae* urging affirmance were filed by *Wayne L. Kidwell,* Attorney General of Idaho, and *Guy G. Hurlbutt,* Chief Deputy Attorney General, *Robert B. Hansen,* Attorney General of Utah, and *Michael L. Deamer,* Deputy Attorney General, for the States of Idaho and Utah; by *Allen A. Lauterbach* for the American Farm Bureau Federation; by *Robert T. Thompson, Lawrence Kraus,* and *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States; by *Anthony J. Obadal, Steven R.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 8 (a) of the Occupational Safety and Health Act of 1970 (OSHA or Act) [1] empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the Act.

On the morning of September 11, 1975, an OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho. The president and general manager, Ferrol G. "Bill" Barlow, was on hand; and the OSHA inspector, after showing his credentials,[2] informed Mr. Barlow that he wished to con-

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*Semler, Stephen C. Yohay, Leonard J. Theberge, Edward H. Dowd,* and *James Watt* for the Mountain States Legal Foundation; by *James D. McKevitt* for the National Federation of Independent Business; and by *Ronald A. Zumbrun, John H. Findley, Albert Ferri, Jr.,* and *W. Hugh O'Riordan* for the Pacific Legal Foundation.

Briefs of *amici curiae* were filed by *Robert E. Rader, Jr.,* for the American Conservative Union; and by *David Goldberger, Barbara O'Toole, McNeill Stokes, Ira J. Smotherman, Jr.,* and *David Rudenstine* for the Roger Baldwin Foundation, Inc., of the American Civil Liberties Union, Illinois Division.

[1] "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." 84 Stat. 1598, 29 U. S. C. § 657 (a).

[2] This is required by the Act. See n. 1, *supra.*

duct a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector answered no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business; Mr. Barlow's response was to inquire whether the inspector had a search warrant. The inspector had none. Thereupon, Mr. Barlow refused the inspector admission to the employee area of his business. He said he was relying on his rights as guaranteed by the Fourth Amendment of the United States Constitution.

Three months later, the Secretary petitioned the United States District Court for the District of Idaho to issue an order compelling Mr. Barlow to admit the inspector.[3] The requested order was issued on December 30, 1975, and was presented to Mr. Barlow on January 5, 1976. Mr. Barlow again refused admission, and he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA. A three-judge court was convened. On December 30, 1976, it ruled in Mr. Barlow's favor. 424 F. Supp. 437. Concluding that *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529 (1967), and *See* v. *Seattle,* 387 U. S. 541, 543 (1967), controlled this case, the court held that the Fourth Amendment required a warrant for the type of search involved here[4] and that the statutory authorization for warrantless inspections was unconstitutional. An injunction against searches or inspections pursuant to § 8 (a) was entered. The Secretary appealed, challenging the judgment, and we noted probable jurisdiction. 430 U. S. 964.

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[3] A regulation of the Secretary, 29 CFR § 1903.4 (1977), requires an inspector to seek compulsory process if an employer refuses a requested search. See *infra,* at 317, and n. 12.

[4] No *res judicata* bar arose against Mr. Barlow from the December 30, 1975, order authorizing a search, because the earlier decision reserved the constitutional issue. See 424 F. Supp. 437.

## I

The Secretary urges that warrantless inspections to enforce OSHA are reasonable within the meaning of the Fourth Amendment. Among other things, he relies on § 8 (a) of the Act, 29 U. S. C. § 657 (a), which authorizes inspection of business premises without a warrant and which the Secretary urges represents a congressional construction of the Fourth Amendment that the courts should not reject. Regrettably, we are unable to agree.

The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." [5] The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution.[6] The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.[7] "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States* v. *Chadwick*, 433 U. S. 1, 7–8 (1977).

[5] H. Commager, Documents of American History 104 (8th ed. 1968).

[6] See, *e. g.*, Dickerson, Writs of Assistance as a Cause of the Revolution in The Era of the American Revolution 40 (R. Morris ed. 1939).

[7] The Stamp Act of 1765, the Townshend Revenue Act of 1767, and the tea tax of 1773 are notable examples. See Commager, *supra*, n. 5, at 53, 63. For commentary, see 1 S. Morison, H. Commager, & W. Leuchtenburg, The Growth of the American Republic 143, 149, 159 (1969).

See also *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 355 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In *Camara* v. *Municipal Court, supra,* at 528–529, we held:

> "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

On the same day, we also ruled:

> "As we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *See* v. *Seattle, supra,* at 543.

These same cases also held that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. *Ibid.* The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara, supra,* at 528. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or

regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, *See* v. *Seattle* would require a warrant to conduct the inspection sought in this case.

The Secretary urges that an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]," *United States* v. *Biswell,* 406 U. S. 311, 316 (1972), and for "closely regulated" industries "long subject to close supervision and inspection." *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72, 74, 77 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz* v. *United States,* 389 U. S. 347, 351–352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

Industries such as these fall within the "certain carefully defined classes of cases," referenced in *Camara,* 387 U. S., at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 271 (1973).

The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule. Invoking

the Walsh-Healey Act of 1936, 41 U. S. C. § 35 *et seq.*, the Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

The Secretary also attempts to derive support for a *Colonnade-Biswell*-type exception by drawing analogies from the field of labor law. In *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945), this Court upheld the rights of employees to solicit for a union during nonworking time where efficiency was not compromised. By opening up his property to employees, the employer had yielded so much of his private property rights as to allow those employees to exercise § 7 rights under the National Labor Relations Act. But this Court also held that the private property rights of an owner prevailed over the intrusion of nonemployee organizers, even in nonworking areas of the plant and during nonworking hours. *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent.[8] Employees

[8] The Government has asked that Mr. Barlow be ordered to show cause why he should not be held in contempt for refusing to honor the inspection order, and its position is that the OSHA inspector is now entitled to enter at once, over Mr. Barlow's objection.

are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well.[9] The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.[10]

## II

The Secretary nevertheless stoutly argues that the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and its regulations already protect as much privacy as a warrant would. The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," *Camara* v. *Municipal*

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[9] Cf. *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974).

[10] The automobile-search cases cited by the Secretary are even less helpful to his position than the labor cases. The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents. *Cady* v. *Dombrowski*, 413 U. S. 433, 441–442 (1973); see also *Chambers* v. *Maroney*, 399 U. S. 42, 48–51 (1970). Even so, probable cause has not been abandoned as a requirement for stopping and searching an automobile.

*Court,* 387 U. S., at 539, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the Warrant Clause would give "full recognition to the competing public and private interests here at stake." *Ibid.*

The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued *ex parte* and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should *ex parte* warrants issued in advance become standard practice.

We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal.[11] In those cases where an owner does insist

[11] We recognize that today's holding itself might have an impact on

on a warrant, the Secretary argues that inspection efficiency will be impeded by the advance notice and delay. The Act's penalty provisions for giving advance notice of a search, 29 U. S. C. § 666 (f), and the Secretary's own regulations, 29 CFR § 1903.6 (1977), indicate that surprise searches are indeed contemplated. However, the Secretary has also promulgated a regulation providing that upon refusal to permit an inspector to enter the property or to complete his inspection, the inspector shall attempt to ascertain the reasons for the refusal and report to his superior, who shall "promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977).[12] The regulation represents a choice to pro-

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whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be.

[12] It is true, as the Secretary asserts, that § 8 (a) of the Act, 29 U. S. C. § 657 (a), purports to authorize inspections without warrant; but it is also true that it does not forbid the Secretary from proceeding to inspect only by warrant or other process. The Secretary has broad authority to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this chapter, "including rules and regulations dealing with the inspection of an employer's establishment." § 8 (g)(2), 29 U. S. C. § 657 (g)(2). The regulations with respect to inspections are contained in 29 CFR Part 1903 (1977). Section 1903.4, referred to in the text, provides as follows:

"Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Direc-

ceed by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse while the inspector obtains the necessary process.[13] Indeed, the kind of process sought in this case and apparently anticipated by the regulation provides notice to the business operator.[14]

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tor and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

When his representative was refused admission by Mr. Barlow, the Secretary proceeded in federal court to enforce his right to enter and inspect, as conferred by 29 U. S. C. § 657.

[13] A change in the language of the Compliance Operations Manual for OSHA inspectors supports the inference that, whatever the Act's administrators might have thought at the start, it was eventually concluded that enforcement efficiency would not be jeopardized by permitting employers to refuse entry, at least until the inspector obtained compulsory process. The 1972 Manual included a section specifically directed to obtaining "warrants," and one provision of that section dealt with *ex parte* warrants:

"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted." Dept. of Labor, OSHA Compliance Operations Manual V–7 (Jan. 1972).

The latest available manual, incorporating changes as of November 1977, deletes this provision, leaving only the details for obtaining "compulsory process" *after* an employer has refused entry. Dept. of Labor, OSHA Field Operations Manual, Vol. V, pp. V–4–V–5. In its present form, the Secretary's regulation appears to permit establishment owners to insist on "process"; and hence their refusal to permit entry would fall short of criminal conduct within the meaning of 18 U. S. C. §§ 111 and 1114 (1976 ed.), which make it a crime forcibly to impede, intimidate, or interfere with federal officials, including OSHA inspectors, while engaged in or on account of the performance of their official duties.

[14] The proceeding was instituted by filing an "Application for Affirmative Order to Grant Entry and for an Order to show cause why such affirmative

If this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it. Nor is it immediately

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order should not issue." The District Court issued the order to show cause, the matter was argued, and an order then issued authorizing the inspection and enjoining interference by Barlow's. The following is the order issued by the District Court:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and Health Administration, through its duly designated representative or representatives, are entitled to entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and may go upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (29 U. S. C. 651, *et seq.*), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 C. F. R., Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employees of Barlow's Inc., pursuant to Section 8 (e) of that Act; that Barlow's Inc., its agents, representatives,

apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an *ex parte* warrant and to reappear at the premises without further notice to the establishment being inspected.[15]

Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation [16] but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara*

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officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby ordered and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith."

[15] Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

[16] Section 8 (f)(1), 29 U. S. C. § 657 (f)(1), provides that employees or their representatives may give written notice to the Secretary of what they believe to be violations of safety or health standards and may request an inspection. If the Secretary then determines that "there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable." The statute thus purports to authorize a warrantless inspection in these circumstances.

v. *Municipal Court,* 387 U. S., at 538. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.[17] We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply. Some statutes already envision resort to federal-court enforcement when entry is refused, employing specific language in some cases [18] and general language in others.[19] In short, we base

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[17] The Secretary, Brief for Petitioner 9 n. 7, states that the Barlow inspection was not based on an employee complaint but was a "general schedule" investigation. "Such general inspections," he explains, "now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U. S. Department of Labor, Occupational Safety and Health Administration, Field Operations Manual, *supra,* 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976)."

[18] The Federal Metal and Nonmetallic Mine Safety Act provides: "Whenever an operator . . . refuses to permit the inspection or investigation of any mine which is subject to this chapter . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the

[*Footnote 19 is on p. 322*]

today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes.

Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed.

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Secretary in the district court of the United States for the district . . . ." 30 U. S. C. § 733 (a). "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court . . . whenever such operator or his agent . . . refuses to permit the inspection of the mine . . . . Each court shall have jurisdiction to provide such relief as may be appropriate." 30 U. S. C. § 818. Another example is the Clean Air Act, which grants federal district courts jurisdiction "to require compliance" with the Administrator of the Environmental Protection Agency's attempt to inspect under 42 U. S. C. § 7414 (1976 ed., Supp. I), when the Administrator has commenced "a civil action" for injunctive relief or to recover a penalty. 42 U. S. C. § 7413 (b) (4) (1976 ed., Supp. I).

[19] Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts are vested with jurisdiction "specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter." 7 U. S. C. § 2146 (c) (1976 ed.). Similar provisions are included in other agricultural inspection Acts; see, *e. g.*, 21 U. S. C. § 674 (meat product inspection); 21 U. S. C. § 1050 (egg product inspection). The Internal Revenue Code, whose excise tax provisions requiring inspections of businesses are cited by the Secretary, provides: "The district courts . . . shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and such other orders and processes, and to render such . . . decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U. S. C. § 7402 (a). For gasoline inspections, federal district courts are granted jurisdiction to restrain violations and enforce standards (one of which, 49 U. S. C. § 1677, requires gas transporters to permit entry or inspection). The owner is to be afforded the opportunity for notice and response in most cases, but "failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief [by the district court]." 49 U. S. C. § 1679 (a).

The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.[20] Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.[21] These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to

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[20] The application for the inspection order filed by the Secretary in this case represented that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8 (a) of the Act." The program was not described, however, or any facts presented that would indicate why an inspection of Barlow's establishment was within the program. The order that issued concluded generally that the inspection authorized was "part of an inspection program designed to assure compliance with the Act."

[21] Section 8 (a) of the Act, as set forth in 29 U. S. C. § 657 (a), provides that "[i]n order to carry out the purposes of this chapter" the Secretary may enter any establishment, area, work place or environment "where work is performed by an employee of an employer" and "inspect and investigate" any such place of employment and all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and . . . question privately any such employer, owner, operator, agent, or employee." Inspections are to be carried out "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." The Secretary's regulations echo the statutory language in these respects. 29 CFR § 1903.3 (1977). They also provide that inspectors are to explain the nature and purpose of the inspection and to "indicate generally the scope of the inspection." 29 CFR § 1903.7 (a) (1977). Environmental samples and photographs are authorized, 29 CFR § 1903.7 (b) (1977), and inspections are to be performed so as "to preclude unreasonable disruption of the operations of the employer's establishment." 29 CFR § 1903.7 (d) (1977). The order that issued in this case reflected much of the foregoing statutory and regulatory language.

inspections for compliance with regulatory statutes.[22] *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *See* v. *Seattle,* 387 U. S. 541 (1967). We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained.

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[22] Delineating the scope of a search with some care is particularly important where documents are involved. Section 8 (c) of the Act, 29 U. S. C. § 657 (c), provides that an employer must "make, keep and preserve, and make available to the Secretary [of Labor] or to the Secretary of Health, Education and Welfare" such records regarding his activities relating to OSHA as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute or for developing information regarding the causes and prevention of occupational accidents and illnesses. Regulations requiring employers to maintain records of and to make periodic reports on "work-related deaths, injuries and illnesses" are also contemplated, as are rules requiring accurate records of employee exposures to potential toxic materials and harmful physical agents.

In describing the scope of the warrantless inspection authorized by the statute, § 8 (a) does not expressly include any *records* among those items or things that may be examined, and § 8 (c) merely provides that the employer is to "make available" his pertinent records and to make periodic reports.

The Secretary's regulation, 29 CFR § 1903.3 (1977), however, expressly includes among the inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection." Further, § 1903.7 requires inspectors to indicate generally "the records specified in § 1903.3 which they wish to review" but "such designations of records shall not preclude access to additional records specified in § 1903.3." It is the Secretary's position, which we reject, that an inspection of documents of this scope may be effected without a warrant.

The order that issued in this case included among the objects and things to be inspected "all other things therein (including but not limited to records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's, Inc. is complying with . . ." the OSHA regulations.

## III

We hold that Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent.[23] The judgment of the District Court is therefore affirmed.

*So ordered.*

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

MR. JUSTICE STEVENS, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

Congress enacted the Occupational Safety and Health Act to safeguard employees against hazards in the work areas of businesses subject to the Act. To ensure compliance, Congress authorized the Secretary of Labor to conduct routine, nonconsensual inspections. Today the Court holds that the Fourth Amendment prohibits such inspections without a warrant. The Court also holds that the constitutionally required warrant may be issued without any showing of probable cause. I disagree with both of these holdings.

The Fourth Amendment contains two separate Clauses, each

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[23] The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to regulations and judicial process that satisfy the Fourth Amendment. The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by § 8 (a). He has expressly declined to rely on 29 CFR § 1903.4 (1977) and upon the order obtained in this case. Tr. of Oral Arg. 19. Of course, if the process obtained here, or obtained in other cases under revised regulations, would satisfy the Fourth Amendment, there would be no occasion for enjoining the inspections authorized by § 8 (a).

flatly prohibiting a category of governmental conduct. The first Clause states that the right to be free from unreasonable searches "shall not be violated";[1] the second unequivocally prohibits the issuance of warrants except "upon probable cause."[2] In this case the ultimate question is whether the category of warrantless searches authorized by the statute is "unreasonable" within the meaning of the first Clause.

In cases involving the investigation of criminal activity, the Court has held that the reasonableness of a search generally depends upon whether it was conducted pursuant to a valid warrant. See, *e. g., Coolidge* v. *New Hampshire,* 403 U. S. 443. There is, however, also a category of searches which are reasonable within the meaning of the first Clause even though the probable-cause requirement of the Warrant Clause cannot be satisfied. See *United States* v. *Martinez-Fuerte,* 428 U. S. 543; *Terry* v. *Ohio,* 392 U. S. 1; *South Dakota* v. *Opperman,* 428 U. S. 364; *United States* v. *Biswell,* 406 U. S. 311. The regulatory inspection program challenged in this case, in my judgment, falls within this category.

## I

The warrant requirement is linked "textually . . . to the probable-cause concept" in the Warrant Clause. *South Dakota* v. *Opperman, supra,* at 370 n. 5. The routine OSHA inspections are, by definition, not based on cause to believe there is a violation on the premises to be inspected. Hence, if the inspections were measured against the requirements of the Warrant Clause, they would be automatically and unequivocally unreasonable.

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[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

[2] "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Because of the acknowledged importance and reasonableness of routine inspections in the enforcement of federal regulatory statutes such as OSHA, the Court recognizes that requiring full compliance with the Warrant Clause would invalidate all such inspection programs. Yet, rather than simply analyzing such programs under the "Reasonableness" Clause of the Fourth Amendment, the Court holds the OSHA program invalid under the Warrant Clause and then avoids a blanket prohibition on all routine, regulatory inspections by relying on the notion that the "probable cause" requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of "searches" outweighs the intrusion on interests protected by the Fourth Amendment.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment—"the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England." [3] This preconstitutional history includes the controversy in England over the issuance of general warrants to aid enforcement of the seditious libel laws and the colonial experience with writs of assistance issued to facilitate collection of the various import duties imposed by Parliament. The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the Fourth Amendment.

> "[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from

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[3] J. Landynski, Search and Seizure and the Supreme Court 19 (1966).

looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ." [4]

Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially developed, warrant-preference scheme.

Fidelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment. If the Court were correct in its view that such inspections, if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant"—to use Mr. Justice Clark's characteristically expressive term—without any true showing of particularized probable cause would not be sufficient to validate them.[5]

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[4] T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

[5] *See* v. *Seattle,* 387 U. S. 541, 547 (Clark, J., dissenting).

## II

Even if a warrant issued without probable cause were faithful to the Warrant Clause, I could not accept the Court's holding that the Government's inspection program is constitutionally unreasonable because it fails to require such a warrant procedure. In determining whether a warrant is a necessary safeguard in a given class of cases, "the Court has weighed the public interest against the Fourth Amendment interest of the individual . . . ." *United States* v. *Martinez-Fuerte,* 428 U. S., at 555. Several considerations persuade me that this balance should be struck in favor of the routine inspections authorized by Congress.

Congress has determined that regulation and supervision of safety in the workplace furthers an important public interest and that the power to conduct warrantless searches is necessary to accomplish the safety goals of the legislation. In assessing the public interest side of the Fourth Amendment balance, however, the Court today substitutes its judgment for that of Congress on the question of what inspection authority is needed to effectuate the purposes of the Act. The Court states that if surprise is truly an important ingredient of an effective, representative inspection program, it can be retained by obtaining *ex parte* warrants in advance. The Court assures the Secretary that this will not unduly burden enforcement resources because most employers will consent to inspection.

The Court's analysis does not persuade me that Congress' determination that the warrantless-inspection power as a necessary adjunct of the exercise of the regulatory power is unreasonable. It was surely not unreasonable to conclude that the rate at which employers deny entry to inspectors would increase if covered businesses, which may have safety violations on their premises, have a right to deny warrantless entry to a compliance inspector. The Court is correct that this problem could be avoided by requiring inspectors to obtain a warrant prior to every inspection visit. But the adoption of

such a practice undercuts the Court's explanation of why a warrant requirement would not create undue enforcement problems. For, even if it were true that many employers would not exercise their right to demand a warrant, it would provide little solace to those charged with administration of OSHA; faced with an increase in the rate of refusals and the added costs generated by futile trips to inspection sites where entry is denied, officials may be compelled to adopt a general practice of obtaining warrants in advance. While the Court's prediction of the effect a warrant requirement would have on the behavior of covered employers may turn out to be accurate, its judgment is essentially empirical. On such an issue, I would defer to Congress' judgment regarding the importance of a warrantless-search power to the OSHA enforcement scheme.

The Court also appears uncomfortable with the notion of second-guessing Congress and the Secretary on the question of how the substantive goals of OSHA can best be achieved. Thus, the Court offers an alternative explanation for its refusal to accept the legislative judgment. We are told that, in any event, the Secretary, who is charged with enforcement of the Act, has indicated that inspections without delay are not essential to the enforcement scheme. The Court bases this conclusion on a regulation prescribing the administrative response when a compliance inspector is denied entry. It provides: "The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977). The Court views this regulation as an admission by the Secretary that no enforcement problem is generated by permitting employers to deny entry and delaying the inspection until a warrant has been obtained. I disagree. The regulation was promulgated against the background of a statutory right to immediate entry, of which covered employers are presumably

aware and which Congress and the Secretary obviously thought would keep denials of entry to a minimum. In these circumstances, it was surely not unreasonable for the Secretary to adopt an orderly procedure for dealing with what he believed would be the occasional denial of entry. The regulation does not imply a judgment by the Secretary that delay caused by numerous denials of entry would be administratively acceptable.

Even if a warrant requirement does not "frustrate" the legislative purpose, the Court has no authority to impose an additional burden on the Secretary unless that burden is required to protect the employer's Fourth Amendment interests.[6] The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause. But this purpose is not served by the newfangled inspection warrant. As the Court acknowledges, the inspector's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. . . . For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based . . . on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Ante,* at 320. To obtain a warrant, the inspector need only show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived

[6] When it passed OSHA, Congress was cognizant of the fact that in light of the enormity of the enforcement task "the number of inspections which it would be desirable to have made will undoubtedly for an unforeseeable period, exceed the capacity of the inspection force . . . ." Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess., 152 (Comm. Print 1971).

from neutral sources . . . ." *Ante,* at 321. Thus, the only question for the magistrate's consideration is whether the contemplated inspection deviates from an inspection schedule drawn up by higher level agency officials.

Unlike the traditional warrant, the inspection warrant provides no protection against the search itself for employers who the Government has no reason to suspect are violating OSHA regulations. The Court plainly accepts the proposition that random health and safety inspections are reasonable. It does not question Congress' determination that the public interest in workplaces free from health and safety hazards outweighs the employer's desire to conduct his business only in the presence of permittees, except in those rare instances when the Government has probable cause to suspect that the premises harbor a violation of the law.

What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform the employer that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him that the person demanding entry is an authorized inspector. *Camara* v. *Municipal Court,* 387 U. S. 523, 532. An examination of these functions in the OSHA context reveals that the inspection warrant adds little to the protections already afforded by the statute and pertinent regulations, and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential.

The inspection warrant is supposed to assure the employer that the inspection is in fact routine, and that the inspector has not improperly departed from the program of representative inspections established by responsible officials. But to the extent that harassment inspections would be reduced by the necessity of obtaining a warrant, the Secretary's present enforcement scheme would have precisely the same effect.

The representative inspections are conducted " 'in accordance with criteria based upon accident experience and the number of employees exposed in particular industries.' " *Ante,* at 321 n. 17. If, under the present scheme, entry to covered premises is denied, the inspector can gain entry only by informing his administrative superiors of the refusal and seeking a court order requiring the employer to submit to the inspection. The inspector who would like to conduct a nonroutine search is just as likely to be deterred by the prospect of informing his superiors of his intention and of making false representations to the court when he seeks compulsory process as by the prospect of having to make bad-faith representations in an *ex parte* warrant proceeding.

The other two asserted purposes of the administrative warrant are also adequately achieved under the existing scheme. If the employer has doubts about the official status of the inspector, he is given adequate opportunity to reassure himself in this regard before permitting entry. The OSHA inspector's statutory right to enter the premises is conditioned upon the presentation of appropriate credentials. 29 U. S. C. § 657 (a)(1). These credentials state the inspector's name, identify him as an OSHA compliance officer, and contain his photograph and signature. If the employer still has doubts, he may make a toll-free call to verify the inspector's authority, *Usery* v. *Godfrey Brake & Supply Service, Inc.,* 545 F. 2d 52, 54 (CA8 1976), or simply deny entry and await the presentation of a court order.

The warrant is not needed to inform the employer of the lawful limits of an OSHA inspection. The statute expressly provides that the inspector may enter all areas in a covered business "where work is performed by an employee of an employer," 29 U. S. C. § 657 (a)(1), "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . all pertinent conditions, structures, machines, appa-

ratus, devices, equipment, and materials therein . . . ." 29 U. S. C. § 657 (a)(2). See also 29 CFR § 1903 (1977). While it is true that the inspection power granted by Congress is broad, the warrant procedure required by the Court does not purport to restrict this power but simply to ensure that the employer is apprised of its scope. Since both the statute and the pertinent regulations perform this informational function, a warrant is superfluous.

Requiring the inspection warrant, therefore, adds little in the way of protection to that already provided under the existing enforcement scheme. In these circumstances, the warrant is essentially a formality. In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the Fourth Amendment, require formalities which merely place an additional strain on already overtaxed federal resources.

Congress, like this Court, has an obligation to obey the mandate of the Fourth Amendment. In the past the Court "has been particularly sensitive to the Amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches." *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 290 (WHITE, J., dissenting). In *United States* v. *Martinez-Fuerte,* 428 U. S. 543, for example, respondents challenged the routine stopping of vehicles to check for aliens at permanent checkpoints located away from the border. The checkpoints were established pursuant to statutory authority and their location and operation were governed by administrative criteria. The Court rejected respondents' argument that the constitutional reasonableness of the location and operation of the fixed checkpoints should be reviewed in a *Camara* warrant proceeding. The Court observed that the reassuring purposes of the inspection warrant were adequately served by the visible manifestations of authority exhibited at the fixed checkpoints.

Moreover, although the location and method of operation of the fixed checkpoints were deemed critical to the constitutional reasonableness of the challenged stops, the Court did not require Border Patrol officials to obtain a warrant based on a showing that the checkpoints were located and operated in accordance with administrative standards. Indeed, the Court observed that "[t]he choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance with statutes and regulations that may be applicable . . . [and] [m]any incidents of checkpoint operation also must be committed to the discretion of such officials." 428 U. S., at 559–560, n. 13. The Court had no difficulty assuming that those officials responsible for allocating limited enforcement resources would be "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." *Id.*, at 559.

The Court's recognition of Congress' role in balancing the public interest advanced by various regulatory statutes and the private interest in being free from arbitrary governmental intrusion has not been limited to situations in which, for example, Congress is exercising its special power to exclude aliens. Until today, we have not rejected a congressional judgment concerning the reasonableness of a category of regulatory inspections of commercial premises.[7] While businesses are unquestionably entitled to Fourth Amendment protection, we have "recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."

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[7] The Court's rejection of a legislative judgment regarding the reasonableness of the OSHA inspection program is especially puzzling in light of recent decisions finding law enforcement practices constitutionally reasonable, even though those practices involved significantly more individual discretion than the OSHA program. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1; *Adams* v. *Williams*, 407 U. S. 143; *Cady* v. *Dombrowski*, 413 U. S. 433; *South Dakota* v. *Opperman*, 428 U. S. 364.

*G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 353. Thus, in *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72, the Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Id.,* at 76. And in *United States* v. *Biswell,* 406 U. S. 311, the Court sustained the authority to conduct warrantless searches of firearm dealers under the Gun Control Act of 1968 primarily on the basis of the reasonableness of the congressional evaluation of the interests at stake.[8]

The Court, however, concludes that the deference accorded Congress in *Biswell* and *Colonnade* should be limited to situations where the evils addressed by the regulatory statute are peculiar to a specific industry and that industry is one which has long been subject to Government regulation. The Court reasons that only in those situations can it be said that a person who engages in business will be aware of and consent to routine, regulatory inspections. I cannot agree that the respect due the congressional judgment should be so narrowly confined.

In the first place, the longevity of a regulatory program does not, in my judgment, have any bearing on the reasonableness of routine inspections necessary to achieve adequate enforcement of that program. Congress' conception of what constitute

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[8] The Court held:

"In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends . . . on the authority of a valid statute.

. . . . . .

"We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." 406 U. S., at 315, 317.

urgent federal interests need not remain static. The recent vintage of public and congressional awareness of the dangers posed by health and safety hazards in the workplace is not a basis for according less respect to the considered judgment of Congress. Indeed, in *Biswell,* the Court upheld an inspection program authorized by a regulatory statute enacted in 1968. The Court there noted that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably" an urgent federal interest. 406 U. S., at 315. Thus, the critical fact is the congressional determination that federal regulation would further significant public interests, not the date that determination was made.

In the second place, I see no basis for the Court's conclusion that a congressional determination that a category of regulatory inspections is reasonable need only be respected when Congress is legislating on an industry-by-industry basis. The pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. Thus, in *Biswell,* if Congress had authorized inspections of all commercial premises as a means of restricting the illegal traffic in firearms, the Court would have found the inspection program unreasonable; the power to inspect was upheld because it was tailored to the subject matter of Congress' proper exercise of regulatory power. Similarly, OSHA is directed at health and safety hazards in the workplace, and the inspection power granted the Secretary extends only to those areas where such hazards are likely to be found.

Finally, the Court would distinguish the respect accorded Congress' judgment in *Colonnade* and *Biswell* on the ground that businesses engaged in the liquor and firearms industry " 'accept the burdens as well as the benefits of their trade . . . .' "

*Ante,* at 313. In the Court's view, such businesses consent to the restrictions placed upon them, while it would be fiction to conclude that a businessman subject to OSHA consented to routine safety inspections. In fact, however, consent is fictional in both contexts. Here, as well as in *Biswell,* businesses are required to be aware of and comply with regulations governing their business activities. In both situations, the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

The case before us involves an attempt to conduct a warrantless search of the working area of an electrical and plumbing contractor. The statute authorizes such an inspection during reasonable hours. The inspection is limited to those areas over which Congress has exercised its proper legislative authority.[9] The area is also one to which employees

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[9] What the Court actually decided in *Camara* v. *Municipal Court,* 387 U. S. 523, and *See* v. *Seattle,* 387 U. S. 541, does not require the result it reaches today. *Camara* involved a residence, rather than a business establishment; although the Fourth Amendment extends its protection to commercial buildings, the central importance of protecting residential privacy is manifest. The building involved in *See* was, of course, a commercial establishment, but a holding that a locked warehouse may not be entered pursuant to a general authorization to "enter all buildings and premises, except the interior of dwellings, as often as may be necessary," 387 U. S., at 541, need not be extended to cover more carefully delineated grants of authority. My view that the *See* holding should be narrowly confined is influenced by my favorable opinion of the dissent written by Mr. Justice Clark and joined by Justices Harlan and STEWART. As *Colonnade* and *Biswell* demonstrate, however, the doctrine of *stare decisis* does not compel the Court to extend those cases to govern today's holding.

have regular access without any suggestion that the work performed or the equipment used has any special claim to confidentiality.[10] Congress has determined that industrial safety is an urgent federal interest requiring regulation and supervision, and further, that warrantless inspections are necessary to accomplish the safety goals of the legislation. While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power.[11]

I respectfully dissent.

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[10] The Act and pertinent regulation provide protection for any trade secrets of the employer. 29 U. S. C. §§ 664–665; 29 CFR § 1903.9 (1977).

[11] The decision today renders presumptively invalid numerous inspection provisions in federal regulatory statutes. *E. g.*, 30 U. S. C. § 813 (Federal Coal Mine Health and Safety Act of 1969); 30 U. S. C. §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act); 21 U. S. C. § 603 (inspection of meat and food products). That some of these provisions apply only to a single industry, as noted above, does not alter this fact. And the fact that some "envision resort to federal-court enforcement when entry is refused" is also irrelevant since the OSHA inspection program invalidated here requires compulsory process when a compliance inspector has been denied entry. *Ante*, at 321.

# UNITED STATES *v.* MAURO ET AL.

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

No. 76–1596. Argued February 27, 1978—Decided May 23, 1978*

After respondents in No. 76–1596, who at the time were serving state sentences in New York, were indicted on federal charges in the United States District Court for the Eastern District of New York, that court issued writs of habeas corpus *ad prosequendum* directing the state prison wardens to produce respondents in court. Subsequently, following their arraignments, respondents were retained in federal custody in New York City, but after trial dates had been set, they were returned to state prison. Respondents then moved for dismissal of their indictments on the ground that the United States, by returning them to state custody without first trying them on the federal charges, violated Art. IV (e) of the Interstate Agreement on Detainers (Agreement), which requires the dismissal of an indictment against a prisoner who is obtained by a receiving State ("State" being defined by Art. II (a) to include the United States) if he is returned to his original place of imprisonment without first being tried on the indictment underlying the detainer and request by which custody of the prisoner was secured. The District Court granted the motion, and the Court of Appeals affirmed. In No. 77–52, after being arrested in Illinois on federal charges and being turned over to Illinois authorities for extradition to Massachusetts on unrelated state charges, respondent requested a speedy trial on the federal charges. After he was transferred to Massachusetts, federal officials lodged a detainer against him with state prison authorities. Subsequently, following his conviction on the state charges, respondent was indicted on the federal charges in the United States District Court for the Southern District of New York and was produced from Massachusetts for arraignment before that court pursuant to a writ of habeas corpus *ad prosequendum*. Thereafter, at his own request respondent was returned to the Massachusetts prison to await the federal trial, which was subsequently postponed several times. When the Government moved to postpone the trial for the third time, respondent moved for dismissal of the indictment on the ground that he had been denied his right to a

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*Together with No. 77–52, *United States* v. *Ford*, also on certiorari to the same court.

speedy trial, alleging that the detainer was causing him to be denied certain privileges at the state prison. Respondent's motion was denied, and the Government secured his presence for trial from the state prison by means of a writ of habeas corpus *ad prosequendum*. At the beginning of his trial, respondent again moved unsuccessfully for dismissal of the indictment on speedy trial grounds, and thereafter was convicted. On appeal, he argued that his indictment should have been dismissed because, *inter alia*, he was not tried within 120 days of his initial arrival in the Southern District of New York in violation of Art. IV (c) of the Agreement. The Court of Appeals agreed that Art. IV (c) had been violated and reversed and remanded for dismissal of the indictment as required by Art. V (c), holding that the writ of habeas corpus *ad prosequendum* utilized to bring respondent to federal court was a "written request for temporary custody" within the meaning of Art. IV (a) of the Agreement required to be filed by the receiving State with the sending State in order to obtain temporary custody of a prisoner. *Held:*

1. As indicated by the statute itself as well as its legislative history, the United States is a party to the Agreement as both a sending and a receiving State, and the fact that the United States already had the writ of habeas corpus *ad prosequendum* as a means of obtaining prisoners at the time the Agreement was enacted does not show that Congress could not have intended to join the United States as a receiving State. Pp. 353–356.

2. A writ of habeas corpus *ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal charges, is not a detainer within the meaning of the Agreement and thus does not trigger the application of the Agreement. Therefore, because in No. 76–1596 the Government never filed a detainer against respondents, the Agreement never became applicable so as to bind the Government to its provisions, and the indictments should not have been dismissed. Pp. 357–361.

(a) The role and functioning of the writ of habeas corpus *ad prosequendum* to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in state custody, are rooted in history and bear little resemblance to the typical detainer that activates the Agreement. Unlike such a writ issued by a federal district court, a detainer may be lodged against a prisoner on the initiative of a prosecutor or law enforcement officer, and, rather than requiring the prisoner's immediate presence as does such a writ, merely puts the officials of the prison in which the prisoner is incarcerated on notice that he is wanted in another jurisdiction for trial, further action being

necessary by the receiving State in order to obtain the prisoner. Pp. 357–359.

(b) The concerns expressed by the drafters of the Agreement and by the Congress that enacted it demonstrate that a writ of habeas corpus *ad prosequendum* was not intended to be included within the definition of "detainer" as used in the Agreement. Pp. 359–361.

3. The United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum,* and hence in No. 77–52 the indictment was properly dismissed because the Government violated Art. IV (c) by not trying respondent within 120 days of his arrival in federal court. Pp. 361–365.

(a) A writ of habeas corpus *ad prosequendum* constitutes a "written request for temporary custody" within the meaning of Art. IV (a) of the Agreement. Because at the point when a detainer is lodged the policies underlying the Agreement to encourage the expeditious disposition of charges against a prisoner subject to a detainer and to provide cooperative procedures among member States to facilitate such disposition are fully implicated, there is no reason to give an unduly restrictive meaning to the term "written request for temporary custody." Whether the Government presents the prison authorities in the sending State with a piece of paper labeled "request for temporary custody" or with a writ of habeas corpus *ad prosequendum* demanding the prisoner's presence in federal court, the United States is able to obtain temporary custody of the prisoner, and the fact that the prisoner is brought before the court pursuant to such a writ in no way reduces the need for prompt disposition of the charges underlying the detainer. Pp. 361–364.

(b) The failure of the respondent in No. 77–52 to invoke the Agreement in specific terms in his speedy trial motions before the District Court did not result in a waiver of his claim that the Government violated Art. IV (c), since the record shows that from the time he was arrested respondent persistently requested that he be given a speedy trial, such requests being sufficient to put the Government and the District Court on notice of the substance of his claim. Pp. 364–365.

No. 76–1596, 544 F. 2d 588, reversed and remanded; No. 77–52, 550 F. 2d 732, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment in No. 76–1596 and dissenting in No. 77–52, in which BURGER, C. J., joined, *post,* p. 365.

*Deputy Solicitor General Frey* argued the cause for the United States in both cases. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Civiletti, H. Bartow Farr III, Jerome M. Feit,* and *Elliott Schulder.*

*Kevin G. Ross* argued the cause and filed a brief for respondents, *pro hac vice,* in No. 76–1596. *David J. Gottlieb* argued the cause for respondent, *pro hac vice,* in No. 77–52. With him on the brief were *William E. Hellerstein* and *Phylis Skloot Bamberger.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1970 Congress enacted the Interstate Agreement on Detainers Act, 18 U. S. C. App., pp. 1395–1398 (1976 ed.), joining the United States and the District of Columbia as parties to the Interstate Agreement on Detainers (Agreement).[1] The Agreement, which has also been enacted by 46 States, is designed "to encourage the expeditious and orderly disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Art. I. It prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction. In either case, however, the provisions of the Agreement are triggered only when a "detainer" is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner; to obtain

[1] The Interstate Agreement on Detainers Act contains eight sections. Section 2 sets forth the Agreement as adopted by the United States and by other member jurisdictions. Provisions of the Agreement will be referred to herein by their original article numbers, as set forth in § 2 of the enactment of Congress.

temporary custody, the receiving State must also file an appropriate "request" with the sending State. The present cases concern the scope of the United States' obligations under the Agreement, and in particular pose the question whether a writ of habeas corpus *ad prosequendum,* used by the United States to secure the presence in federal court of state prisoners, may be considered either a "detainer" or a "request" within the meaning of the Agreement.

## I

### A

Respondents in No. 76–1596, Mauro and Fusco, were indicted for criminal contempt in the United States District Court for the Eastern District of New York on November 3, 1975.[2] At the time of their indictments, both men were serving state sentences at New York correctional facilities.[3] On November 5, 1975, the District Court issued separate writs of habeas corpus *ad prosequendum,* directing the wardens of the prisons where Mauro and Fusco were incarcerated to produce them before the District Court on November 19, 1975. Mauro and Fusco were arraigned in the District Court on November 24, 1975, at which time they both entered pleas of not guilty. Following their arraignment, they were retained in federal custody at the Metropolitan Correctional Center in New York City.

On December 2, 1975, respondents again appeared before the District Court, this time for the purpose of setting a trial date. After trial dates had been established, the court, noting

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[2] The criminal contempt charges arose out of the refusal of Mauro and Fusco, despite a judicial grant of immunity, to testify before a federal grand jury investigating violations of the federal drug laws.

[3] Mauro was serving a sentence of three years to life imprisonment at the Auburn, N. Y., Correctional Facility, and Fusco was serving a sentence of one year to life imprisonment at the Clinton Correctional Facility in Dannemora, N. Y.

the overcrowded conditions at the federal Metropolitan Correctional Center, directed that Mauro and Fusco be returned to their respective state prisons until shortly before their trials.

On April 26, 1976, Mauro was again removed from state prison and taken before the District Court pursuant to a writ of habeas corpus *ad prosequendum,* as was Fusco on April 29, 1976. Prior to these appearances, respondents had moved for dismissal of their indictments on the ground that the United States had violated Art. IV (e) of the Agreement by returning them to state custody without first trying them on the federal indictment.[4] The District Court granted their motions to dismiss the indictments, finding that the Agreement governed their removal from state custody by means of the writs of habeas corpus *ad prosequendum* and that the Government had violated the provisions of Art. IV (e).

On appeal a divided panel of the Court of Appeals for the Second Circuit affirmed the dismissals of respondents' indictments. 544 F. 2d 588 (1976). It held that a "writ of *habeas corpus ad prosequendum* is a detainer entitling the state inmate to the protection provided in Article IV [of the Agreement] and specifically to a trial before his return to the state institution." *Id.,* at 592 (footnote omitted). To hold that a writ of habeas corpus *ad prosequendum* was not a detainer within the meaning of the Agreement, reasoned the court, would permit the United States to circumvent its obligations under the Agreement.

B

Respondent in No. 77–52, Ford, was arrested in Chicago on October 11, 1973, on two federal warrants.[5] Shortly after his

[4] Article IV (e) requires the dismissal of the indictment against a prisoner who is obtained by a receiving State if he is returned to his original place of imprisonment without first being tried on the indictment underlying the detainer and request by which custody of the prisoner was secured. See *infra,* at 352–353.

[5] One of the warrants, issued in the Southern District of New York, was

arrest, he was turned over to Illinois authorities for extradition to Massachusetts on older, unrelated state charges. While in the custody of the Illinois authorities, Ford requested a speedy trial on the federal bank robbery charge by means of letters sent to the United States Attorney for the Southern District of New York and the United States District Court for that District.[6] After he was transferred to Massachusetts, federal officials lodged the federal bank robbery warrant as a detainer against him with the state prison authorities.

Following Ford's conviction on the Massachusetts charges, an indictment was filed in the United States District Court for the Southern District of New York, charging Ford with bank robbery and aggravated bank robbery. On April 1, 1974, he was produced from Massachusetts for arraignment before the District Court pursuant to a writ of habeas corpus *ad prosequendum* issued by the court on March 25, 1974. Because Ford was not represented by counsel, the proceedings were adjourned until April 15, at which time he pleaded not guilty to a superseding indictment.[7] Trial was set for May 28, 1974.

The trial did not commence, however, until September 2, 1975, having been postponed on five separate occasions either at the request of the Government or on the court's own initia-

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for bank robbery; the other, issued in the District of Massachusetts, was for unlawful flight. The latter charge was eventually dismissed.

[6] In these letters, Ford stated that he was in the custody of state officials in Illinois, awaiting extradition to Massachusetts to stand trial for escape. He requested the court and the United States Attorney to take action on the federal bank robbery charge against him, either bringing him to trial or dropping the charge. This request, said Ford, was based on his constitutional right to a speedy trial.

[7] The superseding indictment was filed against Ford on April 3, 1974. It charged him and one James R. Flynn with the same bank robbery that had been charged in the first indictment and also with use of a firearm in the commission of a bank robbery, interstate transportation of a stolen vehicle, and conspiracy to commit the above offenses.

tive.[8] During the period while he was awaiting his federal trial, Ford was incarcerated in the Massachusetts state prison; he had requested and received permission to return there in order to facilitate preparation for trial. On November 4, 1974, in response to the Government's motion to postpone the trial for a third time, Ford moved in the District Court for the dismissal of his indictment on the ground that he had been denied his right to a speedy trial.[9] In support of his motion, he alleged that he was being denied furlough privileges at the state prison as a result of the federal detainer that remained lodged against him. His motion to dismiss the indictment was denied.

On August 8, 1975, the Government secured Ford's presence for trial from the Massachusetts prison authorities by means of a writ of habeas corpus *ad prosequendum* issued by the District Court. At the beginning of his trial, Ford again moved unsuccessfully for a dismissal of the indictment on speedy trial grounds. His jury trial resulted in verdicts of guilty on all counts.

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[8] On May 17, 1974, the Government moved to adjourn the trial for a period of 90 days or until codefendant Flynn could be apprehended, whichever occurred first. The motion was granted, and the trial was rescheduled for August 21, 1974. The second postponement resulted from the reassignment of the case to a different judge in August 1974; trial was then reset for November 18, 1974. On November 1, however, the Government requested an additional 90-day adjournment in order to apprehend Flynn. The District Court granted the Government's motion, over Ford's objections, and set a new trial date of February 18, 1975. Because the District Judge was engaged in a lengthy stock-fraud trial on February 18, the trial was again postponed; it was rescheduled for June 11, 1975. The trial was postponed for a final time, until September 2, 1975, because of the District Court's decision to undertake a "crash" program for the disposition of pending civil cases.

[9] In his motion Ford contended that he had been denied his rights to a speedy trial as guaranteed to him by the Federal Constitution and the Rules of the Southern District of New York.

On appeal to the Court of Appeals for the Second Circuit, Ford argued, among other things, that his indictment should have been dismissed with prejudice because he was not tried within 120 days of his initial arrival in the Southern District of New York, in violation of Art. IV (c) of the Agreement,[10] and because he was returned to state prison without first being tried on the federal charges, in violation of Art. IV (e). The panel,[11] with one judge dissenting, agreed with Ford's contention that dismissal of the indictment was required as a result of the Government's failure to comply with the speedy trial provisions of Art. IV (c).[12] 550 F. 2d 732 (1977). The court reasoned that, regardless of whether a writ of habeas corpus *ad prosequendum* issued by a federal court to obtain a state prisoner is by itself sufficient to trigger the provisions of the Agreement, the Agreement clearly governs situations such as Ford's, in which a federal detainer is first filed with the state authorities and the writ is then used to secure the prisoner's presence in federal court. In the view of the Court of Appeals, the writ of habeas corpus *ad prosequendum* utilized to bring Ford to federal court was a "written request for temporary custody or availability" within the meaning of Art. IV (a). Having concluded that the Agreement was applicable and that the provisions of Art. IV (c) had been violated, the Court of Appeals reversed and remanded for the dismissal of Ford's indictment with prejudice, as required by Art. V (c) of the Agreement.[13]

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[10] For the text of Art. IV (c), see *infra*, at 352.

[11] The opinion for the Court of Appeals was written by Judge Mansfield, who had dissented from the Second Circuit's disposition of the *Mauro* and *Fusco* cases.

[12] The Court of Appeals held that, while Ford had waived his claim under Art. IV (e) by requesting the return to state prison, he had not waived his Art. IV (c) claim, for he had repeatedly insisted on a prompt trial.

[13] See *infra*, at 353.

C

Because there is a conflict among the Federal Courts of Appeals on the issue,[14] we granted certiorari [15] in these cases to consider whether the Agreement governs the use of writs of habeas corpus *ad prosequendum* by the United States to obtain state prisoners. In No. 76–1596 we hold that such a writ issued by a federal court to state authorities, directing the production of a state prisoner for trial on criminal charges, is not a detainer within the meaning of the Agreement and thus does not trigger the application of the Agreement. In No. 77–52 we hold that the United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum*.

II

The origins of the Agreement date back to 1948, when a group known as the Joint Committee on Detainers [16] issued a report concerning the problems arising from the use of detainers and expressing five aims or principles for the guidance of

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[14] In addition to the Court of Appeals for the Second Circuit, the Court of Appeals for the Third Circuit has held that a writ of habeas corpus *ad prosequendum* is a detainer within the meaning of the Agreement. *United States* v. *Sorrell*, 562 F. 2d 227 (1977) (en banc), cert. pending, No. 77–593. The other Courts of Appeals that have considered the question have concluded that an *ad prosequendum* writ does not by itself trigger the application of the Agreement. *Ridgeway* v. *United States*, 558 F. 2d 357 (CA6 1977), cert. pending, No. 77–5252; *United States* v. *Kenaan*, 557 F. 2d 912 (CA1 1977), cert. pending, No. 77–206; *United States* v. *Scallion*, 548 F. 2d 1168 (CA5 1977), cert. pending, No. 76–6559.

[15] 434 U. S. 816 (1977).

[16] This committee was made up of representatives from the following organizations: Parole and Probation Compact Administrators Association, National Association of Attorneys General, National Conference of Commissioners on Uniform State Laws, American Prison Association, and the Section on Criminal Law of the American Bar Association.

prosecuting authorities, prison officials, and parole authorities. These guiding principles, which later served as the underpinnings of the Agreement, were as follows:

> "1. Every effort should be made to accomplish the disposition of detainers as promptly as possible.
>
> "2. There should be assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released.
>
> "3. Prison and parole authorities should take prompt action to settle detainers which have been filed by them.
>
> "4. No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid.
>
> "5. All jurisdictions should observe the principles of interstate comity in the settlement of detainers, and each should bear its own proper burden of the expenses and effort involved in disposing of the charges and settling detainers." Bennett, The Last Full Ounce, 23 Fed. Prob. 20, 22 (June 1959).

The Joint Committee on Detainers was later reconstituted under the auspices of the Council of State Governments. Then known as the Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses, it held meetings in 1955 and 1956, which resulted in the development and approval of several proposals concerning detainers. Among the proposals was a draft version of the Agreement. In April 1956 this proposal was reviewed and approved by a conference jointly sponsored by the American Correctional Association, the Council of State Governments, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation.[17] Follow-

[17] Among the 60 persons in attendance at the conference were representatives of the United States Department of Justice.

ing the endorsement of the Agreement by this conference, the Council of State Governments included it within its Suggested State Legislation Program for 1957.

The Agreement, in the form adopted by the United States and other member jurisdictions, sets forth the findings upon which it is based and its purpose in Art. I. It notes that "charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Accordingly, its purpose is to encourage the expeditious disposition of such charges and to provide cooperative procedures among member States to facilitate such disposition.

The central provisions of the Agreement are Art. III and Art. IV. Article III provides a procedure by which a prisoner against whom a detainer has been filed can demand a speedy disposition of the charges giving rise to the detainer. The warden of the institution in which the prisoner is incarcerated is required to inform him promptly of the source and contents of any detainer lodged against him and of his right to request final disposition of the charges. Art. III (c). If the prisoner does make such a request, the jurisdiction that filed the detainer must bring him to trial within 180 days.[18] Art. III (a). The prisoner's request operates as a request for the final disposition of all untried charges underlying detainers filed against him by that State, Art. III (d), and is deemed to be a waiver of extradition. Art. III (e).

Article IV provides the means by which a prosecutor who has lodged a detainer against a prisoner in another State can secure the prisoner's presence for disposition of the outstanding charges. Once he has filed a detainer against the prisoner,

[18] For good cause shown in open court, with either the prisoner or his counsel present, the court having jurisdiction over the matter may grant any necessary or reasonable continuance.

the prosecutor can have him made available by presenting to the officials of the State in which the prisoner is incarcerated "a written request for temporary custody or availability. . . ." [19] Art. IV (a).

Two important limitations, previously referred to, are placed on a prosecuting authority once it has obtained the presence of a prisoner pursuant to Art. IV. Article IV (c) states that

> "[i]n respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

And Art. IV (e) requires the receiving State to try the prisoner on the outstanding charge before returning him to the State in which he was previously imprisoned:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, informa-

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[19] Article IV (a) states:

"The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided,* That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further,* That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

> tion, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Article V (c) similarly provides that the "indictment, information, or complaint on the basis of which the detainer has been lodged" shall be dismissed if the prisoner is not brought to trial within the period specified in Art. IV (c).

## III

Congress enacted the Agreement into law and entered into it on behalf of the United States and the District of Columbia with relatively little discussion and no apparent opposition. See 116 Cong. Rec. 13997–14000, 38840–38842 (1970). The legislation had been previously introduced in the 90th Congress at the request of the Attorney General; on that occasion, it had passed the House, but the Senate had failed to approve it. When it was introduced again in the 91st Congress, the need for the legislation was noted in both the House and Senate Reports:

> "The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing." H. R. Rep. No. 91–1018, p. 3 (1970); S. Rep. No. 91–1356, p. 3 (1970).

The Government now vigorously argues that when Congress enacted the Agreement into law, the United States became a

party to the Agreement only in its capacity as a "sending State." It contends that "Congress intended the United States to participate in the Agreement only for the purposes of allowing states more readily to obtain federal prisoners and allowing such prisoners to seek trial on outstanding detainers lodged against them with their federal custodian." Brief for United States in No. 77–52, p. 16. Thus, it argues, the Agreement has no relevance to the present cases, for here the Federal Government was the recipient of state prisoners. We have considered the grounds offered by the Government in support of this contention and conclude, as have all of the Courts of Appeals that have considered the question,[20] that the United States is a party to the Agreement as both a sending and a receiving State.

As even the Government concedes, the Agreement as enacted by Congress expressly includes the United States within the definition of "State" [21] and defines "Receiving State" as "the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof." Art. II (c). The statute itself gives no indication that the United States is to be exempted from the category of receiving States. To the contrary, Art. VIII states that "[t]his agreement shall enter into *full* force and effect as to a party State when such State has enacted the same into law" (emphasis added).[22]

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[20] In addition to the Court of Appeals for the Second Circuit, the following Courts of Appeals have rejected the Government's argument that it is only a sending State: the Third Circuit in *United States* v. *Sorrell*, 562 F. 2d, at 232 n. 7; the First Circuit in *United States* v. *Kenaan*, 557 F. 2d, at 915 n. 6; and the Fifth Circuit in *United States* v. *Scallion*, 548 F. 2d, at 1174.

[21] Under the Agreement "State" means "a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." Art. II (a).

[22] Both Committee Reports made express reference to the fact that the

The brief legislative history that exists provides no further support for the Government's contention. It is true, as the Government points out, that most of the comment on the proposed legislation referred to problems encountered by States in obtaining federal prisoners, but there is no indication whatsoever that the United States' participation in the Agreement was to be a limited one. Senator Hruska, for example, spoke in favor of the Agreement on the floor of the Senate, saying:

> "By enactment of this bill the United States and the District of Columbia would become signatories to this agreement which has already been adopted by 28 States. By approving this measure today we can insure that the United States will become part of this vitally needed system of simplified and uniform rules for the disposition of pending criminal charges and the exchange of prisoners." 116 Cong. Rec. 38840 (1970).

Neither he nor anyone else in Congress drew a distinction between the extent of the United States' participation in the Agreement and that of the other member States, an observation that one would expect had the Federal Government entered into the Agreement as only a sending State.

Nor are we persuaded by the Government's argument that, because the United States already had an efficient means of obtaining prisoners—the writ of habeas corpus *ad prosequendum*—Congress could not have intended to join the United States as a receiving State. Although the United States perhaps did not gain as much from its entry into the Agreement as did some of the other member States,[23] the fact remains that

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Agreement would enter into full force and effect upon passage. See H. R. Rep. No. 91–1018, p. 3 (1970); S. Rep. No. 91–1356, p. 3 (1970).

[23] Prior to the Agreement, there were several means by which States could obtain prisoners from other jurisdictions, none of which was entirely satisfactory. The traditional method was the use of formal extradition proceedings. This required a request for the prisoner by the

Congress did enact the Agreement into law in its entirety, and it placed no qualification upon the membership of the United States. The reference in the Committee Reports to the recommendation of the Attorney General, see *supra,* at 353, indicates that Congress was motivated, not only by the desire to aid States in obtaining federal prisoners, but also by the desire to alleviate the problems encountered by prisoners and prison systems as a result of the lodging of detainers. There is no reason to assume that Congress was any less concerned about the effects of federal detainers filed against state prisoners than it was about state detainers filed against federal prisoners. While the Government argues that a writ of habeas corpus *ad prosequendum* leads to none of the problems about which the drafters of the Agreement were concerned, we think that this argument is more properly addressed to the question whether such a writ constitutes a detainer for purposes of the Agreement, which we discuss below.[24]

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Governor of the receiving State. It was sent to the Governor of the State that had custody of the prisoner, and he was permitted to investigate the situation to determine if the prisoner should be surrendered. If the Governor agreed to the extradition, he issued an arrest warrant against the prisoner, who was then permitted to challenge the legality of his arrest.

Rather than going through this formal procedure, some States entered into special contracts controlling the transfer of prisoners. The effort involved in arriving at such a contract, however, was often thought to outweigh the benefit of the simplified procedures unless there were frequent prisoner transfers between two States.

Because of problems with both of these methods, law enforcement authorities developed the informal practice of filing detainers against the prisoners; rather than seeking immediate transfer, the State would merely notify the State having custody of the prisoner that he was wanted at the completion of his sentence. This practice led to various problems, discussed in the text and n. 25, *infra,* that the Agreement sought to overcome. The Agreement also provided States with a simple and efficient means of obtaining prisoners from other States.

[24] The subsequent administrative and congressional actions cited by the Government do not convince us that the United States was meant to be

## IV

### A

United States district courts are authorized by 28 U. S. C. § 2241 (a) to grant writs of habeas corpus; expressly included within this authority is the power to issue such a writ when it is necessary to bring a prisoner into court to testify or for trial. § 2241 (c)(5). This Court has previously examined in great detail the history of the writ of habeas corpus *ad prosequendum,* observing that § 14 of the first Judiciary Act, 1 Stat. 81, authorized courts of the United States to issue writs of habeas corpus. *Carbo* v. *United States,* 364 U. S. 611, 614 (1961). Although § 14 did not expressly state that the courts could issue *ad prosequendum* writs, the Court in an opinion by Mr. Chief Justice Marshall, *Ex parte Bollman,* 4 Cranch 75 (1807), interpreted the words "habeas corpus" as being a generic term including the writ "necessary to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed." *Carbo, supra,* at 615 (emphasis omitted). Since the time of *Ex parte Bollman,*

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only a sending State. Neither the Justice Department's opinion, then or now, that the United States is not a receiving State under the Agreement nor the statement of a subsequent Congress (in a draft Committee Report concerning a bill never enacted) that the Agreement did not limit the scope and applicability of the writ of habeas corpus *ad prosequendum* warrants our departing from the clear wording of the Agreement. Nor do we view the subsequently enacted Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.* (1976 ed.), as being inconsistent with the United States' status as a receiving State. In situations in which two different sets of time limitations are prescribed, the more stringent limitation may simply be applied. Finally, we deem it irrelevant that bills currently pending in Congress, S. 1437, 95th Cong., 1st Sess., § 3201 (1977); H. R. 6869, 95th Cong., 1st Sess., § 3201 (1977), would limit the United States' participation as a receiving State to proceedings under only Art. III of the Agreement. That action demonstrates a view contrary to the Government's position that the United States should be a receiving State for no purposes; furthermore, it may be read as confirming the conclusion that the United States is currently a receiving State for all purposes.

the statutory authority of federal courts to issue writs of habeas corpus *ad prosequendum* to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in state custody, has never been doubted. In 1948 this authority was made explicit with the enactment of 28 U. S. C. § 2241, and in 1961 the Court held that this authority was not limited by the territorial boundaries of the federal district court. *Carbo, supra.* The role and functioning of the *ad prosequendum* writ are rooted in history, and they bear little resemblance to the typical detainer which activates the provisions of the Agreement.

Unlike a writ of habeas corpus *ad prosequendum* issued by a federal district court, a detainer may be lodged against a prisoner on the initiative of a prosecutor or law enforcement officer.[25] Rather than requiring the immediate presence of the prisoner, a detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison. Further action must be taken by the receiving State in order to obtain the prisoner. Before it was made clear that a prosecuting authority is not relieved of its obligation to provide a defendant a speedy trial just because he is in custody elsewhere, see *Smith* v. *Hooey,* 393 U. S. 374

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[25] Problems possibly resulting from this lack of judicial supervision have been described by the Court of Appeals for the Fourth Circuit:

"Detainers, informal aides [*sic*] in interstate and intrastate criminal administration, often produce serious adverse side-effects. The very informality is one source of the difficulty. Requests to an imprisoning jurisdiction to detain a person upon his release so that another jurisdiction may prosecute or incarcerate him may be filed groundlessly, or even in bad faith, as suspected by the appellant in this case. The accusation in a detainer need not be proved; no judicial officer is involved in issuing a detainer. As often happens, the result of the then unestablished charge upon which the detainer in this case rested was that the detainee was seriously hampered in his quest for a parole or commutation." *Pitts* v. *North Carolina,* 395 F. 2d 182, 187 (1968) (footnote omitted).

(1969), detainers were allowed to remain lodged against prisoners for lengthy periods of time, quite often for the duration of a prisoner's sentence.

B

The Agreement itself contains no definition of the word "detainer." The House and Senate Reports, however, explain that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." H. R. Rep. No. 91–1018, p. 2 (1970); S. Rep. No. 91–1356, p. 2 (1970). While the Court of Appeals for the Second Circuit concluded that this definition is broad enough to include within its scope a federal writ of habeas corpus *ad prosequendum,* the concerns expressed by the drafters of the Agreement and by the Congress that enacted it demonstrate that the word "detainer" was not so intended.

In recommending the adoption of the Agreement, the Council of State Governments outlined some of the problems caused by detainers that the Agreement was designed to address. It noted that prison administrators were "thwarted in [their] effort[s] toward rehabilitation [because t]he inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program." Council of State Governments, Suggested State Legislation Program for 1957, p. 74 (1956). Furthermore, the prisoner was often deprived of the ability to take advantage of many of the prison's programs aimed at rehabilitation, merely because there was a detainer lodged against him. This problem was noted by the Director of the Federal Bureau of Prisons, who in 1959 stated that he "remember[ed] the day when the presence of a detainer automatically guaranteed that the inmate would be held in close custody and denied training and work experiences in more relaxed situations, such as the farm, which frequently represent a valuable resource in treating prisoners and testing their progress." Bennett, The Last

Full Ounce, 23 Fed. Prob. 20, 21 (June 1959). The Council of State Governments also pointed out that the existence of detainers presented problems in sentencing; when detainers had previously been filed against the defendant, the sentencing judge would hesitate to give as long a sentence as he thought might otherwise be indicated, there being a possibility that the defendant would be required to serve subsequent sentences. The Council stated that "proper sentencing, as well as proper correctional treatment, is not possible until the detainer system is modified." Council of State Governments, *supra,* at 74. Similar concerns were expressed by the Attorney General in his recommendation to Congress. See *supra,* at 353.

The adverse effects of detainers that prompted the drafting and enactment of the Agreement are thus for the most part the consequence of the lengthy duration of detainers. Because a detainer remains lodged against a prisoner without any action being taken on it, he is denied certain privileges within the prison, and rehabilitation efforts may be frustrated. For these reasons the stated purpose of the Agreement is "to encourage the *expeditious* and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Art. I (emphasis added).

Because writs of habeas corpus *ad prosequendum* issued by a federal court pursuant to the express authority of a federal statute are immediately executed, enactment of the Agreement was not necessary to achieve their expeditious disposition. Furthermore, as noted above, the issuance of *ad prosequendum* writs by federal courts has a long history, dating back to the first Judiciary Act. We can therefore assume that Congress was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word "detainer," it meant something quite different from a writ of habeas corpus *ad prosequendum.* Contrary

to the contention of the Court of Appeals in No. 76–1596, it is not necessary to construe "detainer" as including these writs in order to keep the United States from evading its duties under the Agreement. When the United States obtains state prisoners by means of a writ of habeas corpus *ad prosequendum,* the problems that the Agreement seeks to eliminate do not arise;[26] accordingly, the Government is in no sense circumventing the Agreement by means of the writ. We therefore conclude that a writ of habeas corpus *ad prosequendum* is not a detainer for purposes of the Agreement.

Because in No. 76–1596 the Government never filed a detainer against Mauro and Fusco, the Agreement never became applicable and the United States was never bound by its provisions. The Court of Appeals therefore erred in affirming the dismissal of the indictments against the respondents.

## V

Our analysis of the purposes of the Agreement and the reasons for its adoption by Congress leads us to reject the Government's argument in No. 77–52 that a writ of habeas corpus *ad prosequendum* may not be considered a "written request for temporary custody" within the meaning of Art. IV of the Agreement. Once the Federal Government lodges a detainer

[26] The Court of Appeals concluded that Art. IV's requirement that the prisoner be tried before he is returned to the sending State demonstrates a concern of the Agreement that prisoners not be shuttled back and forth between penal institutions. This problem, the court noted, is one that arises from the use of writs of habeas corpus *ad prosequendum* as well as from detainers. We agree with Judge Mansfield, however, that the real concern of this provision was that, if the prisoner were returned to the sending State prior to the disposition of the charges in the receiving State, the detainer previously lodged against him would remain in effect with all its attendant problems. These problems, of course, would not arise if a detainer had never been lodged and the writ alone had been used to remove the prisoner, for the writ would have run its course and would no longer be operative upon the prisoner's return to state custody.

against a prisoner with state prison officials, the Agreement by its express terms becomes applicable and the United States must comply with its provisions. And once a detainer has been lodged, the United States has precipitated the very problems with which the Agreement is concerned. Because at that point the policies underlying the Agreement are fully implicated, we see no reason to give an unduly restrictive meaning to the term "written request for temporary custody." It matters not whether the Government presents the prison authorities in the sending State with a piece of paper labeled "request for temporary custody" or with a writ of habeas corpus *ad prosequendum* demanding the prisoner's presence in federal court on a certain day; in either case the United States is able to obtain temporary custody of the prisoner. Because the detainer remains lodged against the prisoner until the underlying charges are finally resolved, the Agreement requires that the disposition be speedy and that it be obtained before the prisoner is returned to the sending State. The fact that the prisoner is brought before the district court by means of a writ of habeas corpus *ad prosequendum* in no way reduces the need for this prompt disposition of the charges underlying the detainer. In this situation it clearly would permit the United States to circumvent its obligations under the Agreement to hold that an *ad prosequendum* writ may not be considered a written request for temporary custody.[27]

The Government points to two provisions of the Agreement

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[27] The Government admits that a similar provision of the Speedy Trial Act referring to "a properly supported request for temporary custody of such prisoner for trial," 18 U. S. C. § 3161 (j)(4) (1976 ed.), is properly interpreted as including an *ad prosequendum* writ. Brief for United States in No. 77–52, p. 48 n. 35. The difference, it says, is that the legislative history of the Speedy Trial Act shows that its provisions are to have broad applicability. This argument overlooks the fact that the Agreement, on its face, contains a similar expression of intent. Article IX states that "[t]his agreement shall be liberally construed so as to effectuate its purposes."

which it contends demonstrate that "written request" was not meant to include *ad prosequendum* writs; neither argument is persuasive. First the Government notes that under Art. IV (a) there is to be a 30-day waiting period after the request is presented during which the Governor of the sending State may disapprove the receiving State's request. Because a writ of habeas corpus *ad prosequendum* is a federal-court order, it would be contrary to the Supremacy Clause, the United States argues, to permit a State to refuse to obey it. We are unimpressed. The proviso of Art. IV (a) does not purport to augment the State's authority to dishonor such a writ. As the history of the provision makes clear, it was meant to do no more than preserve previously existing rights of the sending States, not to expand them.[28] If a State has never had authority to dishonor an *ad prosequendum* writ issued by a federal court, then this provision could not be read as providing such authority. Accordingly, we do not view the provision as being inconsistent with the inclusion of writs of habeas corpus *ad prosequendum* within the meaning of "written requests."

The Government also points out that the speedy trial requirement of Art. IV (c) by its terms applies only to a "proceeding made possible by this article . . . ." When a prisoner is brought before a district court by means of an *ad prosequendum* writ, the Government argues, the subsequent proceedings are not *made possible* by Art. IV because the United States was able to obtain prisoners in that manner long before it entered into the Agreement. We do not accept the Gov-

[28] Both Committee Reports note that "a Governor's right to refuse to make a prisoner available is *preserved* . . . ." H. R. Rep. No. 91–1018, p. 2 (1970) (emphasis added); S. Rep No. 91–1356, p. 2 (1970) (emphasis added). The Council of State Governments discussed the provision in similar terms: "[A] Governor's right to refuse to make the prisoner available (on public policy grounds) is *retained*." Council of State Governments, Suggested State Legislation Program for 1957, p. 78 (1956) (emphasis added).

ernment's narrow reading of this provision; rather we view Art. IV (c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner [29] without assuming the responsibilities that the Agreement intended to arise from such an action.[30]

Finally, we agree with the Court of Appeals in No. 77–52 that respondent Ford's failure to invoke the Agreement in specific terms in his speedy trial motions before the District Court did not result in a waiver of his claim that the Government violated Art. IV (c). The record shows that from the time he was arrested Ford persistently requested that he

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[29] The Government made it quite clear during oral argument that, despite the availability of writs of habeas corpus *ad prosequendum*, the United States makes great use of detainers and considers them to play an important function. See Tr. of Oral Arg. in No. 76–1596, p. 37. They serve to put the state prison officials on notice that the Federal Government has charges pending against a prisoner, even though his immediate prosecution may not be contemplated, and that he should not be released without the Government's being notified. We were informed that during a typical year federal courts issue approximately 5,000 *ad prosequendum* writs and that about 3,000 of those are in cases in which a detainer has previously been lodged against the prisoner. Tr. of Oral Arg. in No. 77–52, p. 13.

[30] In arguing that Congress did not intend the word "request" to encompass writs of habeas corpus *ad prosequendum*, the dissent refers to legislative history indicating that the Agreement was not meant to be the exclusive means of effecting a transfer of a prisoner for purposes of prosecution. Nothing we have said today, however, is contrary to this intent. As our judgment in No. 76–1596 indicates, the Government need not proceed by way of the Agreement. It may obtain a state prisoner by means of an *ad prosequendum* writ without ever filing a detainer; in such a case, the Agreement is inapplicable. It is only when the Government does file a detainer that it becomes bound by the Agreement's provisions.

be given a speedy trial. After his trial date had been continued for the third time, he sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the state prison. We deem these actions on Ford's part sufficient to put the Government and the District Court on notice of the substance of his claim.

The United States does not challenge the conclusion of the Court of Appeals that, if Art. IV (c) was applicable, it was violated by the extensive delay in bringing Ford to trial. Accordingly, we conclude that the Court of Appeals correctly reversed the judgment of the District Court and ordered that the indictment against Ford be dismissed.

The judgment of the Court of Appeals in No. 76–1596 is reversed, and the case is remanded for further proceedings consistent with this opinion. In No. 77–52, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the judgment in No. 76–1596 and dissenting in No. 77–52.

I agree with the Court's conclusion in No. 76–1596 that a writ of habeas corpus *ad prosequendum* is not a detainer within the meaning of the Interstate Agreement on Detainers. As the Court observes, *ante,* at 360: "[T]he issuance of *ad prosequendum* writs by federal courts has a long history, dating back to the first Judiciary Act. We can therefore assume that Congress was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word 'detainer,' it meant something quite different from a writ of habeas corpus *ad prosequendum.*" Indeed, there is simply nothing in the language or legislative history of the Agreement to indicate that Congress intended to cut

back in any way on the scope and use of the writ. But for these very reasons I cannot agree with the result in No. 77–52.

I am first struck by the Court's interesting approach to statutory construction, the significance of which cannot be lost on even the most casual reader. The Court considers *ad prosequendum* writs to be "written requests for temporary custody" not because the language of the Agreement compels, or indeed even supports, that result, but rather because the "purposes of the Agreement and the reasons for its adoption by Congress" supposedly lead to that result. *Ante,* at 361. One certainly may find it necessary to resort to interpretative aids other than the language of the statute when difficult questions of construction arise. I would have thought, however, that one would *first* turn to the language of the statute before resorting to such extra-statutory interpretative aids. See *United States* v. *Kahn,* 415 U. S. 143, 151 (1974).

The reason, indeed the necessity, for the Court's pursuing the opposite course in this case is readily apparent, however. The language of the Agreement simply does not support the Court's conclusion. The Agreement speaks only of "requests" for custody. In the writ in the instant case, on the other hand, the warden of the Massachusetts Correctional Institution at Walpole was "HEREBY COMMANDED to have the body of RICHARD THOMSON FORD . . . before the Judges of our District Court" on a date certain. App. in No. 77–52, p. 8. The Massachusetts warden would no doubt be surprised to hear that the United States had only "requested" the custody of his prisoner.

But even if the language of the Agreement were broad enough to encompass a writ of habeas corpus, it seems to me that for the same reasons the Court does not consider a writ to be a "detainer" it cannot view a writ as a request. The writ has a long history, of which Congress must have been aware when it enacted the Agreement. It is inconceivable to me that Congress intended to include the writ in the opera-

tion of the Agreement, and thereby make new and different conditions flow from its use, simply by use of the phrase "written request for temporary custody." In fact, the intimations in the legislative history are to the contrary. The Reports of both the House and Senate Judiciary Committees suggest that Congress did not intend the procedures established by the Agreement to be the exclusive means of effecting a transfer of a prisoner for purposes of prosecution.

> "The agreement also provides *a* method whereby prosecuting authorities may secure prisoners serving sentences in other jurisdictions for trial before the expiration of their sentences and before the passage of time has dulled the memory or made witnesses unavailable." H. R. Rep. No. 91–1018, p. 2 (1970); S. Rep. No. 91–1356, p. 2 (1970). (Emphasis added.)

A draft of the Senate Judiciary Committee Report on S. 1 in 1975 also leaves no doubt that many of the Congressmen directly involved in the passage of the Agreement did not think they were in any way limiting the scope or application of the writ. The Report states:

> "Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U. S. C. § 2241 (c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ." S. Rep. No. 94–00, p. 984 (1975).*

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*This Report is, of course, not overwhelmingly persuasive, given that it postdates the enactment of the Agreement and concerns a measure which was not even enacted into law at that time. Such so-called "subsequent legislative history" cannot "serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974). It does, however, represent the

I likewise find myself at a loss to discover exactly what problems the United States has "precipitated" by lodging a detainer against a prisoner and then securing his custody by use of the writ or how this process allows the Government "to circumvent its obligations under the Agreement . . . ." *Ante,* at 362. The Court correctly recognizes that the primary purpose of the Agreement was to provide a solution to the problems encountered by prisoners and prison systems as a result of the lodging of detainers. *Ante,* at 356, 359–360. Upon the mere filing of a detainer by the United States, however, the prisoner clearly has the right under the Agreement to request speedy disposition of the underlying charges if he so desires. *Ante,* at 351. The Government in no way excuses itself from this obligation by later using a writ of habeas corpus to secure the prisoner's custody. But by the same token, when the Government chooses *not* to take advantage of the remaining procedures specified in the Agreement after it files a detainer, I see nothing in the Agreement to suggest that the Government is still bound by all of the conditions which attach when it does choose to take full advantage of those procedures. Neither do I see anything in this procedure which precipitates any of the problems the Agreement was intended to alleviate. And to the extent any of the concerns expressed by the Court relate to the possibility of pretrial delay, the Speedy Trial Act of 1974, 18 U. S. C. § 1361 *et seq.* (1976 ed.), which creates specific time limits within which all federal defendants must be tried, must lessen if not totally dissipate those concerns.

Neither can I shrug off as cavalierly as the Court the Government's arguments with respect to other related language of the Agreement. The Government argues that since

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personal views of these legislators, *ibid.,* and thus is not totally without significance, given that 12 of the 15 members of the Committee who issued the draft Report had been members of the same Committee which issued the original Report recommending adoption of the Agreement.

Art. IV (a) gives the Governor of a sending State the opportunity to disapprove the receiving State's "request," the term "request" cannot include the writ of habeas corpus, with which a State clearly has no right to refuse to comply. The Court responds that this provision was meant to do no more than preserve existing rights, and if the States did not previously have the right to refuse writs, then this provision cannot be read as providing such authority. *Ante,* at 363. But that is no response at all. The Court is simply picking and choosing which provisions it will apply to the United States and which it will not, in order to consistently construe a statutory scheme which has been made facially inconsistent by the Court's wrong turn at the outset. I see no justification, and, perhaps more importantly, no standards, for engaging in this sort of gerrymandering of a statute. Rather, if, as the Court admits, this statutory provision was intended only to "preserve" a Governor's right to refuse a "request," then the only logical and consistent inference therefrom is that the term "request" does not include writs of habeas corpus, which cannot be refused.

The Government also argues that the speedy trial provision of Art. IV (c) applies only to "proceeding[s] made possible by this article . . . ." Since proceedings against a prisoner whose presence has been secured by an *ad prosequendum* writ are not "made possible" by Art. IV, the speedy trial provision contained therein must not be applicable in this case. The Court's response to this argument is even less persuasive. It primly refuses to "accept the Government's narrow reading of this provision," *ante,* at 363–364, but ventures no alternative reading, narrow or broad, which is a defensible alternative to that offered by the Government.

Finally, the Court admits that the Agreement was introduced into Congress by, and, one can fairly surmise given the paucity of legislative history, enacted into law largely at the behest of, the Department of Justice, which unequivocally en-

dorsed the legislation. S. Rep. No. 91–1356, *supra,* at 1, 5–6; H. R. Rep. No. 91–1018, *supra,* at 1, 5–6. Thereafter, the Department has consistently taken the position through its actions, though perhaps not its words, that writs of habeas corpus do not fall within the terms of the Agreement. This administrative construction certainly may be entitled to less weight than if it had been accompanied by a contemporaneous, well-reasoned explanation. But I would have thought, at least until today, that it was entitled to *some* weight, particularly in a case such as this where the language of the statute is not entirely clear on its face or, to the extent it is, supports, rather than undermines, the administrative construction. Cf. *United States* v. *Correll,* 389 U. S. 299, 304 (1967).

In sum, I am left with the distinct impression that the Court is stretching to reach the result it considers most desirable from a policy standpoint. Since I see little in the normal tools of statutory construction to justify the interpretation adopted by the Court today, and much in them to condemn it, I dissent from the Court's disposition of No. 77–52.

Syllabus

# BALDWIN ET AL. *v.* FISH AND GAME COMMISSION OF MONTANA ET AL.

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

No. 76–1150. Argued October 5, 1977—Decided May 23, 1978

Appellants brought this action for declaratory and other relief claiming that the Montana statutory elk-hunting license scheme, which imposes substantially higher (at least 7½ times) license fees on nonresidents of the State than on residents, and which requires nonresidents (but not residents) to purchase a "combination" license in order to be able to obtain a single elk, denies nonresidents their constitutional rights guaranteed by the Privileges and Immunities Clause of Art. IV, § 2, and by the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court denied all relief to appellants. *Held:*

1. Access by nonresidents to recreational big-game hunting in Montana does not fall within the category of rights protected by the Privileges and Immunities Clause. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must a State treat all citizens, resident and nonresident, equally, and here equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Pp. 378–388.

2. The statutory scheme is an economic means not unreasonably related to the preservation of a finite resource, elk, and a substantial regulatory interest of that State, and hence does not violate the Equal Protection Clause. In view of the fact that residents contribute to the costs of maintaining the elk-hunting program, the great increase in nonresident hunters in recent years, the limit in the elk supply, and the difficulties in supervising hunting practices, it cannot be said that either the license fee differentials or the required combination license for nonresidents is irrational. Pp. 388–391.

417 F. Supp. 1005, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 392. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 394.

*James H. Goetz* argued the cause and filed briefs for appellants.

*Paul A. Lenzini* argued the cause and filed a brief for appellees.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues, under the Privileges and Immunities Clause of the Constitution's Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment, as to the constitutional validity of disparities, as between residents and nonresidents, in a State's hunting license system.

I

Appellant Lester Baldwin is a Montana resident. He also is an outfitter holding a state license as a hunting guide. The majority of his customers are nonresidents who come to Montana to hunt elk and other big game. Appellants Carlson, Huseby, Lee, and Moris are residents of Minnesota.[1] They have hunted big game, particularly elk, in Montana in past years and wish to continue to do so.

In 1975, the five appellants, disturbed by the difference in the kinds of Montana elk-hunting licenses available to nonresidents, as contrasted with those available to residents of the State, and by the difference in the fees the nonresident and the resident must pay for their respective licenses, instituted the present federal suit for declaratory and injunctive relief and for reimbursement, in part, of fees already paid. App. 18–29. The defendants were the Fish and Game Commission of the State of Montana, the Commission's director, and its five com-

[1] Montana statutorily defines one's place of residence. Mont. Rev. Codes Ann. § 83–303 (1966 and Supp. 1977). It imposes a durational requirement of six months for eligibility to receive a resident's hunting or fishing license. § 26–202.3 (2) (Supp. 1975). Appellants, other than Baldwin, make no claim to Montana residence and do not challenge §§ 83–303 and 26–202.3 (2) in any way. Tr. of Oral Arg. 39–40.

missioners. The complaint challenged the Montana elk-hunting licensing scheme specifically, and asserted that, as applied to nonresidents, it violated the Constitution's Privileges and Immunities Clause, Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court was convened and, by a divided vote, entered judgment denying all relief to the plaintiff-appellants. *Montana Outfitters Action Group* v. *Fish & Game Comm'n*, 417 F. Supp. 1005 (Mont. 1976). We noted probable jurisdiction. 429 U. S. 1089 (1977).[2]

## II

The relevant facts are not in any real controversy and many of them are agreed:

A. For the 1975 hunting season, a Montana resident could purchase a license solely for elk for $4. The nonresident, however, in order to hunt elk, was required to purchase a combination license at a cost of $151; this entitled him to take one elk and two deer.[3]

For the 1976 season, the Montana resident could purchase a license solely for elk for $9. The nonresident, in order to hunt elk, was required to purchase a combination license at a cost of $225;[4] this entitled him to take one elk, one deer, one black bear, and game birds, and to fish with hook and line.[5] A

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[2] We note, in passing, that most States charge nonresidents more than residents for hunting licenses. *E. g.*, Alaska Stat. Ann. § 16.05.340 (1977); Colo. Rev. Stat. § 33–4–102 (Supp. 1976); Me. Rev. Stat. Ann., Tit. 12, § 2401 (Supp. 1977); Wis. Stat. §§ 29.10, 29.105, 29.109, 29.12 (Supp. 1977); Wyo. Stat. § 23.1–33 (Supp. 1977). Others are listed in the Appendix to the Brief for Appellees.

[3] 1973 Mont. Laws, ch. 408, § 1, and 1969 Mont. Laws, ch. 172, § 2.

[4] Mont. Rev. Codes Ann. §§ 26–202.1 (4) and (12), and 26–230 (Supp. 1977). A nonresident, however, could obtain a license restricted to deer for $51. §§ 26–202.1 (9) and 26–230.

[5] We were advised at oral argument that Montana's method of use of a combination license is unique among the States. Tr. of Oral Arg. 8. See Reply Brief for Appellants 29.

resident was not required to buy any combination of licenses, but if he did, the cost to him of all the privileges granted by the nonresident combination license was $30.[6] The nonresident thus paid 7½ times as much as the resident, and if the nonresident wished to hunt only elk, he paid 25 times as much as the resident.[7]

B. Montana, with an area of more than 147,000 square miles, is our fourth largest State. Only Alaska, Texas, and California, in that order, are larger. But its population is relatively small; in 1972 it was approximately 716,000.[8] Its 1974 per capita income was 34th among the 50 States. App. 56–57.

Montana maintains significant populations of big game, including elk, deer, and antelope. Tr. 191. Its elk population is one of the largest in the United States. Elk are prized by big-game hunters who come from near and far to pursue the animals for sport.[9] The quest for big game has grown in

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[6] Mont. Rev. Codes Ann. §§ 26–202.1 (1), (2), and (4) and 26–230 (Supp. 1977).

[7] There are similar disparities between Montana resident and nonresident hunting licenses for all other game, except wild turkey and as to bow-hunting. The present litigation, however, focuses only on licenses to hunt elk.

Disparity in rates has not been without criticism. U. S. Public Land Law Review Comm'n, One Third of the Nation's Land 174 (1970); Norman, Are Nonresident Hunters Getting a Fair Deal?, Outdoor Life, Sept. 1949, p. 21; Yeager, The Federal Take-Over, Montana Outdoors, Jan./Feb. 1975, p. 43; Editorial, Field & Stream, June 1974, p. 4.

[8] App. 56. Its estimated population in 1976 has been said to be 753,000. The World Almanac 695 (1978). Of the 50 States, Montana consistently has ranked 42d or lower in population since statehood. App. 56.

[9] It has been said that Montana is the State most frequently visited by nonresident hunters. All Outdoors, Michigan Natural Resources 27–28 (Sept.–Oct. 1975).

For the license year 1974–1975, Montana licensed hunters from each of the other 49 States, the District of Columbia, Puerto Rico, and 11 foreign countries. Defendants' Exhibit A, p. 8 (part of deposition of Don L. Brown). Approximately 43,500 nonresident hunting licenses for deer and

popularity. During the 10-year period from 1960 to 1970 licenses issued by Montana increased by approximately 67% for residents and by approximately 530% for nonresidents.[10] App. 56–57.

Owing to its successful management programs for elk, the State has not been compelled to limit the overall number of hunters by means of drawings or lotteries as have other States with harvestable elk populations. Tr. 243. Elk are not hunted commercially in Montana.[11] Nonresident hunters seek the animal for its trophy value; the trophy is the distinctive set of antlers. The interest of resident hunters more often may be in the meat. *Id.*, at 245. Elk are now found in the mountainous regions of western Montana and are gen-

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elk were issued during that year. *Id.*, at 7. The District Court found that elk hunting is recreational in nature and, "except for a few residents who live in exactly the right place," expensive. 417 F. Supp., at 1009. There was testimony that for a typical seven-day elk hunt a nonresident spends approximately $1,250 *exclusive* of outfitter's fee and the hunting license. Tr. 283–284. Thus, while the nonresident combination license fee is not insubstantial, it appears to be a lesser part of the overall expense of the elk hunt.

[10] The number of nonresident big-game combination licenses is now restricted to 17,000 in any one license year. Mont. Rev. Codes Ann. § 26–202.1 (16)(f) (Supp. 1977). This limitation was imposed by 1975 Mont. Laws, ch. 546, § 1, effective May 1, 1976.

The number of nonresident hunters has not yet reached the 17,000 limit. There are no similar numerical limitations on resident elk or deer licenses.

[11] The District Court concluded: "The elk is not and never will be hunted commercially." 417 F Supp., at 1007. Appellants do not deny that the activity which they wish to pursue is pure sport. The hunter is entitled to take only one elk per year, Montana Department of Fish and Game, Deer, Elk, Bear, and Mountain Lion Regulations, Feb. 27, 1977, and statutory restrictions are placed on the buying and selling of game animals, or parts thereof, taken in Montana. Mont. Rev. Codes Ann. § 26–806 (1967).

The Supreme Court of Montana has said: "In Montana, big game hunting is a sport." *State ex rel. Visser* v. *Fish & Game Comm'n*, 150 Mont. 525, 531, 437 P. 2d 373, 376 (1968).

erally not encountered in the eastern two-thirds of the State where the plains prevail. *Id.*, at 9–10, 249. During the summer the animals move to higher elevations and lands that are largely federally owned. In the late fall they move down to lower privately owned lands that provide the winter habitat necessary to their survival. During the critical midwinter period elk are often supported by ranchers. *Id.*, at 46–47, 191, 285–286.[12]

Elk management is expensive. In regions of the State with significant elk population, more personnel time of the Fish and Game Commission is spent on elk than on any other species of big game. Defendant's Exhibit A, p. 9.

Montana has more than 400 outfitters who equip and guide hunting parties. Tr. 295. These outfitters are regulated and licensed by the State and provide services to hunters and fishermen. It is estimated that as many as half the nonresidents who hunt elk in western Montana utilize outfitters. *Id.*, at 248. Three outfitter-witnesses testified that virtually all their clients were nonresidents. *Id.*, at 141, 281, 307.

The State has a force of 70 game wardens. Each warden district covers approximately 2,100 square miles. *Id.*, at 234. To assist wardens in law enforcement, Montana has an "equal responsibility" statute. Mont. Rev. Codes Ann. § 26–906 (Supp. 1977). This law makes outfitters and guides equally responsible for unreported game-law violations committed by persons in their hunting parties. The outfitter thus, in a sense, is a surrogate warden and serves to bolster the State's warden force.

## III

In the District Court the majority observed that the elk once was a plains animal but now roams the mountains of

[12] "[A] property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse." *State* v. *Rathbone*, 110 Mont. 225, 242, 100 P. 2d 86, 93 (1940).

central and western Montana. About 75% of the elk taken are killed on federal land. The animal's preservation depends upon conservation. 417 F. Supp., at 1007. The majority noted that the appellants conceded that Montana constitutionally may charge nonresidents more for hunting privileges than residents. *Id.*, at 1007–1008.[13] It concluded, however, that on the evidence presented the 7½-to-1 ratio in favor of the resident cannot be justified on any basis of cost allocation. *Id.*, at 1008.

After satisfying itself as to standing [14] and as to the existence of a justiciable controversy, and after passing comment upon the somewhat controversial subject of wild animal legal ownership, the court concluded that the State "has the power to manage and conserve the elk, and to that end to make such laws and regulations as are necessary to protect and preserve it." *Id.*, at 1009. In reaching this result, the majority examined the nature of the rights asserted by the plaintiffs. It observed that there were just too many people and too few elk to enable everyone to hunt the animals. "If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill." *Ibid.* Various means of limitation were mentioned, as was the fact that any one control device might deprive a particular hunter of any possibility of hunting elk. The right asserted by the appellants was "no more than a chance to engage temporarily in a recreational activity in a sister state" and was "not fundamental." *Ibid.* Thus, it was not protected as a privilege and an immunity under the Constitution's Art. IV, § 2. The majority contrasted the nature

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[13] The concession was repeated orally in this Court. Tr. of Oral Arg. 6.

[14] The District Court made no specific findings or conclusions about the standing of each of the five appellants. It ruled, however, that two of the nonresident plaintiff-appellants, Lee and Moris, had sufficient standing to maintain the suit. 417 F. Supp., at 1008. We agree, and find it unnecessary to make any further inquiry on standing. See *Doe* v. *Bolton*, 410 U. S. 179, 189 (1973).

of the asserted right with educational needs at the primary and college levels, citing *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1 (1973), and *Sturgis* v. *Washington,* 368 F. Supp. 38 (WD Wash.), summarily aff'd, 414 U. S. 1057 (1973), and said: "There is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling." 417 F. Supp., at 1009. It followed that it was necessary only to determine whether the system bears some rational relationship to legitimate state purposes. Then:

> "We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit." *Id.,* at 1010.

The dissenting judge took issue with the "ownership theory," and with any "special public interest" theory, and emphasized the absence of any cost-allocation basis for the license fee differential. He described the majority's posture as one upholding discrimination because political support was thereby generated, and took the position that invidious discrimination was not to be justified by popular disapproval of equal treatment. *Id.,* at 1012.

## IV

*Privileges and immunities.* Appellants strongly urge here that the Montana licensing scheme for the hunting of elk violates the Privileges and Immunities Clause [15] of Art. IV, § 2,

[15] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

of our Constitution. That Clause is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789. If there is any significance in the fact, the Clause appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause (also in § 2), the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause. Historically, it has been overshadowed by the appearance in 1868 of similar language in § 1 of the Fourteenth Amendment,[16] and by the continuing controversy and consequent litigation that attended that Amendment's enactment and its meaning and application.

The Privileges and Immunities Clause originally was not isolated from the Commerce Clause, now in the Constitution's Art. I, § 8. In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article.[17] See *Austin* v. *New Hampshire,* 420 U. S. 656, 660–661 (1975); *Lemmon* v. *People,* 20 N. Y. 562, 627 (1860) (opinion of Wright, J.). Their separation may have been an assurance against an anticipated narrow reading of

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[16] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[17] "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ."

the Commerce Clause. See *Ward* v. *Maryland,* 12 Wall. 418, 430–432 (1871).

Perhaps because of the imposition of the Fourteenth Amendment upon our constitutional consciousness and the extraordinary emphasis that the Amendment received, it is not surprising that the contours of Art. IV, § 2, cl. 1, are not well developed,[18] and that the relationship, if any, between the Privileges and Immunities Clause and the "privileges or immunities" language of the Fourteenth Amendment is less than clear. We are, nevertheless, not without some pronouncements by this Court as to the Clause's significance and reach. There are at least three general comments that deserve mention:

The first is that of Mr. Justice Field, writing for a unanimous Court in *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869). He emphasized nationalism, the proscription of discrimination, and the assurance of equality of all citizens within any State:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to

[18] For a description of four theories proffered as to the purpose of the Clause, see S. Doc. No. 92–82, pp. 831–832 (1973).

constitute the citizens of the United States one people as this." [19]

The second came 70 years later when Mr. Justice Roberts, writing for himself and Mr. Justice Black in *Hague* v. *CIO*, 307 U. S. 496, 511 (1939), summed up the history of the Clause and pointed out what he felt to be the difference in analysis in the earlier cases from the analysis in later ones:

> "As has been said, prior to the adoption of the Fourteenth Amendment, there had been no constitutional definition of citizenship of the United States, or of the rights, privileges, and immunities secured thereby or springing therefrom. . . .
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> "At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.

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[19] The opinion goes on to read:

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

"But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given." 8 Wall., at 180–181.

> "While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." (Footnotes omitted.)

The third and most recent general pronouncement is that authored by MR. JUSTICE MARSHALL for a nearly unanimous Court in *Austin* v. *New Hampshire,* 420 U. S. 656, 660–661 (1975), stressing the Clause's "norm of comity" and the Framers' concerns:

> "The Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment. The origins of the Clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. . . .
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> . . . . . .
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> "The discriminations at which this Clause was aimed were by no means eradicated during the short life of the Confederation, and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was

to strengthen the force of the Clause in fashioning a single nation." (Footnotes omitted.)

When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State, *Ward* v. *Maryland,* 12 Wall. 418 (1871); in the ownership and disposition of privately held property within the State, *Blake* v. *McClung,* 172 U. S. 239 (1898); and in access to the courts of the State, *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553 (1920).

It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Kanapaux* v. *Ellisor,* 419 U. S. 891 (1974); *Chimento* v. *Stark,* 353 F. Supp. 1211 (NH), summarily aff'd, 414 U. S. 802 (1973). Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. *Canadian Northern R. Co.* v. *Eggen, supra;* cf. *Sosna* v. *Iowa,* 419 U. S. 393 (1975); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. Here we must

decide into which category falls a distinction with respect to access to recreational big-game hunting.

Many of the early cases embrace the concept that the States had complete ownership over wildlife within their boundaries, and, as well, the power to preserve this bounty for their citizens alone. It was enough to say "that in regulating the use of the common property of the citizens of [a] state, the legislature is [not] bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens." *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3,230) (CC ED Pa. 1825). It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people. In *Corfield,* a case the Court has described as "the first, and long the leading, explication of the [Privileges and Immunities] Clause," see *Austin* v. *New Hampshire,* 420 U. S., at 661, Mr. Justice Washington, sitting as Circuit Justice, although recognizing that the States may not interfere with the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal," [20] 6 F. Cas., at 552, none-

[20] It is possible that this is the language that Mr. Justice Roberts in the quotation, *supra,* at 381, from *Hague* v. *CIO,* 307 U. S., at 511, rather critically regarded as relating to "natural rights." We suspect, however, that he was referring to the more general preceding sentences in Mr. Justice Washington's opinion:

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and

theless concluded that access to oyster beds determined to be owned by New Jersey could be limited to New Jersey residents. This holding, and the conception of state sovereignty upon which it relied, formed the basis for similar decisions during later years of the 19th century. *E. g., McCready* v. *Virginia,* 94 U. S. 391 (1877); *Geer* v. *Connecticut,* 161 U. S. 519 (1896).[21] See *Rosenfeld* v. *Jakways,* 67 Mont. 558, 216 P. 776 (1923). In *Geer,* a case dealing with Connecticut's authority to limit the disposition of game birds taken within its boundaries, the Court roundly rejected the contention "that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own." 161 U. S., at 530.

In more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes

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sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." 6 F. Cas., at 551–552.

[21] The rationale of these cases seems not to have been affected by the adoption of the Fourteenth Amendment and the inclusion therein of a new protection for "the privileges or immunities of citizens of the United States." Appellants do not argue that the State of Montana has deprived them of anything to which they are entitled under this provision, so we need not consider here the relationship between the Fourteenth Amendment and the Privileges and Immunities Clause of Art. IV. See *Hague* v. *CIO,* 307 U. S., at 511 (opinion of Roberts, J.); *Slaughter-House Cases,* 16 Wall. 36 (1873); R. Howell, The Privileges and Immunities of State Citizenship (1918).

interstate commerce. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928); *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229 (1911). Nor does a State's control over its resources preclude the proper exercise of federal power. *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265 (1977); *Kleppe* v. *New Mexico,* 426 U. S. 529 (1976); *Missouri* v. *Holland,* 252 U. S. 416 (1920). And a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause. *Toomer* v. *Witsell,* 334 U. S. 385 (1948). See *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948).

Appellants contend that the doctrine on which *Corfield, McCready,* and *Geer* all relied has no remaining vitality. We do not agree. Only last Term, in referring to the "ownership" or title language of those cases and characterizing it "as no more than a 19th-century legal fiction," the Court pointed out that that language nevertheless expressed " 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' " *Douglas* v. *Seacoast Products, Inc.,* 431 U. S., at 284, citing *Toomer* v. *Witsell,* 334 U. S., at 402. The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.

We need look no further than decisions of this Court to know that this is so. It is true that in *Toomer* v. *Witsell* the Court in 1948 struck down a South Carolina statute requiring nonresidents of the State to pay a license fee of $2,500 for each commercial shrimp boat, and residents to pay a fee of only $25, and did so on the ground that the statute violated the Privileges and Immunities Clause. *Id.,* at 395–403. See also *Mullaney* v. *Anderson,* 342 U. S. 415 (1952), another commercial-livelihood case. Less than three years, however, after the decision in *Toomer,* so heavily relied upon by appellants

here, the Court dismissed for the want of a substantial federal question an appeal from a decision of the Supreme Court of South Dakota holding that the *total* exclusion from that State of nonresident hunters of migratory waterfowl was justified by the State's assertion of a special interest in wildlife that qualified as a substantial reason for the discrimination. *State* v. *Kemp,* 73 S. D. 458, 44 N. W. 2d 214 (1950), appeal dismissed, 340 U. S. 923 (1951). In that case South Dakota had proved that there was real danger that the flyways, breeding grounds, and nursery for ducks and geese would be subject to excessive hunting and possible destruction by nonresident hunters lured to the State by an abundance of pheasants. 73 S. D., at 464, 44 N. W. 2d, at 217.

Appellants have demonstrated nothing to convince us that we should completely reject the Court's earlier decisions. In his opinion in *Coryell,* Mr. Justice Washington, although he seemingly relied on notions of "natural rights" when he considered the reach of the Privileges and Immunities Clause, included in his list of situations, in which he believed the States would be obligated to treat each other's residents equally, only those where a nonresident sought to engage in an essential activity or exercise a basic right. He himself used the term "fundamental," 6 F. Cas., at 551, in the modern as well as the "natural right" sense. Certainly Mr. Justice Field and the Court invoked the same principle in the language quoted above from *Paul* v. *Virginia,* 8 Wall., at 180. So, too, did the Court by its holdings in *Ward* v. *Maryland, Canadian Northern R. Co.* v. *Eggen,* and *Blake* v. *McClung,* all *supra,* when it was concerned with the pursuit of common callings, the ability to transfer property, and access to courts, respectively. And comparable status of the activity involved was apparent in *Toomer,* the commercial-licensing case. With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions.

Does the distinction made by Montana between residents and nonresidents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause? Merely to ask the question seems to provide the answer. We repeat much of what already has been said above: Elk hunting by nonresidents in Montana is a recreation and a sport. In itself—wholly apart from license fees—it is costly and obviously available only to the wealthy nonresident or to the one so taken with the sport that he sacrifices other values in order to indulge in it and to enjoy what it offers. It is not a means to the nonresident's livelihood. The mastery of the animal and the trophy are the ends that are sought; appellants are not totally excluded from these. The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.

Appellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

## V

*Equal protection.* Appellants urge, too, that distinctions drawn between residents and nonresidents are not permissible under the Equal Protection Clause of the Fourteenth Amend-

ment when used to allocate access to recreational hunting. Appellees argue that the State constitutionally should be able to charge nonresidents, who are not subject to the State's general taxing power, more than it charges its residents, who are subject to that power and who already have contributed to the programs that make elk hunting possible. Appellees also urge that Montana, as a State, has made sacrifices in its economic development, and therefore in its tax base, in order to preserve the elk and other wildlife within the State and that this, too, must be counted, along with actual tax revenues spent, when computing the fair share to be paid by nonresidents. We need not commit ourselves to any particular method of computing the cost to the State of maintaining an environment in which elk can survive in order to find the State's efforts rational, and not invidious, and therefore not violative of the Equal Protection Clause.

A repetitious review of the factual setting is revealing: The resident obviously assists in the production and maintenance of big-game populations through taxes. The same taxes provide support for state parks utilized by sportsmen, Plaintiffs' Exhibit 1; for roads providing access to the hunting areas, Tr. 156–158, 335; for fire suppression to protect the wildlife habitat, *id.*, at 167; for benefits to the habitat effected by the State's Environmental Quality Council, *id.*, at 163–165; for the enforcement of state air and water quality standards, *id.*, at 223–224; for assistance by sheriffs' departments to enforce game laws, Defendants' Exhibit G, p. 13; and for state highway patrol officers who assist wildlife officers at game checking stations and in enforcement of game laws. Forage support by resident ranchers is critical for winter survival. Tr. 46–47, 286. All this is on a continuing basis.

On the other side of the same ledger is the great, and almost alarming, increase in the number of nonresident hunters—in the decade of the 1960's, almost eight times the increase in resident hunters; the group character of much non-

resident hunting, with its opportunity for license "swapping" when the combination license system is not employed, *id.*, at 237; [22] the intermingling of deer and elk in the wild and the inexperienced hunter's inability to tell one from the other; the obvious limit in the elk supply; the supposition that the nonresident occasional and short-term visitor is more likely to commit game-law violations; the need to supervise hunting practices in order to prevent violations and illegal overkill; and the difficulties of supervision in the primitive areas where the elk is found during the hunting season.

All this adds up, in our view, to no irrationality in the differences the Montana Legislature has drawn in the costs of its licenses to hunt elk. The legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State. It serves to limit the number of hunter days in the Montana elk country. There is, to be sure, a contrasting cost feature favorable to the resident, and, perhaps, the details and the figures might have been more precisely fixed and more closely related to basic costs to the State. But, as has been noted, appellants concede that a differential in cost between residents and nonresidents is not in itself invidious or unconstitutional. And "a statutory classification impinging upon no fundamental interest . . . need not be drawn so as to fit with precision the legitimate purposes animating it. . . . That [Montana] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 813 (1976).[23]

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[22] It is, of course, possible for residents, with single-animal licenses, hunting in groups to engage in license swapping.

[23] The appellants point to the facts that federal land in Montana provides a significant contribution to the elk habitat, and that substantial apportionments to the State flow from the Federal Aid in the Wild Life Restoration Act, 50 Stat. 917, as amended, 16 U. S. C. §§ 669–669i (1976

Appellants also contend that the requirement that nonresident, but not resident, hunters must purchase combination licenses in order to be able to obtain a single elk is arbitrary. In the District Court the State introduced evidence, largely uncontradicted, that nonresident hunters create greater enforcement problems and that some of these problems are alleviated by this requirement. The District Court's majority appears to have found this evidence credible and the justification rational, and we are in no position to disagree. Many of the same factors just listed in connection with the license fee differential have equal pertinency for the combination license requirement. We perceive no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, nonlivelihood setting. Rationality is sufficient. That standard, we feel, has been met by Montana. So long as constitutional requirements have been met, as we conclude is the case here, "[p]rotection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." *Lacoste* v. *Department of Conservation,* 263 U. S. 545, 552 (1924).[24]

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ed.). We fail to see how these federal aspects transform a recreational pursuit into a fundamental right protected by the Privileges and Immunities Clause, or how they impose a barrier to resident-nonresident differentials. Congress knows how to impose such a condition on its largess when it wishes to do so. See 16 U. S. C. § 669 (1976 ed.). See also Pub. L. 94–422, 90 Stat. 1314, adding § 6 (f) (8) to the Land and Water Conservation Fund Act of 1965, 16 U. S. C. § 460*l*–8 (f) (8) (1976 ed.).

[24] The dissenting opinion in the District Court ascribes to the majority there a holding that "an otherwise invidious discrimination against nonresidents is justified because the state may rationally consider the discrimination necessary to induce residents to support the state program required to conserve the herd." 417 F. Supp., at 1011. We agree with that dissent that the State's need or desire to engender political support for its conservation programs cannot by itself justify an otherwise invidi-

The judgment of the District Court is affirmed.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, concurring.

In joining the Court's opinion I write separately only to emphasize the significance of Montana's special interest in its elk population and to point out the limits of the Court's holding.

The doctrine that a State "owns" the wildlife within its borders as trustee for its citizens, see *Geer* v. *Connecticut,* 161 U. S. 519 (1896), is admittedly a legal anachronism of sorts. See *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265, 284 (1977). A State does not "own" wild birds and animals in the same way that it may own other natural resources such as land, oil, or timber. But, as noted in the Court's opinion, *ante,* at 386, and contrary to the implications of the dissent, the doctrine is not completely obsolete. It manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens. See *Douglas* v. *Seacoast Products, Inc., supra,* at 284, 287. Whether we describe this interest as proprietary or otherwise is not significant.

We recognized in *Toomer* v. *Witsell,* 334 U. S. 385, 401–402 (1948), that the doctrine does not apply to migratory shrimp located in the three-mile belt of the marginal sea. But the elk involved in this case are found within Montana and remain primarily within the State. As such they are natural resources of the State, and Montana citizens have a legitimate interest in preserving their access to them. The Court acknowledges this interest when it points out that the Montana elk supply "has been entrusted to the care of the State by the people of Montana," *ante,* at 388, and asserts the continued vitality of

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ous classification. *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 266 (1974). But, in our view, the record, that is, the case as proved, discloses that the classification utilized in Montana's licensing scheme is not "otherwise invidious discrimination."

the doctrine upon which the court relied in *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3,230) (CC ED Pa. 1825); *McCready* v. *Virginia,* 94 U. S. 391 (1877); and *Geer* v. *Connecticut, supra.* See *ante,* at 386.

*McCready* v. *Virginia, supra,* made it clear that the Privileges and Immunities Clause does not prevent a State from preferring its own citizens in granting public access to natural resources in which they have a special interest. Thus Montana does not offend the Privileges and Immunities Clause by granting residents preferred access to natural resources that do not belong to private owners. And Montana may give its residents preferred access to Montana elk without offending the Privileges and Immunities Clause.

It is not necessary to challenge the cases cited by the dissent, *post,* at 405, which make clear that a State does not have absolute freedom to regulate the taking of wildlife within its borders or over its airspace. A State may not regulate the killing of migratory game birds in a way that frustrates a valid treaty of the United States entered into pursuant to the Art. II, § 2, treaty power, *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920); it may not regulate wild animals found on federal lands in a way that conflicts with federal statutes enacted under the Property Clause, Art. IV, § 3, cl. 2, *Kleppe* v. *New Mexico,* 426 U. S. 529, 546 (1976); nor may it allocate access to its wildlife in a manner that offends the Fourteenth Amendment. *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948). Once wildlife becomes involved in interstate commerce, a State may not restrict the use of or access to that wildlife in a way that burdens interstate commerce. *Douglas* v. *Seacoast Products, Inc., supra,* at 281–282; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928). None of those cases hold that the Privileges and Immunities Clause prevents a State from preferring its own citizens in allocating access to wildlife within that State.

It is the special interest of Montana citizens in its elk that

permits Montana to charge nonresident hunters higher license fees without offending the Privileges and Immunities Clause. The Court does not hold that the Clause permits a State to give its residents preferred access to recreational activities offered for sale by private parties. Indeed it acknowledges that the Clause requires equality with respect to privileges "bearing upon the vitality of the Nation as a single entity." *Ante,* at 383. It seems clear that those basic privileges include "all the privileges of trade and commerce" which were protected in the fourth Article of the Articles of Confederation. See *Austin* v. *New Hampshire,* 420 U. S. 656, 660–661, and n. 6 (1975). The Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens; it confers the same protection upon the buyer of luxury goods and services as upon the buyer of bread.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Far more troublesome than the Court's narrow holding—elk hunting in Montana is not a privilege or immunity entitled to protection under Art. IV, § 2, cl. 1, of the Constitution—is the rationale of the holding that Montana's elk-hunting licensing scheme passes constitutional muster. The Court concludes that because elk hunting is not a "basic and essential activit[y], interference with which would frustrate the purposes of the formation of the Union," *ante,* at 387, the Privileges and Immunities Clause of Art. IV, § 2—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"—does not prevent Montana from irrationally, wantonly, and even invidiously discriminating against nonresidents seeking to enjoy natural treasures it alone among the 50 States possesses. I cannot agree that the Privileges and Immunities Clause is so impotent a guarantee that such discrimination remains wholly beyond the purview of that provision.

I

It is true that because the Clause has not often been the subject of litigation before this Court, the precise scope of the protection it affords the citizens of each State in their sister States remains to be defined. Much of the uncertainty is, no doubt, a product of Mr. Justice Washington's exposition of its scope in *Corfield* v. *Coryell,* 6 F. Cas. 546, 551 (No. 3,230) (CC ED Pa. 1825), where he observed:

> "[W]hat are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; *which belong, of right, to the citizens of all free governments;* and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." (Emphasis added.)

Among these "fundamental" rights he included "[p]rotection by the government; . . . [t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Id.,* at 551–552. These rights, only the last of which was framed in terms of discriminatory treatment, were to be enjoyed *"by the citizens of each state, in every other state . . . ."* *Id.,* at 552. As both the italicized language and the list of rights designed as falling within the compass of Art. IV, § 2, cl. 1, make clear, Mr. Justice Washington believed that the Clause was designed to guarantee certain "fundamental" rights to all United States citizens, regardless of the rights afforded by a State to its own

citizens. In *Hague* v. *CIO,* 307 U. S. 496, 511 (1939), Mr. Justice Roberts so characterized Mr. Justice Washington's view: "At one time it was thought that [Art. IV, § 2, cl. 1] recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington."

That Mr. Justice Washington thought Art. IV, § 2, cl. 1, to embody a guarantee of "natural rights" is not surprising. It revealed his preference for that determination of the controversy raging in his time over the significance of "natural rights" in constitutional adjudication.

> "Behind the 1825 *Corfield* opinion lay the nineteenth century controversy over the status of 'natural rights' in constitutional litigation. Some judges had supposed an inherent limitation on state and federal legislation that compelled courts to strike down any law 'contrary to the first great principles of the social compact.' They were the proponents of the natural rights doctrine which, without specific constitutional moorings, posited 'certain vital principles in our free republican governments, which will determine and overrule an apparent abuse of legislative powers.'
>
> "*Corfield* can be understood as an attempt to import the natural rights doctrine into the Constitution by way of the privileges and immunities clause of article IV. By attaching the fundamental rights of state citizenship to the privileges and immunities clause, Justice Washington would have created federal judicial protection against state encroachment upon the 'natural rights' of citizens." L. Tribe, American Constitutional Law 405–406 (1978) (footnotes omitted).

What *is* surprising, however, is the extent to which *Corfield*'s

view of the Clause as protecting against governmental encroachment upon "natural rights" continued to influence interpretation of the Clause [1] even after Mr. Justice Washington's view was seemingly discarded in *Paul* v. *Virginia,* 8 Wall. 168 (1869), and replaced by the view that the measure of the rights secured to nonresidents [2] was the extent of the rights afforded by a State to its own citizens. *Paul* announced that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States, *so far as the advantages resulting from citizenship in those States are concerned.*" *Id.,* at 180 (emphasis added). But during the 79 years between *Paul* and our decision in *Toomer* v. *Witsell,* 334 U. S. 385 (1948), Art. IV, § 2, cl. 1, was given an anomalous and unduly restrictive scope. Mr. Justice Washington's expansive interpretation of "privileges and immunities" as broadly insuring a host of rights against *all* government interference was superimposed on *Paul*'s conception of the Clause as prohibiting a State from unjustifiably discriminating against nonresidents—a view of Art. IV, § 2, cl. 1, that I think correct—with the result that the Clause's guarantee was held to prohibit a State from denying to citizens of other States only those "fundamental" rights that it guaranteed to its own citizens. Cf. *Minor* v. *Happersett,* 21 Wall. 162, 174 (1875). Yet because nonresidents could present special problems for a State in the administration of its laws even where rights thought to be "fundamental" were involved, this conception of Art. IV, § 2, cl. 1, born of the commingling of two disparate views of the Clause that

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[1] See, *e. g., Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553, 560 (1920); *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U. S. 142, 155 (1907); *Blake* v. *McClung,* 172 U. S. 239, 248–249 (1898).

[2] For the purpose of analysis of most cases under the Privileges and Immunities Clause of Art. IV, the terms "citizen" and "resident" are "essentially interchangeable." *Austin* v. *New Hampshire,* 420 U. S. 656, 662 n. 8 (1975); *Toomer* v. *Witsell,* 334 U. S. 385, 397 (1948).

were never meant to mate, proved difficult of rigid application. Thus, although Mr. Justice Washington listed the right "to institute and maintain actions of any kind in the courts of the state" as one of the "fundamental" rights within the ambit of Art. IV, § 2, cl. 1, *Corfield* v. *Coryell, supra,* at 552, this Court upheld state statutes that denied nonresidents precisely the same access to state courts as was guaranteed residents. *Chemung Canal Bank* v. *Lowery,* 93 U. S. 72 (1876), for example, upheld a Wisconsin statute that tolled the statute of limitations on a cause of action against a defendant absent from the State only when the plaintiff was a Wisconsin resident; the ground was that "[t]here is, in fact, a valid reason for the discrimination." *Id.,* at 77.[3] Similarly, *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553 (1920), sanctioned a Minnesota provision that allowed only citizens of that State to sue in state court on a cause of action arising out of the State that would have been barred by the statute of limitations in the State where the cause of action arose. The Court found that such a statute did not, in the words of *Blake* v. *McClung,* 172 U. S. 239, 256 (1898), " 'materially interfer[e] with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States.' " *Canadian Northern R. Co.* v. *Eggen, supra,* at 562.

Mr. Justice Roberts' analysis of the Privileges and Immunities Clause of Art. IV, § 2, in *Hague* v. *CIO, supra,* was the first noteworthy modern pronouncement on the Clause from

[3] The reason given was: "If the statute does not run as between nonresident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin,—it may be only in a railroad train,—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust." 93 U. S., at 77.

this Court. Not only did Mr. Justice Roberts recognize that *Corfield*'s view of the Privileges and Immunities Clause might, and should be, properly interred as the product of a bygone era, but also he went on to emphasize the interpretation of the scope of the Clause proposed in *Paul* v. *Virginia, supra,* namely, that "[t]he section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." 307 U. S., at 511. In singling out this passage as one of "three general comments [on the Clause] that deserve mention," *ante,* at 380, the Court acknowledges the significance of Mr. Justice Roberts' statement, but, with all respect, errs in not also appreciating that the Roberts statement signaled the complete demise of the Court's acceptance of *Corfield*'s definition of the type of rights encompassed by the phrase "privileges and immunities." No longer would that definition be controlling, or even relevant, in evaluating whether the discrimination visited by a State on nonresidents vis-à-vis its own citizens passed constitutional muster.

Less than a decade after *Hague, Toomer* v. *Witsell, supra,* embraced and applied the Roberts interpretation of the Clause. In *Toomer,* a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State was held to be violative of the Clause. After stating that the Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy," 334 U. S., at 395, the Court set out the standard against which a State's differential treatment of nonresidents would be evaluated.

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States *where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other*

> *States.* But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.*, at 396 (emphasis added) (footnote omitted).

Unlike the relatively minimal burden of rationality South Carolina would have had to satisfy in defending a law not infringing on a "fundamental" interest against an equal protection attack, see *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), the State could not meet the plaintiffs' privileges and immunities challenge simply by asserting that the discrimination was a rational means for fostering a legitimate state interest. Instead, even though an important state objective—conservation—was at stake, *Toomer* held that a classification based on the fact of noncitizenship was constitutionally infirm "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U. S., at 398. Moreover, even where the problem the State is attempting to remedy is linked to the presence or activity of nonresidents in the State, the Clause requires that there be "a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.*, at 399.

*Toomer* was followed in *Mullaney* v. *Anderson*, 342 U. S. 415 (1952). In *Mullaney*, the scheme employed by the Territorial Legislature of Alaska for the licensing of commercial fishermen in territorial waters, which imposed a $5 license fee on resident fishermen and a $50 fee on nonresidents, was found invalid under the Clause. Although the Court reaffirmed its observation in *Toomer* that a State may "charge non-residents a

differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay," 342 U. S., at 417, the Court found that Alaska's mere assertion of these justifications was insufficient to sustain the fee differential in licensing in the face of evidence that, in the case under review, the justifications had no basis in fact.

Neither *Toomer* nor *Mullaney* cited *Corfield* or discussed whether commercial fishing was the type of "fundamental" right entitled to protection under Mr. Justice Washington's view of the Privileges and Immunities Clause. Although the Court in *Toomer* did "hold that commercial shrimping in the marginal sea, like other common callings, is within the privileges and immunities clause," 334 U. S., at 403, its statement to this effect was conclusory and clearly secondary to its extensive analysis of whether South Carolina's discrimination against nonresidents was properly justified. The State's justification for its discrimination against nonresidents was also the focus of the privileges and immunities analysis in *Doe* v. *Bolton,* 410 U. S. 179 (1973), which summarily added "medical services" to the panoply of privileges protected by the Clause and held invalid a Georgia law permitting only Georgia residents to obtain abortions within that State.[4] It is true that *Austin* v. *New Hampshire,* 420 U. S. 656 (1975), cited *Corfield* for the proposition that discriminatory taxation of the nonresident was one of the evils the Clause was designed to protect against; but "an exemption from higher taxes" was the one privileges and immunities right that Mr. Justice Washington framed in terms of discriminatory treatment. As in *Toomer, Mullaney,* and *Bolton,* the Court's

[4] Although it is true that a woman's right to choose to have an abortion is "fundamental" for purposes of equal protection analysis, *Roe* v. *Wade,* 410 U. S. 113 (1973), the Court did not rely on this fact and deemed all "medical services" within the protection of the Clause. Again no mention was made of *Corfield.*

principal concern in *Austin* was the classification itself—the fact that the discrimination hinged on the status of nonresidency.

I think the time has come to confirm explicitly that which has been implicit in our modern privileges and immunities decisions, namely that an inquiry into whether a given right is "fundamental" has no place in our analysis of whether a State's discrimination against nonresidents—who "are not represented in the [discriminating] State's legislative halls," *Austin* v. *New Hampshire, supra,* at 662—violates the Clause. Rather, our primary concern is the State's justification for its discrimination. Drawing from the principles announced in *Toomer* and *Mullaney,* a State's discrimination against nonresidents is permissible where (1) the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal, and (2) the discrimination practiced against nonresidents bears a substantial relation to the problem they present. Although a State has no burden to prove that its laws are not violative of the Privileges and Immunities Clause, its mere assertion that the discrimination practiced against nonresidents is justified by the peculiar problem nonresidents present will not prevail in the face of a prima facie showing that the discrimination is not supportable on the asserted grounds. This requirement that a State's unequal treatment of nonresidents be reasoned and suitably tailored furthers the federal interest in ensuring that "a norm of comity," *Austin* v. *New Hampshire, supra,* at 660, prevails throughout the Nation while simultaneously guaranteeing to the States the needed leeway to draw viable distinctions between their citizens and those of other States.

## II

It is clear that under a proper privileges and immunities analysis Montana's discriminatory treatment of nonresident big-game hunters in this case must fall. Putting aside the

validity of the requirement that nonresident hunters desiring to hunt elk must purchase a combination license that resident elk hunters need not buy, there are three possible justifications for charging nonresident elk hunters an amount at least 7.5 times the fee imposed on resident big-game hunters.[5] The first is conservation. The State did not attempt to assert this as a justification for its discriminatory licensing scheme in the District Court, and apparently does not do so here. Indeed, it is difficult to see how it could consistently with the first prong of a modern privileges and immunities analysis. First, there is nothing in the record to indicate that the influx of nonresident hunters created a special danger to Montana's elk or to any of its other wildlife species. In the most recent year for which statistics are available, 1974–1975, there were 198,411 resident hunters in Montana and only 31,406 nonresident hunters. Nonresidents thus constituted only 13% of all hunters pursuing their sport in the State.[6] Moreover, as the Court recognizes, *ante,* at 375 n. 10, the number of nonresident *big-game* hunters has never approached the 17,000 limit set by statute, presumably as a precautionary conservation measure.[7] Second, if Montana's discriminatorily high big-game license fee is an outgrowth of general conservation policy to discourage elk hunting, this too fails as a basis for the licensing scheme.

[5] This is the cost ratio of the 1976 nonresident combination license fee ($225) to the 1976 resident combination license fee ($30). Since a Montana resident wishing to hunt only elk could purchase an elk-hunting license for only $9, a nonresident who wanted to hunt only elk had to pay a fee 25 times as great as that charged a similarly situated resident of Montana.

[6] These are the figures for all hunters in Montana, not only for those hunting elk. The Court's notation of the fact that the number of nonresident hunters in Montana has increased more dramatically than the number of resident hunters during the past decade, *ante,* at 374–375, thus somewhat overstates the putative conservation threat nonresident hunters pose for Montana's wildlife.

[7] This restriction on the number of big-game hunters allowed into Montana is thus not at issue.

Montana makes no effort similarly to inhibit its own residents. As we said in *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 285 n. 21 (1977), "[a] statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all."

The second possible justification for the fee differential Montana imposes on nonresident elk hunters—the one presented in the District Court and principally relied upon here—is a cost justification. Appellants have never contended that the Privileges and Immunities Clause requires that identical fees be assessed residents and nonresidents. They recognize that *Toomer* and *Mullaney* allow additional charges to be made on nonresidents based on both the added enforcement costs the presence of nonresident hunters imposes on Montana and the State's conservation expenditures supported by resident-borne taxes. Their position throughout this litigation has been that the higher fee extracted from nonresident elk hunters is not a valid effort by Montana to recoup state expenditures on their behalf, but a price gouged from those who can satisfactorily pursue their avocation in no other State in the Union. The licensing scheme, appellants contend, is simply an attempt by Montana to shift the costs of its conservation efforts, however commendable they may be, onto the shoulders of nonresidents who are powerless to help themselves at the ballot box. The District Court agreed, finding that "[o]n a consideration of [the] evidence . . . and with due regard to the presumption of constitutionality . . . the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation." *Montana Outfitters Action Group* v. *Fish & Game Comm'n*, 417 F. Supp. 1005, 1008 (Mont. 1976). This finding is not clearly erroneous, *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395 (1948), and the Court does not intimate otherwise. Montana's attempt to cost-justify its discriminatory licensing practices thus fails under the second prong of a correct privileges and immunities

analysis—that which requires the discrimination a State visits upon nonresidents to bear a substantial relation to the problem or burden they pose.

The third possible justification for Montana's licensing scheme, the doctrine of *McCready* v. *Virginia,* 94 U. S. 391 (1877), is actually no justification at all, but simply an assertion that a State "owns" the wildlife within its borders in trust for its citizens and may therefore do with it what it pleases. See *Geer* v. *Connecticut,* 161 U. S. 519 (1896). The lingering death of the *McCready* doctrine as applied to a State's wildlife, begun with the thrust of Mr. Justice Holmes' blade in *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920) ("[t]o put the claim of the State upon title is to lean upon a slender reed") and aided by increasingly deep twists of the knife in *Foster Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 11–14 (1928); *Toomer* v. *Witsell,* 334 U. S., at 402; *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410, 421 (1948); and *Kleppe* v. *New Mexico,* 426 U. S. 529, 545–546 (1976), finally became a reality in *Douglas* v. *Seacoast Products, Inc., supra,* at 284, where MR. JUSTICE MARSHALL, speaking for the Court, observed:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' *Toomer* v. *Witsell,* 334 U. S., at 402 . . . . Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution."

In unjustifiably discriminating against nonresident elk hunters, Montana has not "exercised its police power in conformity with the . . . Constitution." The State's police power interest in its wildlife cannot override the appellants' constitutionally protected privileges and immunities right. I respectfully dissent and would reverse.[8]

[8] Because I find Montana's elk-hunting licensing scheme unconstitutional under the Privileges and Immunities Clause of Art. IV, § 2, I find it unnecessary to determine whether the scheme would pass equal protection scrutiny. In any event, where a State discriminates *solely* on the basis of noncitizenship or nonresidency in the State, see n. 1, *supra*, it is my view that the Equal Protection Clause affords a discriminatee no greater protection than the Privileges and Immunities Clause.

# VITEK, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. *v.* JONES ET AL.

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

No. 77–888. Argued April 24, 1978—Decided May 23, 1978

District Court's judgment that a Nebraska statute authorizing a state prisoner's transfer to a state mental hospital without his consent was unconstitutional as applied to plaintiff prisoners, including appellee, in an action challenging the statute's validity, is vacated, and the case is remanded for consideration of mootness, where it appears that appellee has accepted parole for the purpose of receiving, and is receiving, psychiatric care at a Veterans Hospital.

437 F. Supp. 569, vacated and remanded.

*Melvin Kent Kammerlohr,* Assistant Attorney General of Nebraska, argued the cause for appellants. With him on the brief was *Paul L. Douglas,* Attorney General.

*Thomas A. Wurtz,* by appointment of the Court, 435 U. S. 949, argued the cause and filed a brief for appellee Jones.*

PER CURIAM.

This appeal presents a challenge under the Due Process Clause of the Fourteenth Amendment to a state statute which authorizes the transfer of a state prisoner, without his consent, to a state mental hospital upon a finding by a physician or psychologist that the prisoner suffers from a mental disease or defect and that he cannot be given proper treatment within the facility in which he is confined.[1]

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**Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, and *John T. Murphy, Karl S. Mayer,* and *Thomas P. Dove,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

[1] Nebraska Rev. Stat. § 83–180 (1976) provides in relevant part:

"[W]hen a physician or psychologist designated by the [Director of

Appellee Larry D. Jones [2] was convicted of the crime of robbery and was sentenced to a prison term of three to nine years. In May 1974, he began serving his sentence at the Nebraska Penal and Correctional Complex, a state prison. In January 1975, appellee was transferred to the penitentiary hospital; two days later he was placed in solitary confinement in the prison adjustment center. While there, appellee set his mattress on fire and suffered serious burns. Appellee was transferred by ambulance to the burn unit of a private hospital where he remained for some four months. In April 1975, immediately following his release from the hospital, appellee was transferred to the security unit of the Lincoln Regional Center, a hospital facility owned and operated by the State of Nebraska for the purpose of providing treatment for persons afflicted with emotional and mental disorders.

In advance of his transfer to Lincoln Regional Center,

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Correctional Sevices] finds that a person committed to the [Department of Correctional Services] suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

[2] This lawsuit was initially brought by a single plaintiff, Charles Miller. On August 18, 1976, plaintiff's suit was certified as a class action. After a hearing, the action was decertified. Thereafter, William McKinley Hines, William George Foote, and Larry D. Jones were added as individual plaintiffs-intervenors. Hines, who had been returned to state prison and released on parole, did not participate in the proceedings before the District Court, which ordered him dismissed as a plaintiff-intervenor on September 12, 1977. Prior to the entry of the judgment below, Miller and Foote each completed his maximum sentence and received a final discharge. Jones is the sole appellee in this Court.

appellee was examined by a psychiatrist as required by Neb. Rev. Stat. § 83–180 (1976). The evidence adduced before the District Court revealed that, when asked by the examining psychiatrist whether or not he wished to be transferred, appellee answered that he did. However, the District Court deemed the transfer to have been involuntary because appellee was offered no means of obtaining independent advice on the subject and because, in the view of the District Court, appellee "may well not have been competent to exercise a free choice." [3] It is undisputed that, in transferring appellee from a prison facility to a mental institution, the correctional authorities exercised the authority conferred on them by the state statute challenged here.

In April 1976, appellee filed a complaint in the United States District Court for the District of Nebraska seeking to intervene in a civil rights action brought by a state prisoner who, like appellee, had been transferred from the State Penal Complex to Lincoln Regional Center.

The three-judge District Court agreed that due process attached to plaintiffs' asserted liberty interest and declared § 83–180 (1) unconstitutional as applied. *Miller* v. *Vitek,* 437 F. Supp. 569. The District Court also enjoined the transfer of any state prisoner from a penal facility to a mental institution except in compliance with procedures similar to those identified in this Court's opinions in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), and *Wolff* v. *McDonnell,* 418 U. S. 539 (1974). Additional procedures set forth by the District Court require the State to furnish the inmate with effective and timely notice of his rights and, in the case of an indigent inmate, with legal counsel. We noted probable jurisdiction.[4]

On November 17, 1977,[5] the Nebraska Board of Parole

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[3] *Miller* v. *Vitek,* 437 F. Supp. 569, 571 n. 3.

[4] 434 U. S. 1060 (1978).

[5] The District Court rendered its judgment in this case on October 14, 1977.

granted appellee parole for the purpose of allowing him to receive in-patient psychiatric care at the Veterans Hospital in Danville, Ill. During the course of oral argument in this Court, appellee's counsel advised the Court that appellee has accepted the parole offered to him and agreed to treatment at the Veterans Hospital. Moreover, according to counsel, appellee is now cooperating with the medical staff assigned to his care and voluntarily taking medication prescribed for him.[6]

In light of these disclosures, the judgment of the United States District Court for the District of Nebraska is hereby vacated, and the case is remanded to the District Court for consideration of the question of mootness.

*Vacated and remanded.*

MR. JUSTICE STEVENS, dissenting.

The question whether a person convicted of a crime has a constitutional right to a hearing before being involuntarily placed in a mental institution is an important one. In this case the three-judge District Court answered that question in the affirmative and entered an injunction protecting appellee against the risk of an arbitrary transfer. As long as he remains in appellants' custody, he will continue to encounter that risk unless the District Court's injunction remains in effect. Recognizing this, the District Court explicitly provided that appellants "are enjoined from transferring . . . Larry D. Jones, *at any time before his complete discharge from the custody of the State of Nebraska,*" [1] without following the mandated procedures.

It is undisputed that Jones remains in the custody of the State of Nebraska.[2] At the moment, he is on limited parole, and, as a condition of that parole, is receiving in-patient

[6] Tr. of Oral Arg. 13, 19, 41–44.

[1] App. to Jurisdictional Statement 2 (emphasis added).

[2] Jones' tentative discharge date is not until March 1982. Brief for Appellants on the Question of Mootness 2.

psychiatric services in Danville, Ill. I have previously expressed my disagreement with this Court's conclusion that a parole release moots a controversy between a prisoner and the State over proper parole procedures, see *Scott* v. *Kentucky Parole Board*, 429 U. S. 60 (STEVENS, J., dissenting), and what was said in *Scott* applies with even greater force here. For unlike Scott, Jones has not challenged the Nebraska parole procedures, and his limited release on parole does not even arguably moot this live controversy between two adverse litigants. Jones challenged the procedures provided for the transfer of a criminal convict under the State's custody to a mental hospital. He is still in a mental hospital; he is still under the State's custody; and if he refuses treatment at this hospital, the State asserts the right to transfer him, involuntarily and without a hearing, to another mental hospital. In short, nothing has happened to destroy or even substantially lessen Jones' interest in preserving the injunction entered below, and appellants' interest in vindicating the Nebraska statute is similarly unaffected. I therefore respectfully dissent from the Court's disposition of this appeal.

# IN RE PRIMUS

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 77–56. Argued January 16, 1978—Decided May 30, 1978

Appellant, a practicing lawyer in South Carolina who was also a cooperating lawyer with a branch of the American Civil Liberties Union (ACLU), after advising a gathering of women of their legal rights resulting from their having been sterilized as a condition of receiving public medical assistance, informed one of the women in a subsequent letter that free legal assistance was available from the ACLU. Thereafter, the disciplinary Board of the South Carolina Supreme Court charged and determined that appellant, by sending such letter, had engaged in soliciting a client in violation of certain Disciplinary Rules of the State Supreme Court, and issued a private reprimand. The court adopted the Board's findings and increased the sanction to a public reprimand. *Held:* South Carolina's application of its Disciplinary Rules to appellant's solicitation by letter on the ACLU's behalf violates the First and Fourteenth Amendments. *NAACP* v. *Button,* 371 U. S. 415, followed; *Ohralik* v. *Ohio Bar Assn., post,* p. 447, distinguished. Pp. 421–439.

(a) Solicitation of prospective litigants by nonprofit organizations that engage in litigation as "a form of political expression" and "political association" constitutes expressive and associational conduct entitled to First Amendment protection, as to which government may regulate only "with narrow specificity," *Button, supra,* at 429, 431, 433. Pp. 422–425.

(b) Subsequent decisions have interpreted *Button* as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 585, and have required that "broad rules framed to protect the public and to preserve respect for the administration of justice" must not work a significant impairment of "the value of associational freedoms," *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217, 222. P. 426.

(c) Appellant's activity in this case comes within the generous zone of protection reserved for associational freedoms because she engaged in solicitation by mail on behalf of a bona fide, nonprofit organization that pursues litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. There is nothing in the record to suggest that the ACLU

or its South Carolina affiliate is an organization dedicated exclusively to providing legal services, or a group of attorneys that exists for the purpose of financial gain through the recovery of counsel fees, or a mere sham to evade a valid state rule against solicitation for pecuniary gain. Pp. 426–432.

(d) The Disciplinary Rules in question, which sweep broadly, rather than regulating with the degree of precision required in the context of political expression and association, have a distinct potential for dampening the kind of "cooperative activity that would make advocacy of litigation meaningful," *Button, supra,* at 438, as well as for permitting discretionary enforcement against unpopular causes. P. 433.

(e) Although a showing of potential danger may suffice in the context of in-person solicitation for pecuniary gain under the decision today in *Ohralik,* appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed. P. 434.

(f) The record does not support appellee's contention that undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, or lay interference actually occurred in this case. And the State's interests in preventing the "stirring up" of frivolous or vexatious litigation and minimizing commercialization of the legal profession offer no further justification for the discipline administered to appellant. Pp. 434–437.

(g) Nothing in this decision should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the ACLU. Pp. 438–439.

268 S. C. 259, 233 S. E. 2d 301, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and STEVENS, JJ., joined, and in all but the first paragraph of Part VI of which MARSHALL, J., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 439. MARSHALL, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 468. REHNQUIST, J., filed a dissenting opinion, *post,* p. 440. BRENNAN, J., took no part in the consideration or decision of the case.

*Ray P. McClain* argued the cause for appellant. With him on the briefs were *Joel M. Gora, Laughlin McDonald, Neil Bradley,* and *H. Christopher Coates.*

*Richard B. Kale, Jr.,* Assistant Attorney General of South

Carolina, argued the cause for appellee. With him on the brief was *Daniel R. McLeod,* Attorney General.*

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button,* 371 U. S. 415 (1963), we noted probable jurisdiction.

## I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm,".[1] and was an officer of and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU).[2] She re-

*Briefs of *amici curiae* were filed by *Herbert M. Rosenthal* and *Stuart A. Forsyth* for the State Bar of California, and by *Girardeau A. Spann* and *Alan B. Morrison* for Public Citizen et al.

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

[2] The ACLU was organized in 1920 by individuals who had worked in the defense of the rights of conscientious objectors during World War I and political dissidents during the postwar period. It views itself as a "national non-partisan organization defending our Bill of Rights for all

ceived no compensation for her work on behalf of the ACLU,[3] but was paid a retainer as a legal consultant for the South Carolina Council on Human Relations (Council), a nonprofit organization with offices in Columbia.

During the summer of 1973, local and national newspapers reported that pregnant mothers on public assistance in Aiken County, S. C., were being sterilized or threatened with sterilization as a condition of the continued receipt of medical assistance under the Medicaid program.[4] Concerned by this development, Gary Allen, an Aiken businessman and officer of a local organization serving indigents, called the Council requesting that one of its representatives come to Aiken to address some of the women who had been sterilized. At the Council's behest, appellant, who had not known Allen previously, called him and arranged a meeting in his office in July 1973. Among those attending was Mary Etta Williams, who had been sterilized by Dr. Clovis H. Pierce after the birth of her third child. Williams and her grandmother attended the meeting because Allen, an old family friend, had invited

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without distinction or compromise." ACLU, Presenting the American Civil Liberties Union 2 (1948). The organization's activities range from litigation and lobbying to educational campaigns in support of its avowed goals. See Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 Stan. L. Rev. 207, 211–212 (1976); Note, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L. J. 574, 576 (1949); see also App. 185–186. See generally C. Markmann, The Noblest Cry: A History of the American Civil Liberties Union (1965); D. Johnson, The Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union (1963).

[3] Although all three lawyers in the Carolina Community Law Firm maintained some association with the ACLU—appellant and Carlton Bagby as unsalaried cooperating lawyers, and Herbert Buhl as staff counsel—appellant testified that "the firm did not handle any litigation for [the] ACLU." App. 134.

[4] See, *e. g.*, 3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers, New York Times, July 22, 1973, p. 30, cols. 1–3.

them and because Williams wanted "[t]o see what it was all about . . . ." App. 41–42. At the meeting, appellant advised those present, including Williams and the other women who had been sterilized by Dr. Pierce, of their legal rights and suggested the possibility of a lawsuit.

Early in August 1973 the ACLU informed appellant that it was willing to provide representation for Aiken mothers who had been sterilized.[5] Appellant testified that after being advised by Allen that Williams wished to institute suit against Dr. Pierce, she decided to inform Williams of the ACLU's offer of free legal representation. Shortly after receiving appellant's letter, dated August 30, 1973[6]—the centerpiece of this

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[5] App. 94–95, 131–133, 135–137; Brief for Appellee 8.

[6] Written on the stationery of the Carolina Community Law Firm, the letter stated:

August 30, 1973

Mrs. Marietta Williams
347 Sumter Street
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me *collect* at 254–8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) *collect*.

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming

litigation—Williams visited Dr. Pierce to discuss the progress of her third child who was ill. At the doctor's office, she encountered his lawyer and at the latter's request signed a release of liability in the doctor's favor. Williams showed appellant's letter to the doctor and his lawyer, and they retained a copy. She then called appellant from the doctor's office and announced her intention not to sue. There was no further communication between appellant and Williams.

On October 9, 1974, the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) filed a formal complaint with the Board, charging that appellant had engaged in "solicitation in violation of the Canons of Ethics" by sending the August 30, 1973, letter to Williams. App. 1–2. Appellant denied any unethical solicitation and asserted, *inter alia,* that her conduct was protected by the First and Fourteenth Amendments and by Canon 2 of the Code of Professional Responsibility of the American Bar Association (ABA). The complaint was heard by a panel of the Board on March 20, 1975. The State's evidence consisted of the letter, the testimony of Williams,[7]

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to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,
s/ Edna Smith
Edna Smith
Attorney-at-law

App. 3–4.

[7] Williams testified that at the July meeting appellant advised her of her legal remedies, of the possibility of a lawsuit if her sterilization had been coerced, and of appellant's willingness to serve as her lawyer without compensation. Williams recounted that she had told appellant that because her child was in critical condition, she "did not have time for" a lawsuit and "would contact [appellant] some more." She also denied that she had expressed to Allen an interest in suing her doctor. *Id.,* at 29–34, 58. On cross-examination, however, Williams confirmed an earlier statement she had made in an affidavit that appellant "did not attempt to persuade or pressure me to file [the] lawsuit." *Id.,* at 52. See n. 28, *infra.*

and a copy of the summons and complaint in the action instituted against Dr. Pierce and various state officials, *Walker* v. *Pierce*, Civ. No. 74–475 (SC, July 28, 1975), aff'd in part and rev'd in part, 560 F. 2d 609 (CA4 1977), cert. denied, 434 U. S. 1075 (1978).[8] Following denial of appellant's motion to dismiss, App. 77–82, she testified in her own behalf and called Allen, a number of ACLU representatives, and several character witnesses.[9]

The panel filed a report recommending that appellant be found guilty of soliciting a client on behalf of the ACLU, in violation of Disciplinary Rules (DR) 2–103 (D)(5)(a) and (c) [10] and 2–104 (A)(5) [11] of the Supreme Court of South

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[8] This class action was filed on April 15, 1974, by two Negro women alleging that Dr. Pierce, in conspiracy with state officials, had sterilized them, or was threatening to do so, solely on account of their race and number of children, while they received assistance under the Medicaid program. The complaint sought declaratory and injunctive relief, damages, and attorney's fees, and asserted violations of the Constitution and 42 U. S. C. §§ 1981, 1983, 1985 (3), and 2000d.

Bagby, one of appellant's associates in the Carolina Community Law Firm and fellow cooperating lawyer with the ACLU, was one of several attorneys of record for the plaintiffs. Buhl, another of appellant's associates and a staff counsel for the ACLU in South Carolina, also may have represented one of the women.

[9] Appellant also offered to produce expert testimony to the effect that some measure of solicitation of prospective litigants is necessary in safeguarding the civil liberties of inarticulate, economically disadvantaged individuals who may not be aware of their legal rights and of the availability of legal counsel, App. 166–168; that the purpose of the ACLU is to advance and defend the cause of civil liberties, *id.*, at 183–186; and that the ACLU relies on decisions such as *NAACP* v. *Button*, 371 U. S. 415 (1963), in advising its attorneys of the extent of constitutional protection for their litigation activities, App. 187–188. These offers of proof were rejected as not germane to the disciplinary proceeding.

[10] South Carolina's DR 2–103 (D) provides:

"(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of

[*Footnote 11 is on p. 420*]

Carolina,[12] and that a private reprimand be issued. It noted that "[t]he evidence is inconclusive as to whether [appellant] solicited Mrs. Williams on her own behalf, but she did solicit

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his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

"(1) A legal aid office or public defender office:

"(a) Operated or sponsored by a duly accredited law school.

"(b) Operated or sponsored by a bona fide non-profit community organization.

"(c) Operated or sponsored by a governmental agency.

"(d) Operated, sponsored, or approved by a bar association respresentative of the general bar of the geographical area in which the association exists.

"(2) A military legal assistance office.

"(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

"(4) A bar association representative of the general bar of the geographical area in which the association exists.

"(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

"(a) The primary purposes of such organization do not include the rendition of legal services.

"(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

"(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

"(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter."

[*Footnote 12 is on p. 420*]

Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages." The panel determined that appellant violated DR 2–103 (D)(5) "by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a

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[11] South Carolina's DR 2–104 (A) provides:

"(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

"(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

"(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2–103 (D) (1) through (5), to the extent and under the conditions prescribed therein.

"(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2–103 (D) (1), (2), or (5) may represent a member or beneficiary thereof to the extent and under the conditions prescribed therein.

"(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

"(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."

[12] Section 4 (b) of the Supreme Court of South Carolina's Rule on Disciplinary Procedure defines misconduct as a "violation of any of the Canons of Professional Ethics as adopted by this Court from time to time . . . ." 22 S. C. Code, p. 59 (1977). On March 1, 1973, the state court adopted the ABA's Code of Professional Responsibility. Rule 32 of the Supreme Court of South Carolina, *id.*, at 48. Although DR 2–103 (D) has been revised substantially by the ABA, South Carolina has not adopted that revision.

staff counsel for the non-profit organization." Appellant also was found to have violated DR 2–104 (A)(5) because she solicited Williams, after providing unsolicited legal advice, to join in a prospective class action for damages and other relief that was to be brought by the ACLU.

After a hearing on January 9, 1976, the full Board approved the panel report and administered a private reprimand. On March 17, 1977, the Supreme Court of South Carolina entered an order which adopted verbatim the findings and conclusions of the panel report and increased the sanction, *sua sponte,* to a public reprimand. 268 S. C. 259, 233 S. E. 2d 301.

On July 9, 1977, appellant filed a jurisdictional statement and this appeal was docketed. We noted probable jurisdiction on October 3, 1977, *sub nom. In re Smith,* 434 U. S. 814. We now reverse.

## II

This appeal concerns the tension between contending values of considerable moment to the legal profession and to society. Relying upon *NAACP* v. *Button,* 371 U. S. 415 (1963), and its progeny, appellant maintains that her activity involved constitutionally protected expression and association. In her view, South Carolina has not shown that the discipline meted out to her advances a subordinating state interest in a manner that avoids unnecessary abridgment of First Amendment freedoms.[13] Appellee counters that appellant's letter to Williams falls outside of the protection of *Button,* and that

[13] In addition to her claim of protection under this Court's *Button* decision, appellant contends that (i) the State's failure to give her fair notice of the precise charges leveled against her in the disciplinary proceeding worked a violation of due process, see *In re Ruffalo,* 390 U. S. 544 (1968); (ii) the absence of proof of essential elements of the Disciplinary Rules also violated due process, see *Thompson* v. *Louisville,* 362 U. S. 199 (1960); and (iii) the Disciplinary Rules are void for vagueness under the First and Fourteenth Amendments, see *Bouie* v. *Columbia,* 378 U. S. 347 (1964). In view of our disposition of this case, we do not reach these contentions.

South Carolina acted lawfully in punishing a member of its Bar for solicitation.

The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792 (1975). For example, we decide today in *Ohralik* v. *Ohio State Bar Assn., post,* p. 447, that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons.

Unlike the situation in *Ohralik,* however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.

## III

In *NAACP* v. *Button, supra,* the Supreme Court of Appeals of Virginia had held that the activities of members and staff attorneys of the National Association for the Advancement of Colored People (NAACP) and its affiliate, the Virginia State Conference of NAACP Branches (Conference), constituted

"solicitation of legal business" in violation of state law. *NAACP* v. *Harrison,* 202 Va. 142, 116 S. E. 2d 55 (1960). Although the NAACP representatives and staff attorneys had "a right to peaceably assemble with the members of the branches and other groups to discuss with them and advise them relative to their legal rights in matters concerning racial segregation," the court found no constitutional protection for efforts to "solicit prospective litigants to authorize the filing of suits" by NAACP-compensated attorneys. *Id.,* at 159, 116 S. E. 2d, at 68–69.

This Court reversed: "We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of [state law] and the Canons of Professional Ethics." 371 U. S., at 428–429. The solicitation of prospective litigants,[14] many of whom were not

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[14] The *Button* Court described the solicitation activities of NAACP members and attorneys in the following terms:

"Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or [NAACP Legal] Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund. In effect, then, the prospective litigant retains not so much a particular attorney as the firm of NAACP and Defense Fund lawyers . . . .

"These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation

members of the NAACP or the Conference, for the purpose of furthering the civil-rights objectives of the organization and its members was held to come within the right " 'to engage in association for the advancement of beliefs and ideas.' " *Id.*, at 430, quoting *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

Since the Virginia statute sought to regulate expressive and associational conduct at the core of the First Amendment's protective ambit, the *Button* Court insisted that "government may regulate in the area only with narrow specificity." 371 U. S., at 433. The Attorney General of Virginia had argued that the law merely (i) proscribed control of the actual litigation by the NAACP after it was instituted, *ibid.*, and (ii) sought to prevent the evils traditionally associated with common-law maintenance, champerty, and barratry, *id.*, at 438.[15] The Court found inadequate the first justification because of an absence of evidence of NAACP interference with the actual conduct of litigation, or neglect or harassment of clients, and because the statute, as construed, was not drawn narrowly to advance the asserted goal. It rejected the analogy to the common-law offenses because of an absence of proof that malicious intent or the prospect of pecuniary gain inspired the NAACP-sponsored litigation. It also found a lack of proof that a serious danger of conflict of interest marked the relationship between the NAACP and its member and nonmember Negro litigants. The Court concluded that "although the [NAACP] has amply shown that its activities fall within the

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to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to 'go all the way' in any possible litigation that may ensue." 371 U. S., at 421–422.

[15] Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty. See generally 4 W. Blackstone, Commentaries *134–136; Zimroth, Group Legal Services and the Constitution, 76 Yale L. J. 966, 969–970 (1967); Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48 (1935).

First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from [the NAACP's] activities, which can justify the broad prohibitions which it has imposed." *Id.*, at 444.[16]

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[16] Whatever the precise limits of the holding in *Button*, the Court at least found constitutionally protected the activities of NAACP members and staff lawyers in "advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation." 371 U. S., at 447 (WHITE, J., concurring in part and dissenting in part). In the following Term, the Court noted that *Button* presented an "occasion to consider an . . . attempt by Virginia to enjoin the National Association for the Advancement of Colored People from advising prospective litigants to seek the assistance of particular attorneys. In fact, . . . the attorneys were actually employed by the association which recommended them, and recommendations were made even to nonmembers." *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1, 7 (1964); see *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 221, 222–223 (1967).

The dissent of MR. JUSTICE REHNQUIST suggests that *Button* is distinguishable from this case because there "lawyers played only a limited role" in the solicitation of prospective litigants, and "the Commonwealth did not attempt to discipline the individual lawyers . . . ." *Post*, at 444, and n. 3. We do not think that *Button* can be read in this way. As the *Button* Court recognized, see n. 14, *supra*, and as the Virginia Supreme Court of Appeals had found, *NAACP* v. *Harrison*, 202 Va. 142, 154–155, 116 S. E. 2d 55, 65 (1960), NAACP staff attorneys were involved in the actual solicitation efforts. The absence of discipline in *Button* was not due to an absence of lawyer involvement in solicitation. Indeed, from all that appears, no one was disciplined; the case came to this Court in the posture of an anticipatory action for declaratory relief. The state court's decree made quite clear that "the solicitation of legal business by . . . [NAACP] attorneys, as shown by the evidence," and the acceptance of such solicited employment by NAACP-compensated attorneys, violated the state ban and the canons of ethics. *Id.*, at 164, 116 S. E. 2d, at 72. We therefore cannot view as dicta *Button*'s holding that "the activities of the NAACP . . . legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business . . . ." 371 U. S., at 428–429.

Subsequent decisions have interpreted *Button* as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 585 (1971). See *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 376 n. 32 (1977). The Court has held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal representation to their members. See *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964); *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217 (1967); *United Transportation Union* v. *Michigan Bar, supra.* And "lawyers accepting employment under [such plans] have a like protection which the State cannot abridge." *Railroad Trainmen, supra,* at 8. Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that "broad rules framed to protect the public and to preserve respect for the administration of justice" must not work a significant impairment of "the value of associational freedoms." *Mine Workers, supra,* at 222.

## IV

We turn now to the question whether appellant's conduct implicates interests of free expression and association sufficient to justify the level of protection recognized in *Button* and subsequent cases.[17] The Supreme Court of South Carolina found appellant to have engaged in unethical conduct because

[17] Appellee "finds no fault in Appellant's conduct in meeting with the women to advise them of their legal rights, even if such advice was unsolicited. There is no doubt that such activity is protected under the First Amendment." Brief for Appellee 30.

she " 'solicit[ed] a client for a non-profit organization, which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization.' " 268 S. C., at 269, 233 S. E. 2d, at 306.[18] It rejected appellant's First Amendment defenses by distinguishing *Button* from the case before it. Whereas the NAACP in that case was primarily a " 'political' " organization that used " 'litigation as an adjunct to the overriding political aims of the organization,' " the ACLU " 'has as one of its primary purposes the rendition of legal services.' " *Id.,* at 268, 269, 233 S. E. 2d, at 305, 306. The court also intimated that the ACLU's policy of requesting an award of counsel fees indicated that the organization might " 'benefit financially in the event of successful prosecution of the suit for money damages.' " *Id.,* at 263, 233 S. E. 2d, at 303.

Although the disciplinary panel did not permit full factual development of the aims and practices of the ACLU, see n. 9, *supra,* the record does not support the state court's effort to draw a meaningful distinction between the ACLU and the NAACP. From all that appears, the ACLU and its local chapters, much like the NAACP and its local affiliates in *Button,* "[engage] in extensive educational and lobbying activities" and "also [devote] much of [their] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [their] declared purposes." 371 U. S., at 419–420. See App. 177–178; n. 2, *supra.* The court below acknowledged that " 'the ACLU has only entered cases in which substantial civil liberties questions are involved . . . .' " 268 S. C., at 263, 233 S. E. 2d, at 303. See *Button,* 371 U. S., at 440 n. 19. It has engaged in the defense of unpopular

[18] In the discussion that follows, we do not treat separately the two Disciplinary Rules upon which appellant's violation was based. Since DR 2–103 (D)(5) was held by the court below to proscribe in a narrower fashion the same conduct as DR 2–104 (A)(5), see n. 26, *infra,* a determination of unconstitutionality as to the former would subsume the latter.

causes and unpopular defendants [19] and has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy. See generally Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 Stan. L. Rev. 207, 210–214 (1976). For the ACLU, as for the NAACP, "litigation is not a technique of resolving private differences"; it is "a form of political expression" and "political association." 371 U. S., at 429, 431.[20]

We find equally unpersuasive any suggestion that the level of constitutional scrutiny in this case should be lowered because of a possible benefit to the ACLU. The discipline administered to appellant was premised solely on the possibility of financial benefit to the organization, rather than any possibility of pecuniary gain to herself, her associates, or the lawyers representing the plaintiffs in the *Walker* v. *Pierce* litigation.[21] It is conceded that appellant received no com-

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[19] See, *e. g., Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363 (1927); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *United States* v. *O'Brien,* 391 U. S. 367 (1968); *Oestereich* v. *Selective Service Bd.,* 393 U. S. 233 (1968).

[20] There is nothing in the record to suggest that the ACLU or its South Carolina affiliate is an organization dedicated exclusively to the provision of legal services. See n. 2, *supra.* Nor does the record support any inference that either the ACLU or its affiliate "is a mere sham to cover what is actually nothing more than an attempt," *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 144 (1961), by a group of attorneys to evade a valid state rule against solicitation for pecuniary gain. Compare *Valentine* v. *Chrestensen,* 316 U. S. 52, 55 (1942), with *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964). Cf. *California Transport* v. *Trucking Unlimited,* 404 U. S. 508, 515 (1972).

[21] Appellee conjectures that appellant would have received increased support from private foundations if her reputation was enhanced as a result of her efforts in the cause of the ACLU. The decision below acknowledged, however, that the evidence did not support a finding that appellant solicited Williams on her own behalf. 268 S. C., at 263, 233 S. E. 2d, at 303. Since the discipline in this case was premised solely on the possibility that

pensation for any of the activities in question. It is also undisputed that neither the ACLU nor any lawyer associated with it would have shared in any monetary recovery by the plaintiffs in *Walker* v. *Pierce*. If Williams had elected to bring suit, and had been represented by staff lawyers for the ACLU, the situation would have been similar to that in *Button*, where the lawyers for the NAACP were "organized as a staff and paid by" that organization. 371 U. S., at 434; see *id.*, at 457 (Harlan, J., dissenting); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S., at 222–223; n. 16, *supra*.[22]

Contrary to appellee's suggestion, the ACLU's policy of requesting an award of counsel fees does not take this case outside of the protection of *Button*. Although the Court in *Button* did not consider whether the NAACP seeks counsel fees, such requests are often made both by that organization, see, *e. g.*, *NAACP* v. *Allen*, 493 F. 2d 614, 622 (CA5 1974); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507, 523 (Mass.), aff'd, 504 F. 2d 1017 (CA1 1974), cert. denied, 421 U. S. 910 (1975), and by the NAACP Legal Defense Fund, Inc., see, *e. g.*, *Bradley* v. *Richmond School Board*, 416 U. S. 696 (1974); *Reynolds* v. *Coomey*, 567 F. 2d 1166, 1167 (CA1 1978). In any event, in a case of this kind there are differences between counsel fees awarded by a court and traditional fee-paying arrangements which militate against a presumption

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appellant's solicitation might have conferred a financial benefit on the ACLU, *ibid.*, and any award of counsel fees would have been received only for the organization's benefit, see n. 24, *infra*, we also attach no significance to the fact that two of the attorneys in the *Doe* v. *Pierce* litigation were associated with appellant in an arrangement for sharing office expenses. See nn. 1, 8, *supra*.

[22] "The Virginia State Conference of [NAACP] Branches or petitioner pays the fees and expenses of the attorneys when they are handling a case involving discrimination, supported by the state or the national organization . . . . A fee of $60 per day is paid to the attorneys . . . who are almost invariably members of the legal staff." Brief for Petitioner in *NAACP* v. *Gray*, O. T. 1962, No. 5, pp. 9–10.

that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain rather than by its widely recognized goal of vindicating civil liberties. Counsel fees are awarded in the discretion of the court; awards are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome; and the amounts awarded often may not correspond to fees generally obtainable in private litigation. Moreover, under prevailing law during the events in question, an award of counsel fees in federal litigation was available only in limited circumstances.[23] And even if there had been an award during the period in question, it would have gone to the central fund of the ACLU.[24] Although such benefit to the organiza-

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[23] In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975), the Court held that a federal court may not award counsel fees in the absence of specific statutory authorization, a showing of "bad faith" in the conduct of the litigation, or facts giving rise to a "common fund" or "common benefit" recovery. The Court of Appeals for the Fourth Circuit anticipated our ruling in *Alyeska.* See *Bradley* v. *School Board of Richmond,* 472 F. 2d 318, 327–331 (1972), vacated and remanded on other grounds, 416 U. S. 696 (1974); *Bradley* v. *School Board of Richmond,* 345 F. 2d 310, 321 (1965).

[24] Appellant informs us that the ACLU policy then in effect provided that cooperating lawyers associated with the ACLU or with an affiliate could not receive an award of counsel fees for services rendered in an ACLU-sponsored litigation. Reply Brief for Appellant 4–5; see App. 173–175, 181–183; 1976 Policy Guide of the American Civil Liberties Union, Policy #512, p. 302:

"Under no circumstances may any cooperating attorney associated in any way with an ACLU or affiliate case receive payment for services rendered in such a case, whether as a fee or voluntary donation. The smallest exception to this rule would jeopardize the voluntary nature of the cooperating system and the effectiveness of ACLU's entire legal program."

Apparently it was feared that allowing acceptance of such fees might lead to selection of clients and cases for pecuniary reasons. See App. 182.

This policy was changed in 1977 to permit local experimentation with the sharing of court-awarded fees between state affiliates and cooperating attorneys. The South Carolina chapter has not exercised that option. Reply Brief for Appellant 5–6. We express no opinion whether our analy-

tion may increase with the maintenance of successful litigation, the same situation obtains with voluntary contributions and foundation support, which also may rise with ACLU victories in important areas of the law. That possibility, standing alone, offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees. See n. 20, *supra.*[25]

Appellant's letter of August 30, 1973, to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. See n. 32, *infra;* cf. *Bates* v. *State Bar of Arizona,* 433 U. S., at 364; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 779–780 (1976) (STEWART, J., concurring). As *Button* indicates, and as appellant offered to prove at the disciplinary hearing, see n. 9, *supra,* the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.

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sis in this case would be different had the latter policy been in effect during the period in question.

[25] The Internal Revenue Service has announced certain requirements for "public interest law firms" that seek tax-exempt status under § 501 (c) (3) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c) (3). Such an organization (i) may not accept fees from its clients as compensation for services rendered; (ii) may accept fees "in public interest cases" only if such fees are awarded by a court or administrative agency; (iii) may "not use the likelihood or probability of a fee award as a consideration in its selection of cases"; (iv) may not defray "more than 50 percent of the total cost of its legal functions" from awarded fees, unless an exemption is granted; (v) may not permit payment of awarded fees directly to individual staff attorneys; and (vi) may not accept awarded fees in circumstances that would result in any conflict with state law or professional canons of ethics. Rev. Proc. 75–13, § 3, 1975–1 Cum. Bull. 662. See Rev. Ruls. 75–74 through 75–76, 1975–1 Cum. Bull. 152–155.

" 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U. S. 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button,* 371 U. S., at 437, including "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance," *id.,* at 434.

V

South Carolina's action in punishing appellant for soliciting a prospective litigant by mail, on behalf of the ACLU, must withstand the "exacting scrutiny applicable to limitations on core First Amendment rights . . . ." *Buckley* v. *Valeo,* 424 U. S. 1, 44–45 (1976). South Carolina must demonstrate "a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960), and that the means employed in furtherance of that interest are "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley, supra,* at 25.

Appellee contends that the disciplinary action taken in this case is part of a regulatory program aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients, and to be present on the record before us. Brief for Appellee 37–49. We do not dispute the importance of these interests. This Court's decision in *Button* makes clear, however, that "[b]road prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U. S., at 438; see *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S., at 222–223. Because of the danger of censorship through selective enforcement of broad prohibitions, and "[b]ecause First Amendment freedoms need breathing space to survive, gov-

ernment may regulate in [this] area only with narrow specificity." *Button, supra,* at 433.

A

The Disciplinary Rules in question sweep broadly. Under DR 2–103 (D)(5), a lawyer employed by the ACLU or a similar organization may never give unsolicited advice to a lay person that he retain the organization's free services, and it would seem that one who merely assists or maintains a cooperative relationship with the organization also must suppress the giving of such advice if he or anyone associated with the organization will be involved in the ultimate litigation. See Tr. of Oral Arg. 32–34. Notwithstanding appellee's concession in this Court, it is far from clear that a lawyer may communicate the organization's offer of legal assistance at an informational gathering such as the July 1973 meeting in Aiken without breaching the literal terms of the Rule. Cf. Memorandum of Complainant, Apr. 8, 1975, p. 9.[26] Moreover, the Disciplinary Rules in question permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee maintains were present in this case. In sum, the Rules in their present form have a distinct potential for dampening the kind of "cooperative activity that would make advocacy of litigation meaningful," *Button, supra,* at 438, as well as for permitting discretionary enforcement against unpopular causes.

B

Even if we ignore the breadth of the Disciplinary Rules and the absence of findings in the decision below that support

[26] DR 2–104 (A)(5), as construed below, stands as a separate prohibition even though it appears in terms to be an exception to DR 2–104 (A), which bars only the acceptance of employment after the giving of unsolicited advice. It was applied in this case to an attorney who recommended participation in a prospective litigation and who did not accept any employment.

the justifications advanced by appellee in this Court,[27] we think it clear from the record—which appellee does not suggest is inadequately developed—that findings compatible with the First Amendment could not have been made in this case. As in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 284–285 (1964), "considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied." See *Jenkins* v. *Georgia,* 418 U. S. 153, 160–161 (1974); *Pickering* v. *Board of Education,* 391 U. S. 563, 574–575, 578–582, and n. 2 (1968); *Edwards* v. *South Carolina,* 372 U. S. 229, 235–236 (1963).

Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopt today in *Ohralik, post,* p. 447, that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

The record does not support appellee's contention that

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[27] Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court. See *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765, 789–790 (1978); *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 581 (1971); *Sherbert* v. *Verner,* 374 U. S. 398, 407 (1963); *Button,* 371 U. S., at 442–443; *Wood* v. *Georgia,* 370 U. S. 375, 388 (1962); *Thomas* v. *Collins,* 323 U. S. 516, 530, 536 (1945).

undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case. Appellant's letter of August 30, 1973, followed up the earlier meeting—one concededly protected by the First and Fourteenth Amendments—by notifying Williams that the ACLU would be interested in supporting possible litigation. The letter imparted additional information material to making an informed decision about whether to authorize litigation, and permitted Williams an opportunity, which she exercised, for arriving at a deliberate decision. The letter was not facially misleading; indeed, it offered "to explain what is involved so you can understand what is going on." The transmittal of this letter—as contrasted with in-person solicitation—involved no appreciable invasion of privacy; [28] nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the

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[28] This record does not provide a constitutionally adequate basis for a finding, not made below, that appellant deliberately thrust her professional services on an individual who had communicated unambiguously a decision against litigation. Cf. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970). For present purposes, we credit Williams' conflicting testimony to the effect that at the July meeting she told appellant that because of the condition of her child she "didn't have time to think about suing" and "if I needed you all I will call you." App. 74; see n. 7, *supra*. But even on that view of the testimony, appellant's letter cannot be characterized as a pressure tactic. A month had elapsed between the meeting and the letter. Not only was there a possibility that Williams' personal situation might have changed during this period, but appellant testified that Allen, a close friend of the Williams family, told her that Williams subsequently communicated to him an interest in the lawsuit; Allen corroborated this testimony. App. 115–116, 137, 195–196. In light of these circumstances, and Williams' own acknowledgment that appellant "did not attempt to persuade or pressure me to file this lawsuit," *id.*, at 52, appellant did not go beyond the pale of constitutional protection in writing a single letter for the purpose of imparting new information material to a decision whether or not to authorize litigation, and inquiring "if you are interested, let me know, and I'll let you know when we will come down to talk to you about it."

difficulty of policing solicitation practices that do offend valid rules of professional conduct. See *Ohralik, post,* at 466–467. The manner of solicitation in this case certainly was no more likely to cause harmful consequences than the activity considered in *Button,* see n. 14, *supra.*

Nor does the record permit a finding of a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship. Admittedly, there is some potential for such conflict or interference whenever a lay organization supports any litigation. That potential was present in *Button,* in the NAACP's solicitation of nonmembers and its disavowal of any relief short of full integration, see 371 U. S., at 420; *id.,* at 460, 465 (Harlan, J., dissenting). But the Court found that potential insufficient in the absence of proof of a "serious danger" of conflict of interest, *id.,* at 443, or of organizational interference with the actual conduct of the litigation, *id.,* at 433, 444. As in *Button,* "[n]othing that this record shows as to the nature and purpose of [ACLU] activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application," *id.,* at 444, of the Disciplinary Rules to appellant's activity.[29] A "very distant possibility of harm," *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S., at 223, cannot justify proscription of the activity of appellant revealed by this record. See *id.,* at 223–224.[30]

The State's interests in preventing the "stirring up" of frivolous or vexatious litigation and minimizing commerciali-

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[29] Although the decision whether or not to support a particular litigation is made in accordance with the ACLU's broader objectives, the organization's declared policy is to avoid all interference with the attorney-client relationship after that decision has been made. See 1976 Policy Guide of the American Civil Liberties Union, Policy #513, p. 305.

[30] We are not presented in this case with a situation where the income of the lawyer who solicits the prospective litigant or who engages in the actual representation of the solicited client rises or falls with the outcome of the particular litigation. See *supra,* at 428–431, and n. 24.

zation of the legal profession offer no further justification for the discipline administered in this case. The *Button* Court declined to accept the proffered analogy to the common-law offenses of maintenance, champerty, and barratry, where the record would not support a finding that the litigant was solicited for a malicious purpose or "for private gain, serving no public interest," 371 U. S., at 440; see *id.*, at 439–444. The same result follows from the facts of this case. And considerations of undue commercialization of the legal profession are of marginal force where, as here, a nonprofit organization offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid.[31]

At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973). See *Ohralik, post,* at 455–459. In the con-

[31] *Button* makes clear that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest," 371 U. S., at 440, and that "[o]bjection to the intervention of a lay intermediary . . . also derives from the element of pecuniary gain," *id.*, at 441. In recognition of the overarching obligation of the lawyer to serve the community, see Canon 2 of the ABA Code of Professional Responsibility, the ethical rules of the legal profession traditionally have recognized an exception from any general ban on solicitation for offers of representation, without charge, extended to individuals who may be unable to obtain legal assistance on their own. See, *e. g., In re Ades,* 6 F. Supp. 467, 475–476 (Md. 1934); *Gunnels* v. *Atlanta Bar Assn.,* 191 Ga. 366, 12 S. E. 2d 602 (1940); American Bar Association, Opinions of the Committee on Professional Ethics, Formal Opinion 148, pp. 416–419 (1967).

text of political expression and association, however, a State must regulate with significantly greater precision.[32]

## VI

The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar. See *Bates* v. *State Bar of Arizona,* 433 U. S., at 384; *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 771, and cases cited therein. The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence.[33] As we decide today in

[32] Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression'," Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1, 26 (1964), and other activity subject to plenary regulation by government. *Button* recognized that certain forms of "cooperative, organizational activity," 371 U. S., at 430, including litigation, are part of the "freedom to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama,* 357 U. S. 449, 460 (1958), and that this freedom is an implicit guarantee of the First Amendment. See *Healy* v. *James,* 408 U. S. 169, 181 (1972). As shown above, appellant's speech—as part of associational activity—was expression intended to advance "beliefs and ideas." In *Ohralik* v. *Ohio State Bar Assn., post,* p. 447, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 787–788 (1976) (REHNQUIST, J., dissenting), but that is no reason for avoiding the undertaking.

[33] We have no occasion here to delineate the precise contours of permissible state regulation. Thus, for example, a different situation might be presented if an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in furthering associational or political interests.

*Ohralik,* a State also may forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils. And a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation. See *Button,* 371 U. S., at 447 (WHITE, J., concurring in part and dissenting in part). Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU.

We conclude that South Carolina's application of DR 2–103 (D)(5)(a) and (c) and 2–104 (A)(5) to appellant's solicitation by letter on behalf of the ACLU violates the First and Fourteenth Amendments. The judgment of the Supreme Court of South Carolina is

*Reversed.*

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

[For opinion of MR. JUSTICE MARSHALL, concurring in part and concurring in the judgment, see *post,* p. 468.]

MR. JUSTICE BLACKMUN, concurring.

Although I join the opinion of the Court, my understanding of the first paragraph of Part VI requires further explanation. The dicta contained in that paragraph are unnecessary to the decision of this case and its First Amendment overtones. I, for one, am not now able to delineate in the area of political solicitation the extent of state authority to proscribe misleading statements. Despite the positive language of the text,*

*"The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading . . . ." *Ante,* at 438.

footnote 33 explains that the Court also has refused to draw a line regarding misrepresentation:

> "We have no occasion here to delineate the precise contours of permissible state regulation. Thus, for example, a different situation might be presented if an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in furthering associational or political interests."

It may well be that the State is able to proscribe such solicitation. The resolution of that issue, however, requires a balancing of the State's interests against the important First Amendment values that may lurk in even a negligent misstatement. The Court wisely has postponed this task until an appropriate case is presented and full arguments are carefully considered.

MR. JUSTICE REHNQUIST, dissenting.

In this case and the companion case of *Ohralik* v. *Ohio State Bar Assn., post,* p. 447, the Court tells its own tale of two lawyers: One tale ends happily for the lawyer and one does not. If we were given the latitude of novelists in deciding between happy and unhappy endings for the heroes and villains of our tales, I might well join in the Court's disposition of both cases. But under our federal system it is for the States to decide which lawyers shall be admitted to the Bar and remain there; this Court may interfere only if the State's decision is rendered impermissible by the United States Constitution. We can, of course, develop a jurisprudence of epithets and slogans in this area, in which "ambulance chasers" suffer one fate and "civil liberties lawyers" another. But I remain unpersuaded by the Court's opinions in these two cases that there is a principled basis for concluding that the First and Fourteenth Amendments forbid South Carolina from disciplining Primus here, but permit Ohio to discipline Ohralik

in the companion case. I believe that both South Carolina and Ohio acted within the limits prescribed by those Amendments, and I would therefore affirm the judgment in each case.

This Court said in *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 585 (1971): "The common thread running through our decisions in *NAACP* v. *Button,* [371 U. S. 415 (1963),] *Trainmen* [v. *Virginia Bar,* 377 U. S. 1 (1964),] and *United Mine Workers* [v. *Illinois Bar Assn.,* 389 U. S. 217 (1967),] is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." The Court today ignores the absence of this common thread from the fabric of this case, and decides that South Carolina may not constitutionally discipline a member of its Bar for badgering a lay citizen to take part in "collective activity" which she has never desired to join.

Neither *Button* nor any other decision of this Court compels a State to permit an attorney to engage in uninvited solicitation on an individual basis. Further, I agree with the Court's statement in the companion case that the State has a strong interest in forestalling the evils that result "when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Ohralik, post,* at 465. The reversal of the judgment of the Supreme Court of South Carolina thus seems to me quite unsupported by previous decisions or by any principle which may be abstracted from them.

In distinguishing between Primus' protected solicitation and Ohralik's unprotected solicitation, the Court lamely declares: "We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Post,* at 455–456. Yet to the extent that this "common-sense" distinction focuses on the content of the speech, it is at least suspect under many of

this Court's First Amendment cases, see, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 96–98 (1972), and to the extent it focuses upon the motive of the speaker, it is subject to manipulation by clever practitioners. If Albert Ohralik, like Edna Primus, viewed litigation " 'not [as] a technique of resolving private differences,' " but as " 'a form of political expression' and 'political association,' " *ante,* at 428, quoting *Button, supra,* at 429, 431, for all that appears he would be restored to his right to practice. And we may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of "political association" to assure that insurance companies do not take unfair advantage of policyholders.

This absence of any principled distinction between the two cases is made all the more unfortunate by the radical difference in scrutiny brought to bear upon state regulation in each area. Where solicitation proposes merely a commercial transaction, the Court recognizes "the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public." *Ohralik, post,* at 468. On the other hand, in some circumstances (at least in those identical to the instant case)[1] "[w]here political expression or association is at

[1] The Court carefully reserves judgment on factual circumstances in any way distinguishable from those presented here. For instance, the Court suggests that different considerations would arise if Primus herself had received any benefit from the solicitation, or if her income depended in any way on the outcome of the litigation. *Ante,* at 428–429, n. 21, 436 n. 30. Likewise, the Court emphasizes that the lawyers conducting the litigation would have taken no share had attorney's fees been awarded by the court. *Ante,* at 430 n. 24. Finally, the Court points out that Williams had not "communicated unambiguously a decision against litigation," *ante,* at 435 n. 28, that the solicitation was not effected in person, *ante,* at 435, and that legal services were offered free of charge, *ante,* at 437. All these reservations seem to imply that a State might be able to raise an absolute prohibition against any of these factual variations, even "[i]n the context of political expression and association." *Ante,* at 437–438. But see *ante,* p. 439 (BLACKMUN, J., concurring). On the other hand, in

issue," a member of the Bar "may not be disciplined unless her activity in fact involve[s] the type of misconduct at which South Carolina's broad prohibition is said to be directed." *Ante,* at 434.

I do not believe that any State will be able to determine with confidence the area in which it may regulate prophylactically and the area in which it may regulate only upon a specific showing of harm. Despite the Court's assertion to the contrary, *ante,* at 438 n. 32, the difficulty of drawing distinctions on the basis of the content of the speech or the motive of the speaker *is* a valid reason for avoiding the undertaking where a more objective standard is readily available. I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved. The State is empowered to discipline for conduct which it deems detrimental to the public interest unless foreclosed from doing so by our cases construing the First and Fourteenth Amendments.

In *Button* this Court recognized the right of the National Association for the Advancement of Colored People to engage in collective activity, including the solicitation of potential plaintiffs from outside its ranks, for the purpose of instituting and maintaining litigation to achieve the desegregation of public schools. The NAACP utilized letters, bulletins, and petition drives, 371 U. S., at 422, apparently directed toward both members and nonmembers of the organization, *id.,* at 433,[2] to organize public meetings for the purpose of soliciting

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*Ohralik, post,* at 463 n. 20, the Court appears to give a broader reading to today's holding. "We hold today in *Primus* that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe."

[2] Of all our cases recognizing the protected status of "collective activity undertaken to obtain meaningful access to the courts," *United Transporta-*

plaintiffs. As described in *Button,* lawyers played only a limited role in this solicitation:

> "Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting, authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation." *Id.,* at 421.

The Court held that the organization could not be punished by the Commonwealth of Virginia for solicitation on the basis of its role in instituting desegregation litigation.[3]

Here, South Carolina has not attempted to punish the ACLU or any laymen associated with it. Gary Allen, who was the instigator of the effort to sue Dr. Pierce, remains as free as before to solicit potential plaintiffs for future litigation. Likewise, Primus remains as free as before to address gatherings of the sort described in *Button* to advise potential plaintiffs of their legal rights. Primus' first contact with Williams took place at such a gathering, and South Carolina, evidently in response to *Button,* has not attempted to disci-

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*tion Union* v. *Michigan Bar,* 401 U. S. 576, 585 (1971), only *Button* involves the solicitation of nonmembers of the organization. See *United Transportation Union, supra,* at 577–578; *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217, 218 (1967); *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1, 7 (1964).

[3] In *Button* the Commonwealth did not attempt to discipline the individual lawyers for their role in the solicitation. The Court's statement that "the activities of the . . . legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit," 371 U. S., at 428–429, is therefore technically dictum. Thus, the Court's conclusion today that a State may not discipline a member of its Bar for soliciting an individual not already engaged in the sort of collective activity protected under our cases is as unprecedented as it is unsound.

pline her for her part in that meeting. It has disciplined her for initiating further contact on an individual basis with Williams, who had not expressed any desire to become involved in the collective activity being organized by the ACLU. While *Button* appears to permit such individual solicitation for political purposes by lay members of the organization, *id.*, at 422, it nowhere explicitly permits such activity on the part of lawyers.

As the Court understands the Disciplinary Rule enforced by South Carolina, "a lawyer employed by the ACLU or a similar organization may never give unsolicited advice to a lay person that he or she retain the organization's free services." *Ante,* at 433. That prohibition seems to me entirely reasonable. A State may rightly fear that members of its Bar have powers of persuasion not possessed by laymen, see *Ohralik, post,* at 464–465, and it may also fear that such persuasion may be as potent in writing as it is in person. Such persuasion may draw an unsophisticated layman into litigation contrary to his own best interests, compare *ante,* at 434–438, with *Ohralik, post,* at 464–467, and it may force other citizens of South Carolina to defend against baseless litigation which would not otherwise have been brought. I cannot agree that a State must prove such harmful consequences in each case simply because an organization such as the ACLU or the NAACP is involved.

I cannot share the Court's confidence that the danger of such consequences is minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain. A State may reasonably fear that a lawyer's desire to resolve "substantial civil liberties questions," 268 S. C. 259, 263, 233 S. E. 2d 301, 303 (1977), may occasionally take precedence over his duty to advance the interests of his client. It is even more reasonable to fear that a lawyer in such circumstances will be inclined to pursue both culpable and blameless defendants to the last ditch in order to achieve his

ideological goals.[4] Although individual litigants, including the ACLU, may be free to use the courts for such purposes, South Carolina is likewise free to restrict the activities of the members of its Bar who attempt to persuade them to do so.

I can only conclude that the discipline imposed upon Primus does not violate the Constitution, and I would affirm the judgment of the Supreme Court of South Carolina.

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[4] In the case with which Primus was concerned, the last ditch was the denial of certiorari in this Court after the Court of Appeals for the Fourth Circuit had held that Pierce had not in fact acted under color of state law. *Walker* v. *Pierce*, 560 F. 2d 609 (CA4 1977), cert. denied, 434 U. S. 1075 (1978).

# OHRALIK *v.* OHIO STATE BAR ASSN.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 76–1650. Argued January 16, 1978—Decided May 30, 1978

Appellant, an Ohio lawyer, contacted the parents of one of the drivers injured in an automobile accident after hearing about the accident from another source, and learned that the 18-year-old daughter was hospitalized. He then approached the daughter at the hospital and offered to represent her. After another visit with her parents, he again visited the accident victim in her hospital room, where she signed a contingent-fee agreement. In the meantime, appellant approached the driver's 18-year-old female passenger—who also had been injured—at her home on the day she was released from the hospital; she agreed orally to a contingent-fee arrangement. Eventually, both young women discharged appellant as their lawyer, but he succeeded in obtaining a share of the driver's insurance recovery in settlement of his lawsuit against her for breach of contract. As a result of complaints filed against appellant by the two young women with a bar grievance committee, appellee filed a formal complaint with the disciplinary Board of the Ohio Supreme Court. The Board found that appellant solicited clients in violation of certain Disciplinary Rules, and rejected appellant's defense that his conduct was protected by the First and Fourteenth Amendments. The Ohio Supreme Court adopted the Board's findings, and increased the Board's recommended sanction of a public reprimand to indefinite suspension. *Held:* The Bar, acting with state authorization, constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent, and thus the application of the Disciplinary Rules in question to appellant does not offend the Constitution. *Bates* v. *State Bar of Arizona,* 433 U. S. 350, distinguished. Pp. 454–468.

(a) A lawyer's solicitation of business through direct, in-person communication with the prospective clients has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. P. 454.

(b) The State does not lose its power to regulate commercial activity deemed harmful to the public simply because speech is a component of that activity. Pp. 455–456.

(c) A lawyer's procurement of remunerative employment is only marginally affected with First Amendment concerns. While entitled to

some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests. Pp. 457–459.

(d) In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions, especially members of the Bar. Protection of the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct" is a legitimate and important state interest. Pp. 460–462.

(e) Because the State's interest is in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury to the person solicited is immaterial. The application of the Disciplinary Rules to appellant, who solicited employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert, does not offend the Constitution. Pp. 462–468.

48 Ohio St. 2d 217, 357 N. E. 2d 1097, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 468. REHNQUIST, J., filed a statement concurring in the judgment, *post*, p. 477. BRENNAN, J., took no part in the consideration or decision of the case.

*Eugene Gressman* argued the cause and filed briefs for appellant.

*John R. Welch* argued the cause for appellee. With him on the brief were *Albert L. Bell, Edward N. Heiser,* and *Thomas E. Palmer.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), this Court held that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments against

**William B. Spann, Jr.,* and *H. Blair White* filed a brief for the American Bar Assn. as *amicus curiae* urging affirmance.

*Girardeau A. Spann* and *Alan B. Morrison* filed a brief for Public Citizen et al. as *amici curiae*.

blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of "in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or 'runners.'" *Id.*, at 366. Today we answer part of the question so reserved, and hold that the State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

I

Appellant, a member of the Ohio Bar, lives in Montville, Ohio. Until recently he practiced law in Montville and Cleveland. On February 13, 1974, while picking up his mail at the Montville Post Office, appellant learned from the postmaster's brother about an automobile accident that had taken place on February 2 in which Carol McClintock, a young woman with whom appellant was casually acquainted, had been injured. Appellant made a telephone call to Ms. McClintock's parents, who informed him that their daughter was in the hospital. Appellant suggested that he might visit Carol in the hospital. Mrs. McClintock assented to the idea, but requested that appellant first stop by at her home.

During appellant's visit with the McClintocks, they explained that their daughter had been driving the family automobile on a local road when she was hit by an uninsured motorist. Both Carol and her passenger, Wanda Lou Holbert, were injured and hospitalized. In response to the McClintocks' expression of apprehension that they might be sued by Holbert, appellant explained that Ohio's guest statute would preclude such a suit. When appellant suggested to the McClintocks that they hire a lawyer, Mrs. McClintock retorted that such a decision would be up to Carol, who was 18 years old and would be the beneficiary of a successful claim.

Appellant proceeded to the hospital, where he found Carol lying in traction in her room. After a brief conversation about her condition,[1] appellant told Carol he would represent her and asked her to sign an agreement. Carol said she would have to discuss the matter with her parents. She did not sign the agreement, but asked appellant to have her parents come to see her.[2] Appellant also attempted to see Wanda Lou Holbert, but learned that she had just been released from the hospital. App. 98a. He then departed for another visit with the McClintocks.

On his way appellant detoured to the scene of the accident, where he took a set of photographs. He also picked up a tape recorder, which he concealed under his raincoat before arriving at the McClintocks' residence. Once there, he re-examined their automobile insurance policy, discussed with them the law applicable to passengers, and explained the consequences of the fact that the driver who struck Carol's car was an uninsured motorist. Appellant discovered that the McClintocks' insurance policy would provide benefits of up to $12,500 each for Carol and Wanda Lou under an uninsured-motorist clause. Mrs. McClintock acknowledged that both Carol and Wanda Lou could sue for their injuries, but recounted to appellant that "Wanda swore up and down she would not do it." *Ibid.* The McClintocks also told appellant that Carol had phoned to say that appellant could "go ahead" with her representation. Two days later appellant returned to Carol's hospital room to have her sign a contract, which provided that he would receive one-third of her recovery.

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[1] Carol also mentioned that one of the hospital administrators was urging a lawyer upon her. According to his own testimony, appellant replied: "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal." App. 53a.

[2] Despite the fact that appellant maintains that he did not secure an agreement to represent Carol while he was at the hospital, he waited for an opportunity when no visitors were present and then took photographs of Carol in traction. *Id.*, at 129a.

In the meantime, appellant obtained Wanda Lou's name and address from the McClintocks after telling them he wanted to ask her some questions about the accident. He then visited Wanda Lou at her home, without having been invited. He again concealed his tape recorder and recorded most of the conversation with Wanda Lou.[3] After a brief, unproductive inquiry about the facts of the accident, appellant told Wanda Lou that he was representing Carol and that he had a "little tip" for Wanda Lou: the McClintocks' insurance policy contained an uninsured-motorist clause which might provide her with a recovery of up to $12,500. The young woman, who was 18 years of age and not a high school graduate at the time, replied to appellant's query about whether she was going to file a claim by stating that she really did not understand what was going on. Appellant offered to represent her, also, for a contingent fee of one-third of any recovery, and Wanda Lou stated "O. K." [4]

Wanda's mother attempted to repudiate her daughter's oral assent the following day, when appellant called on the tele-

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[3] Appellant maintains that the tape is a complete reproduction of everything that was said at the Holbert home. Wanda Lou testified that the tape does not contain appellant's introductory remarks to her about his identity as a lawyer, his agreement to represent Carol McClintock, and his availability and willingness to represent Wanda Lou as well. *Id.*, at 19a–21a. Appellant disputed Wanda Lou's testimony but agreed that he did not activate the recorder until he had been admitted to the Holbert home and was seated in the living room with Wanda Lou. *Id.*, at 58a.

[4] Appellant told Wanda that she should indicate assent by stating "O. K.," which she did. Appellant later testified: "I would say that most of my clients have essentially that much of a communication. . . . I think most of my clients, that's the way I practice law." *Id.*, at 81a.

In explaining the contingent-fee arrangement, appellant told Wanda Lou that his representation would not "cost [her] anything" because she would receive two-thirds of the recovery if appellant were successful in representing her but would not "have to pay [him] anything" otherwise. *Id.*, at 120a, 125a.

phone to speak to Wanda. Mrs. Holbert informed appellant that she and her daughter did not want to sue anyone or to have appellant represent them, and that if they decided to sue they would consult their own lawyer. Appellant insisted that Wanda had entered into a binding agreement. A month later Wanda confirmed in writing that she wanted neither to sue nor to be represented by appellant. She requested that appellant notify the insurance company that he was not her lawyer, as the company would not release a check to her until he did so.[5] Carol also eventually discharged appellant. Although another lawyer represented her in concluding a settlement with the insurance company, she paid appellant one-third of her recovery [6] in settlement of his lawsuit against her for breach of contract.[7]

Both Carol McClintock and Wanda Lou Holbert filed complaints against appellant with the Grievance Committee of the Geauga County Bar Association. The County Bar Association referred the grievance to appellee, which filed a formal complaint with the Board of Commissioners on Grievances

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[5] The insurance company was willing to pay Wanda Lou for her injuries but would not release the check while appellant claimed, and Wanda Lou denied, that he represented her. Before appellant would "disavow further interest and claim" in Wanda Lou's recovery, he insisted by letter that she first pay him the sum of $2,466.66, which represented one-third of his "conservative" estimate of the worth of her claim. *Id.*, at 26a–27a.

[6] Carol recovered the full $12,500 and paid appellant $4,166.66. She testified that she paid the second lawyer $900 as compensation for his services. *Id.*, at 38a, 42a.

[7] Appellant represented to the Board of Commissioners at the disciplinary hearing that he would abandon his claim against Wanda Lou Holbert because "the rules say that if a contract has its origin in a controversy, that an ethical question can arise." Tr. 256. Yet in fact appellant filed suit against Wanda for $2,466.66 after the disciplinary hearing. *Ohralik* v. *Holbert,* Case No. 76–CV–F–66 (Chardon Mun. Ct., Geauga County, Ohio, filed Feb. 2, 1976). Appellant's suit was dismissed with prejudice on January 27, 1977, after the decision of the Supreme Court of Ohio had been filed.

and Discipline of the Supreme Court of Ohio.[8] After a hearing, the Board found that appellant had violated Disciplinary Rules (DR) 2–103 (A) and 2–104 (A) of the Ohio Code of Professional Responsibility.[9] The Board rejected appellant's defense that his conduct was protected under the First and Fourteenth Amendments. The Supreme Court of Ohio adopted the findings of the Board,[10] reiterated that appellant's conduct was not constitutionally protected, and increased the

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[8] The Board of Commissioners is an agent of the Supreme Court of Ohio. Counsel for appellee stated at oral argument that the Board has "no connection with the Ohio State Bar Association whatsoever." Tr. of Oral Arg. 24.

[9] The Ohio Code of Professional Responsibility is promulgated by the Supreme Court of Ohio. The Rules under which appellant was disciplined are modeled on the same-numbered rules in the Code of Professional Responsibility of the American Bar Association. DR 2–103 (A) of the ABA Code has since been amended so as not to proscribe forms of public advertising that would be permitted, after *Bates*, under amended DR 2–101 (B).

DR 2–103 (A) of the Ohio Code (1970) provides:

"A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

DR 2–104 (A) (1970) provides in relevant part:

"A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

"(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client."

[10] The Board found that Carol and Wanda Lou "were, if anything, casual acquaintances" of appellant; that appellant initiated the contact with Carol and obtained her consent to handle her claim; that he advised Wanda Lou that he represented Carol, had a "tip" for Wanda, and was prepared to represent her, too. The Board also found that appellant would not abide by Mrs. Holbert's request to leave Wanda alone, that both young women attempted to discharge appellant, and that appellant sued Carol McClintock.

sanction of a public reprimand recommended by the Board to indefinite suspension.

The decision in *Bates* was handed down after the conclusion of proceedings in the Ohio Supreme Court. We noted probable jurisdiction in this case to consider the scope of protection of a form of commercial speech, and an aspect of the State's authority to regulate and discipline members of the bar, not considered in *Bates*. 434 U. S. 814 (1977). We now affirm the judgment of the Supreme Court of Ohio.

## II

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years.[11] Last Term the Court ruled that the justifications for prohibiting truthful, "restrained" advertising concerning "the availability and terms of routine legal services" are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information.

[11] An informal ban on solicitation, like that on advertising, historically was linked to the goals of preventing barratry, champerty, and maintenance. See Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1181–1182, and n. 6 (1972). "The first Code of Professional Ethics in the United States was that formulated and adopted by the Alabama State Bar Association in 1887." H. Drinker, Legal Ethics 23 (1953). The "more stringent prohibitions which form the basis of the current rules" were adopted by the American Bar Association in 1908. Note, 81 Yale L. J., *supra*, at 1182; see Drinker, *supra*, at 215. The present Code of Professional Responsibility, containing DR 2–103 (A) and 2–104 (A), was adopted by the American Bar Association in 1969 after more than four years of study by a special committee of the Association. It is a complete revision of the 1908 Canons, although many of its provisions proscribe conduct traditionally deemed unprofessional and detrimental to the public.

*Bates,* 433 U. S., at 384; see *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976). The balance struck in *Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates,* as does the strength of the State's countervailing interest in prohibition.

A

Appellant contends that his solicitation of the two young women as clients is indistinguishable, for purposes of constitutional analysis, from the advertisement in *Bates.* Like that advertisement, his meetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer to pursue their claims. According to appellant, such conduct is "presumptively an exercise of his free speech rights" which cannot be curtailed in the absence of proof that it actually caused a specific harm that the State has a compelling interest in preventing. Brief for Appellant 39. But in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment.

Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.[12] In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra,* at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U. S., at 771 n. 24. We have not discarded the "common-

[12] See *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942); *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376 (1973); *Bigelow* v. *Virginia,* 421 U. S. 809 (1975); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976).

sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 394 U. S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 618 (1969). See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61–62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy,* it lowers the level of appropriate judicial scrutiny.

As applied in this case, the Disciplinary Rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates.* But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.[13] The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" [14] is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices"

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[13] The immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others. Compare *Cohen* v. *California,* 403 U. S. 15 (1971), with *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); see *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969); *Schenck* v. *United States,* 249 U. S. 47 (1919).

[14] *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

of legal services, cf. *Bates,* 433 U. S., at 364; it actually may disserve the individual and societal interest, identified in *Bates,* in facilitating "informed and reliable decisionmaking." *Ibid.*[15]

It also is argued that in-person solicitation may provide the solicited individual with information about his or her legal rights and remedies. In this case, appellant gave Wanda Lou a "tip" about the prospect of recovery based on the uninsured-motorist clause in the McClintocks' insurance policy, and he explained that clause and Ohio's guest statute to Carol McClintock's parents. But neither of the Disciplinary Rules here at issue prohibited appellant from communicating information to these young women about their legal rights and the prospects of obtaining a monetary recovery, or from recommending that they obtain counsel. DR 2–104 (A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.

Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, "employ[ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." *NAACP* v. *Button,* 371 U. S. 415, 442 (1963); see *In re Primus, ante,* p. 412. Nor can he compare his solicitation to the mutual assistance in asserting legal rights that was at issue in *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576 (1971); *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217

[15] We do not minimize the importance of providing low- and middle-income individuals with adequate information about the availability of legal services. The Bar is aware of this need and innovative measures are being implemented, see *Bates,* 433 U. S., at 398–399 (opinion of POWELL, J.). In addition, the advertising permitted under *Bates* will provide a further source of such information.

(1967); and *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964).[16] A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. See *Button, supra,* at 439–443. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

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[16] In *Railroad Trainmen* v. *Virginia Bar,* the Court highlighted the difference between permissible regulation of lawyers and regulation that impinges on the associational rights of union members: "Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not 'ambulance chasing.'" 377 U. S., at 6. The Court implicitly approved of the State's regulation of conduct characterized colloquially as "ambulance chasing." See generally *Cohen* v. *Hurley,* 366 U. S. 117 (1961); Note, 30 N. Y. U. L. Rev. 182 (1955). Indeed, in ruling that the railroad workers had a constitutional right "to gather together for the lawful purpose of helping and advising one another" in asserting federal statutory rights, 377 U. S., at 5, the Court adverted to the kind of problem with which Ohio is concerned in prohibiting solicitation:

"Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar." *Id.,* at 3–4.

In recognizing the importance of the State's interest in regulating solicitation of paying clients by lawyers, we are not unmindful of the problem of the related practice, described in *Railroad Trainmen,* of the solicitation of releases of liability by claims agents or adjusters of prospective defendants or their insurers. Such solicitations frequently occur prior to the employment of counsel by the injured person and during circumstances posing many of the dangers of overreaching we address in this case. Where lay agents or adjusters are involved, these practices for the most part fall outside the scope of regulation by the organized Bar; but releases or settlements so obtained are viewed critically by the courts. See, *e. g., Florkiewicz* v. *Gonzalez,* 38 Ill. App. 3d 115, 347 N. E. 2d 401 (1976); *Cady* v. *Mitchell,* 208 Pa. Super. 16, 220 A. 2d 373 (1966).

B

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Semler* v. *Oregon State Bd. of Dental Examiners*, 294 U. S. 608 (1935). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975). While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen* v. *Hurley*, 366 U. S. 117, 124 (1961).

As is true with respect to advertising, see *Bates, supra*, at 371, it appears that the ban on solicitation by lawyers originated as a rule of professional etiquette rather than as a strictly ethical rule. See H. Drinker, Legal Ethics 210–211, and n. 3 (1953). "[T]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674 (1958) (footnote omitted). But the fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve. Cf. *McGowan* v. *Maryland*, 366 U. S. 420, 431, 433–435, 444 (1961). While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers, this was only because it found "the postulated connection between

advertising and the erosion of *true professionalism* to be severely strained." 433 U. S., at 368 (emphasis supplied). The *Bates* Court did not question a State's interest in maintaining high standards among licensed professionals.[17] Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of "true professionalism."

The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation.[18] The American Bar Association, as *amicus curiae*, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR 2–103 (A) and 2–104 (A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.[19]

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[17] In *Virginia Pharmacy* we stated that it is indisputable that the State has a "strong interest" in maintaining "a high degree of professionalism on the part of licensed pharmacists." 425 U. S., at 766. See also *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 696 (1978).

[18] See, *e. g.*, Note, 81 Yale L. J., *supra*, n. 11, at 1184; Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674 (1958).

[19] A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.

We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." Brief for Appellant 25. We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

## III

Appellant's concession that strong state interests justify regulation to prevent the evils he enumerates would end this case but for his insistence that none of those evils was found to be present in his acts of solicitation. He challenges what he characterizes as the "indiscriminate application" of the Rules to him and thus attacks the validity of DR 2–103 (A) and DR 2–104 (A) not facially, but as applied to his acts of solicitation.[20] And because no allegations or findings were

[20] To the extent that appellant charges that the Rules prohibit solicitation that is constitutionally protected—as he contends his is—as well as solicitation that is unprotected, his challenge could be characterized as a contention that the Rules are overbroad. But appellant does not rely on the overbreadth doctrine under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him. See, *e. g., Gooding* v. *Wilson,* 405 U. S. 518, 520–521 (1972); *United States* v. *Robel,* 389 U. S. 258, 265–266 (1967); *Dombrowski* v. *Pfister,* 380 U. S. 479, 491 (1965); *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963); *Kunz* v. *New York,* 340 U. S. 290 (1951). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). On the contrary, appellant maintains that DR 2–103 (A) and 2–104 (A) could not constitutionally be applied to him.

Nor could appellant make a successful overbreadth argument in view of the Court's observation in *Bates* that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." 433 U. S., at 380. Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach.

Even if the commercial speaker could mount an overbreadth attack, "where conduct and not merely speech is involved, . . . the overbreadth

made of the specific wrongs appellant concedes would justify disciplinary action, appellant terms his solicitation "pure," meaning "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them," without more. Appellant therefore argues that we must decide whether a State may discipline him for solicitation *per se* without offending the First and Fourteenth Amendments.

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. *Edwards* v. *South*

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of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 615 (1973). The Disciplinary Rules here at issue are addressed to the problem of a particular kind of commercial solicitation and are applied in the main in that context. Indeed, the Bar historically has characterized impermissible solicitation as that undertaken for purposes of the attorney's pecuniary gain and as not including offers of service to indigents without charge. Compare American Bar Association, Committee on Professional Ethics and Grievances, Formal Opinion 148 (1935), with Formal Opinion 169 (1937); see H. Drinker, Legal Ethics 219 (1953). See also *NAACP* v. *Button, supra,* at 440 n. 19. Solicitation has been defined in terms of the presence of the pecuniary motivation of the lawyer, see *People ex rel. Chicago Bar Assn.* v. *Edelson,* 313 Ill. 601, 610–611, 145 N. E. 246, 249 (1924); Note, Advertising, Solicitation and Legal Ethics, 7 Vand. L. Rev. 677, 687 (1954), and ABA Formal Opinion 148 states that the ban on solicitation "was never aimed at a situation . . . in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed." We hold today in *Primus* that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe. As these Disciplinary Rules thus can be expected to operate primarily if not exclusively in the context of commercial activity by lawyers, the potential effect on protected, noncommercial speech is speculative. See *Broadrick, supra,* at 612, 615. See also Note, 83 Harv. L. Rev., *supra,* at 882–884, 908–910.

*Carolina,* 372 U. S. 229, 235 (1963).[21] But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded.[22] The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission,[23] and it hardly need be said that

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[21] See also *Time, Inc.* v. *Pape,* 401 U. S. 279, 284 (1971); *Jacobellis* v. *Ohio,* 378 U. S. 184, 189 (1964); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285 (1964); *Napue* v. *Illinois,* 360 U. S. 264, 271–272 (1959).

[22] Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems.

[23] The Federal Trade Commission has identified and sought to regulate the abuses inherent in the direct-selling industry. See 37 Fed. Reg. 22934, 22937 (1972). See also Project: The Direct Selling Industry: An Empirical Study, 16 UCLA L. Rev. 883, 895–922 (1969). Quoted in

the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.[24] Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy,[25] even when no other harm

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the FTC report is an observation by the National Consumer Law Center that "'[t]he door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the marketplace . . . .'" 37 Fed. Reg., at 22939 n. 44.

[24] Most lay persons are unfamiliar with the law, with how legal services normally are procured, and with typical arrangements between lawyer and client. To be sure, the same might be said about the lay person who seeks out a lawyer for the first time. But the critical distinction is that in the latter situation the prospective client has made an initial choice of a lawyer at least for purposes of a consultation; has chosen the time to seek legal advice; has had a prior opportunity to confer with family, friends, or a public or private referral agency; and has chosen whether to consult with the lawyer alone or accompanied.

[25] Unlike the reader of an advertisement, who can "effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes," *Cohen* v. *California,* 403 U. S., at 21, quoted in *Erznoznik* v. *Jacksonville,* 422 U. S. 205, 211 (1975); *Lehman* v. *Shaker Heights,* 418 U. S. 298, 320 (1974) (BRENNAN, J., dissenting), the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning. Cf. *Breard* v. *Alexandria,* 341 U. S. 622 (1951).

materializes.[26] Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.[27]

The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury. Unlike the advertising in *Bates,* in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date. If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession,[28] in

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[26] By allowing a lawyer to accept employment after he has given unsolicited legal advice to a close friend, relative, or former client, DR 2–104 (A)(1) recognizes an exception for activity that is not likely to present these problems.

[27] Indeed, appellant concedes that certain types of in-person solicitation are inherently injurious. His brief states that "solicitation that is superimposed upon the physically or mentally ill patient, or upon an accident victim unable to manage his legal affairs, obviously injures the best interests of such a client." Brief for Appellant 32.

[28] The problems of affording adequate protection of the public against the potential for overreaching evidenced by this case should not be minimized. The organized bars, operating under codes approved by the highest state courts pursuant to statutory authority, have the primary responsibility for assuring compliance with professional ethics and standards by the more than 400,000 lawyers licensed by the States. The means employed usually are disciplinary proceedings initially conducted by voluntary bar committees, subject to judicial review. A study of the problems of enforcing the codes of professional conduct, chaired by then retired Justice Tom C. Clark, reveals the difficulties and complexities—and the inadequacy—of

contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.[29]

On the basis of the undisputed facts of record, we conclude that the Disciplinary Rules constitutionally could be applied to appellant. He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O. K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

The court below did not hold that these or other facts were

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disciplinary enforcement. See ABA, Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). No problem is more intractable than that of prescribing and enforcing standards with respect to in-person private solicitation.

[29] Even commentators who have advocated modification of the disciplinary rules to allow some solicitation recognize the clear potential for unethical conduct or exploitation of lay persons in certain contexts and recommend that solicitation under such circumstances continue to be proscribed. Note, 81 Yale L. J., *supra*, n. 11, at 1199.

proof of actual harm to Wanda Holbert or Carol McClintock but rested on the conclusion that appellant had engaged in the general misconduct proscribed by the Disciplinary Rules. Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public. We hold that the application of DR 2–103 (A) and 2–104 (A) to appellant does not offend the Constitution.

Accordingly, the judgment of the Supreme Court of Ohio is

*Affirmed.*

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

MR. JUSTICE MARSHALL, concurring in part and concurring in the judgment.*

I agree with the majority that the factual circumstances presented by appellant Ohralik's conduct "pose dangers that the State has a right to prevent," *ante,* at 449, and accordingly that he may constitutionally be disciplined by the disciplinary Board and the Ohio Supreme Court. I further agree that appellant Primus' activity in advising a Medicaid patient who had been sterilized that the American Civil Liberties Union (ACLU) would be willing to represent her without fee in a lawsuit against the doctor and the hospital was constitutionally protected and could not form the basis for disciplinary proceedings. I write separately to highlight what I believe these cases do and do not decide, and to express my concern

*[This opinion applies also to No. 77–56, *In re Primus, ante,* p. 412.]

that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them.

## I

While both of these cases involve application of rules prohibiting attorneys from soliciting business, they could hardly have arisen in more disparate factual settings. The circumstances in which appellant Ohralik initially approached his two clients provide classic examples of "ambulance chasing," fraught with obvious potential for misrepresentation and overreaching. Ohralik, an experienced lawyer in practice for over 25 years, approached two 18-year-old women shortly after they had been in a traumatic car accident. One was in traction in a hospital room; the other had just been released following nearly two weeks of hospital care. Both were in pain and may have been on medication; neither had more than a high school education. Certainly these facts alone would have cautioned hesitation in pressing one's employment on either of these women; any lawyer of ordinary prudence should have carefully considered whether the person was in an appropriate condition to make a decision about legal counsel. See Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1199 (1972).

But appellant not only foisted himself upon these clients; he acted in gross disregard for their privacy by covertly recording, without their consent or knowledge, his conversations with Wanda Lou Holbert and Carol McClintock's family. This conduct, which appellant has never disputed, is itself completely inconsistent with an attorney's fiduciary obligation fairly and fully to disclose to clients his activities affecting their interests. See American Bar Association, Code of Professional Responsibility, Ethical Considerations 4–1, 4–5. And appellant's unethical conduct was further compounded by his pursuing Wanda Lou Holbert, when her interests were clearly

in potential conflict with those of his prior-retained client, Carol McClintock. See *ante*, at 451.[1]

What is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it. Appropriately, the Court's actual holding in *Ohralik* is a limited one: that the solicitation of business, under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State. In this much of the Court's opinion in *Ohralik*, I join fully.

## II

The facts in *Primus*, by contrast, show a "solicitation" of employment in accordance with the highest standards of the legal profession. Appellant in this case was acting, not for her own pecuniary benefit, but to promote what she perceived to be the legal rights of persons not likely to appreciate or to be able to vindicate their own rights. The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available "where the litigant is in need of assistance, or where important issues are involved in the case," has long been established. *In re Ades*, 6 F. Supp. 467, 475 (Md. 1934); see *NAACP* v. *Button*, 371 U. S. 415, 440 n. 19 (1963). Indeed, Judge Soper in *Ades* was able to recite numerous instances in which lawyers, including Alexander Hamilton, Luther Martin, and Clarence Darrow, volunteered their services in aid of indigent persons or important public issues. 6 F. Supp., at 475–476. The American Bar Association Code of Professional Responsibility itself recognizes that the "responsibility for providing

[1] Appellant's advice to Wanda Lou Holbert that she could get money from the McClintocks' insurance policy created the risk that the financial interests of his two clients would come into conflict.

legal services for those unable to pay ultimately rests upon the individual lawyer," and further states that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." [2]

In light of this long tradition of public interest representation by lawyer volunteers, I share my Brother BLACKMUN's concern with respect to Part VI of the Court's opinion, and believe that the Court has engaged in unnecessary and unfortunate dicta therein. It would be most undesirable to discourage lawyers—so many of whom find time to work only for those clients who can pay their fees—from continuing to volunteer their services in appropriate cases. Moreover, it cannot be too strongly emphasized that, where "political expression and association" are involved, *ante,* at 438, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button, supra,* at 439. For these reasons, I find particularly troubling the Court's dictum that "a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation." *Ante,* at 439. This proposition is by no means self-evident, has never been the actual holding of this Court, and is not put in issue by the facts presently before us. Thus, while I agree with much of the Court's opinion in *Primus,* I cannot join in the first paragraph of Part VI.

## III

Our holdings today deal only with situations at opposite poles of the problem of attorney solicitation. In their aftermath, courts and professional associations may reasonably be

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[2] EC 2–25. The Disciplinary Rules of the Code, moreover, while generally forbidding a lawyer from "knowingly assist[ing] a person or organization that furnishes or pays for legal services to others to promote the use of his services," makes an exception for attorney participation in, *inter alia,* legal aid or public defender offices. DR 2–103 (D)(1).

expected to look to these opinions for guidance in redrafting the disciplinary rules that must apply across a spectrum of activities ranging from clearly protected speech to clearly proscribable conduct. A large number of situations falling between the poles represented by the instant facts will doubtless occur. In considering the wisdom and constitutionality of rules directed at such intermediate situations, our fellow members of the Bench and Bar must be guided not only by today's decisions, but also by our decision last Term in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). There, we held that truthful printed advertising by private practitioners regarding the availability and price of certain legal services was protected by the First Amendment. In that context we rejected many of the general justifications for rules applicable to one intermediate situation not directly addressed by the Court today—the commercial, but otherwise "benign" solicitation of clients by an attorney.[3]

The state bar associations in both of these cases took the position that solicitation itself was an evil that could lawfully be proscribed. See Brief for Appellee in No. 76–1650, p. 17; Brief for Appellee in No. 77–56, p. 19. While the Court's *Primus* opinion does suggest that the only justification for non-solicitation rules is their prophylactic value in preventing such evils as actual fraud, overreaching, deception, and misrepresentation, see *ante*, at 432–433, 437–438, I think it should

[3] By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous. Cf. *Louisville Bar Assn.* v. *W. Hubbard*, 282 Ky. 734, 739, 139 S. W. 2d 773, 775 (1940) (attorney may personally solicit business "where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them"); see also *Petition of R. Hubbard*, 267 S. W. 2d 743, 744 (Ky. 1954).

be made crystal clear that the State's legitimate interests in this area are limited to prohibiting such substantive evils.

A

Like rules against advertising, rules against solicitation substantially impede the flow of important information to consumers from those most likely to provide it—the practicing members of the Bar. Many persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem, and, even if they "perceive a need," many "do not obtain counsel . . . because of an inability to locate a competent attorney." *Bates* v. *State Bar of Arizona, supra,* at 370.[4] Notwithstanding the injurious aspects of Ohralik's conduct, even his case illustrates the potentially useful, information-providing aspects of attorney solicitation: Motivated by the desire for pecuniary gain, but informed with the special training and knowledge of an attorney, Ohralik advised both his clients (apparently correctly) that, although they had been injured by an uninsured motorist, they could nonetheless recover on the McClintocks' insurance policy. The provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones. See *Mine Workers* v. *Illinois Bar Assn.,* 389 U. S. 217, 221–223 (1967). See also *United Transportation Union* v. *Michigan Bar,* 401 U. S. 576, 585 (1971).

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[4] As we noted only last Term in *Bates,* there appears to be substantial underutilization of lawyers' services. 433 U. S., at 370–371, nn. 22, 23; see 4 ABA Alternatives 1 (July 1977), summarizing report of ABA Special Committee to Survey Legal Needs. This problem may be especially acute among the middle-class majority of this country, persons too affluent to qualify for government-funded legal services but not wealthy enough to afford the fees of the major law firms that serve mostly corporate clients. See generally B. Christensen, Lawyers for People of Moderate Means (1970).

In view of the similar functions performed by advertising and solicitation by attorneys, I find somewhat disturbing the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech," is entitled to less protection under the First Amendment than is "the kind of advertising approved in *Bates*." *Ante*, at 455.[5] The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates*.

B

Not only do prohibitions on solicitation interfere with the free flow of information protected by the First Amendment, but by origin and in practice they operate in a discriminatory manner. As we have noted, these constraints developed as rules of "etiquette" and came to rest on the notion that a lawyer's reputation in his community would spread by word of mouth and bring business to the worthy lawyer.[6] *Bates* v.

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[5] The Court may mean simply that conducting solicitation in person presents somewhat greater dangers that the State may permissibly seek to avoid. See *infra*, at 476–477. But if instead the Court means that different forms of "commercial speech" are generally to be subjected to differing levels of First Amendment scrutiny, I cannot agree. The Court also states that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." *Ante*, at 455. The relevant comparison, however, at the least is between *truthful* in-person solicitation of employment and truthful advertising.

[6] The Court's opinion in *Bates* persuasively demonstrated the lack of basis for concluding that advertising by attorneys would demean the profession, increase the incidence of fraudulent or deceptive behavior by attorneys, or otherwise harm the consumers of legal services. It is interesting in this connection to note that for many years even those in favor of the rules against solicitation by attorneys agreed that solicita-

*State Bar of Arizona, supra,* at 371–372, 374–375, n. 30; see *ante,* at 460–461. The social model on which this conception depends is that of the small, cohesive, and homogeneous community; the anachronistic nature of this model has long been recognized. See, *e. g.,* B. Christensen, Lawyers for People of Moderate Means 128–134 (1970); Note, 81 Yale L. J., at 1202–1203; Garrison, The Legal Profession and the Public, 1 Nat. Law. Guild Q. 127–128 (1938). If ever this conception were more generally true, it is now valid only with respect to those persons who move in the relatively elite social and educational circles in which knowledge about legal problems, legal remedies, and lawyers is widely shared. Christensen, *supra,* at 130; Note, 81 Yale L. J., at 1203. See also Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 684 (1958).

The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, see *supra,* at 473, and n. 4, so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice [7]—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms. See Shuchman, Ethics and Legal Ethics: The

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tion was not *"malum in se."* H. Drinker, Legal Ethics 211 n. 3 (1953). Dr. Johnson, a venerable commentator on mores of all sorts, expressed well the prevailing view of the profession when he stated: "I should not solicit employment as a lawyer—not because I should think it wrong, but because I should disdain it." Quoted in R. Pound, The Lawyer from Antiquity to Modern Times 12 n. 3 (1953). As *Bates* made clear, "disdain" is an inadequate basis on which to restrict the flow of information otherwise protected by the First Amendment.

[7] According to the American Bar Foundation, 72.7% of all lawyers were in private practice in 1970; of these, over half practiced as individual practitioners. The 1971 Lawyer Statistical Report 10 (1972).

Propriety of the Canons as a Group Moral Code, 37 Geo. Wash. L. Rev. 244, 255–266, and n. 77 (1968); Note, 81 Yale L. J., at 1204–1208; see also Garrison, *supra,* at 130. Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession. See J. Auerbach, Unequal Justice 42–62, 126–129 (1976). In light of this history, I am less inclined than the majority appears to be, *ante,* at 460–461, to weigh favorably in the balance of the State's interests here the longevity of the ban on attorney solicitation.

C

By discussing the origin and impact of the nonsolicitation rules, I do not mean to belittle those obviously substantial interests that the State has in regulating attorneys to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy. But where honest, unpressured "commercial" solicitation is involved—a situation not presented in either of these cases—I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment ordinarily protects. While the State's interest in regulating in-person solicitation may, for reasons explained *ante,* at 457–458, 460–462, be somewhat greater than its interest in regulating printed advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation. For example, the Justice Department has suggested that the disciplinary rules be reworded "so as to *permit* all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous." [8]

[8] Remarks of L. Bernstein, Chief, Special Litigation Section, Antitrust Division, Department of Justice, reprinted in 5 CCH Trade Reg. Rep.

To the extent that in-person solicitation of business may constitutionally be subjected to more substantial state regulation as to time, place, and manner than printed advertising of legal services, it is not because such solicitation has "traditionally" been banned, nor because one form of commercial speech is of less value than another under the First Amendment. Rather, any additional restrictions can be justified only to the degree that dangers which the State has a right to prevent are actually presented by conduct attendant to such speech, thus increasing the relative "strength of the State's countervailing interest in prohibition," *ante,* at 455. As the majority notes, and I wholeheartedly agree, these dangers are amply present in the *Ohralik* case.

Accordingly, while I concur in the judgments of the Court in both of these cases, I join in the Court's opinions only to the extent and with the exceptions noted above.

MR. JUSTICE REHNQUIST, concurring in the judgment.

For the reasons stated in my dissenting opinion in *In re Primus, ante,* p. 440, I concur in the affirmance of the judgment of the Supreme Court of Ohio.

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¶ 50,197 (1974) (emphasis added). In addition, at least one bar association has recently considered proposals to eliminate its current prohibitions on solicitation and instead to prohibit false and misleading statements and the solicitation of clients who have given adequate notice that they do not want to hear from the lawyer. Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia, reproduced in App. B to Brief for United States as *Amicus Curiae* in *Bates* v. *State Bar of Arizona,* O. T. 1976, No. 76–316.

# TAYLOR *v.* KENTUCKY

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 77–5549. Argued March 27, 1978—Decided May 30, 1978

At petitioner's Kentucky state robbery trial, which resulted in his conviction, the trial court instructed the jury as to the prosecutor's burden of proof beyond a reasonable doubt but refused, *inter alia,* petitioner's requested instruction on the presumption of innocence. The robbery victim was the prosecution's only witness, and petitioner was the sole defense witness. The prosecutor in his opening statement related the circumstances of petitioner's arrest and indictment. In his closing statement, the prosecutor made observations suggesting that petitioner's status as a defendant tended to establish his guilt. The Kentucky Court of Appeals affirmed the conviction, rejecting petitioner's argument that he was entitled to the requested instruction as a matter of due process under the Fourteenth Amendment. *Held:* On the facts, the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. *Howard* v. *Fleming,* 191 U. S. 126, distinguished. Pp. 483–490.

(a) While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may draw significant additional guidance from an instruction on the presumption of innocence. Pp. 483–485.

(b) An instruction on the presumption is one way of impressing upon the jury the importance of an accused's right to have his guilt or innocence determined solely on the basis of evidence introduced at trial and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. Pp. 485–486.

(c) The prosecutor's remarks during his opening and closing statements, together with the skeletal instructions of the trial court, gave rise to a genuine risk that the jury would convict petitioner on the basis of extraneous considerations, rather than on the proof adduced at the trial, a risk heightened by the fact that the trial was essentially a swearing contest between victim and accused. Pp. 486–488.

(d) That the trial court instructed as to the burden of proof beyond a reasonable doubt did not obviate the necessity for a presumption-of-innocence instruction in view of both the special purpose of such an instruction and the particular need for it in this case. P. 488.

(e) Nor did the fact that defense counsel argued the presumption of innocence in both his opening and closing statements dispense with the need for a presumption-of-innocence instruction, since arguments of counsel cannot substitute for instructions by the court. Pp. 488–489.

551 S. W. 2d 813, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring statement, *post*, p. 490. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 491.

*J. Vincent Aprile II* argued the cause and filed briefs for petitioner.

*Guy C. Shearer*, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *Robert F. Stephens*, Attorney General, *Robert L. Chenoweth*, Assistant Attorney General, and *James M. Ringo*, Assistant Deputy Attorney General.

MR. JUSTICE POWELL delivered the opinion of the Court.

Only two Terms ago, this Court observed that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976). In this felony case, the trial court instructed the jury as to the prosecution's burden of proof beyond a reasonable doubt, but refused petitioner's timely request for instructions on the presumption of innocence and the indictment's lack of evidentiary value. We are asked to decide whether the Due Process Clause of the Fourteenth Amendment requires that either or both instructions be given upon timely defense motions.

I

Petitioner was tried for robbery in 1976, allegedly having forced his way into the home of James Maddox and stolen a house key and a billfold containing $10 to $15. During *voir*

*dire* of the jury, defense counsel questioned the panel about their understanding of the presumption of innocence,[1] the burden of proof beyond a reasonable doubt,[2] and the fact that an indictment is not evidence.[3] The prosecutor then read the indictment to the jury.[4]

The Commonwealth's only witness was Maddox. He testified that he had known petitioner for several years and had entertained petitioner at his home on several occasions. According to Maddox, petitioner and a friend knocked on his door on the evening of February 16, 1976, asking to be admitted. Maddox refused, saying he had to go to bed. The two left, but returned 15 minutes later. They forced their way in, hit Maddox over the head, and fled with his billfold and house key, which were never recovered.

Petitioner then took the stand as the only witness for the defense. He admitted having been at Maddox's home on other occasions, but denied going there on February 16 or participating in the robbery. He stated that he had spent that night with two friends sitting in a parked car, watching a rainstorm and a power failure. Defense counsel requested the trial court to instruct the jury that "[t]he law presumes a defendant to be innocent of a crime," [5] and that the indict-

[1] App. 19, 21.

[2] *Id.*, at 19–21.

[3] *Id.*, at 17.

[4] *Id.*, at 23.

[5] Petitioner's requested instruction on this point read as follows:

"The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a 'clean slate.' That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case." *Id.*, at 53.

This instruction is nearly identical to one contained in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.14, p. 310 (3d ed.

ment, previously read to the jury, was not evidence to be considered against the defendant.[6] The court declined to give either instruction, and did not convey their substance in its charge to the jury. It did instruct the jury as to the Commonwealth's burden of proving petitioner's guilt beyond a reasonable doubt.[7] Petitioner was found guilty and sentenced to five years of imprisonment.

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1977). See also *United States* v. *Alston*, 179 U. S. App. D. C. 129, 132–133, 551 F. 2d 315, 318–319 (1976); *United States* v. *Cummings*, 468 F. 2d 274, 280 (CA9 1972).

[6] Petitioner's proposed instruction on this point read as follows:

"The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt." App. 53.

[7] The trial court's instructions, in their entirety, were as follows:

"All right. These are your instructions as to the law applicable to the facts you've heard in evidence from the witness stand in this case.

"Number one, you will find the defendant guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about February 16, 1976 and before the finding of the indictment herein, he the defendant stole a sum of money and a house key from James Maddox, 249 Rosewood, Frankfort, Kentucky; and B. in the course of so doing he used physical force on James Maddox. If you find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than five nor more than ten years in your discretion.

"Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term 'reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty.

"Number three, the verdict of the jury must be unanimous and be signed by one of you as foreman. You may use the form provided at the end of these instructions for writing your verdict.

"There is appended to these instructions a form with alternate verdicts,

The Kentucky Court of Appeals affirmed, one judge dissenting. 551 S. W. 2d 813 (1977). Petitioner argued [8]—and the Commonwealth denied [9]—that he was entitled as a matter of due process under the Fourteenth Amendment to instructions that he was presumed to be innocent [10] and that his indictment was not evidence of guilt. Both sides briefed federal decisions at some length. Nevertheless, the Court of Appeals rejected petitioner's presumption-of-innocence contention by

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one of which you will use: A. We the jury find the defendant not guilty; B. We the jury find the defendant guilty under instruction number one and fix his punishment at blank years in the penitentiary." *Id.*, at 40–41.

[8] *E. g.*, 3 Record 15, 86–87.

[9] *E. g., id.*, at 56.

[10] Although the Commonwealth does not challenge our jurisdiction to entertain petitioner's claims, we have examined the record and satisfied ourselves that jurisdiction exists. Petitioner's contemporaneous objection to the refusal of his request for an instruction on the presumption of innocence invoked "fundamental principle[s] of judicial fair play." App. 51. This should have sufficed to alert the trial judge to petitioner's reliance on due process principles. And in the face of petitioner's exclusive, explicit reliance on the Fourteenth Amendment in the Kentucky Court of Appeals, the Commonwealth has not argued that he has forfeited his right to raise federal claims.

The short opinion of the Kentucky Court of Appeals did not discuss federal decisions, relying instead on Kentucky authority. 551 S. W. 2d, at 813–814. This reliance on state law apparently was due to the fact that the highest court of Kentucky settled the issue for that State almost 50 years ago. See, *e. g.*, *Mink* v. *Commonwealth*, 228 Ky. 674, 15 S. W. 2d 463 (1929). By way of contrast, the Court of Appeals quite explicitly refused to consider petitioner's argument that he was prejudiced by improper prosecutorial comments, on the ground that petitioner's failure to make a contemporaneous objection operated as a bar to appellate review. Thus, the Court of Appeals clearly denoted the one issue it refused to consider because of a procedural default. In view of both petitioner's contemporaneous objection to the failure to give the presumption-of-innocence charge, and the Kentucky Court of Appeals' apparent consideration of petitioner's federal claim, we will not strain the record in an effort to divest petitioner of his federal forum at this late date. See *Cicenia* v. *Lagay*, 357 U. S. 504, 507–508, n. 2 (1958).

citing Kentucky case law for the proposition "that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary." *Id.*, at 814. Without citing any authority, the court also declared that there was no merit in the position "that failure to give . . . an instruction [on the indictment's lack of evidentiary value] denies the defendant due process of the law." *Ibid.* Because petitioner had not made a contemporaneous objection, the court refused to consider petitioner's additional contention that the prosecutor's closing argument had been improper.[11] The Supreme Court of Kentucky denied discretionary review, and we granted certiorari, 434 U. S. 964 (1977). We now reverse.

II

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U. S. 432, 453 (1895). The *Coffin* Court traced the venerable history of the presumption from Deuteronomy through Roman law, English common law, and the common law of the United States. While *Coffin* held that the presumption of innocence and the equally fundamental principle that the prosecution bears the burden of proof beyond a reasonable doubt were logically separate and distinct, *id.*, at 458–461, sharp scholarly criticism demonstrated the error of that view, see, *e. g.*, J. Thayer, A Preliminary Treatise on Evidence 551–576 (1898) (hereafter Thayer); 9 J. Wigmore, Evidence § 2511 (3d ed. 1940) (hereafter Wigmore); C. McCormick, Evidence 805–806 (2d ed. 1972) (hereafter McCormick).[12]

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[11] The Kentucky court remanded for resentencing because of the trial court's failure to order a statutorily required presentencing investigation. 551 S. W. 2d, at 814.

[12] The *Coffin* Court viewed the presumption of innocence as "an instrument of proof created by the law in favor of one accused, whereby his

Nevertheless, these same scholars advise against abandoning the instruction on the presumption of innocence, even when a complete explanation of the burden of proof beyond a reasonable doubt is provided. Thayer 571–572; Wigmore 407; McCormick 806. See also ALI, Model Penal Code § 1.12 (1) (Proposed Off. Draft 1962). This admonition derives from a perceived salutary effect upon lay jurors. While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence. Wigmore described this effect as follows:

"[I]n a criminal case the term [presumption of inno-

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innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." 156 U. S., at 459. As actual "evidence in favor of the accused," *id.*, at 460, it was distinguished from the reasonable-doubt standard, which merely described "the condition of mind produced by the proof resulting from the evidence in the cause." *Ibid.* Professor Thayer ably demonstrated the error of this distinction, pointing out that the so-called "presumption" is not evidence—not even an inference drawn from a fact in evidence—but instead is a way of describing the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt. Thayer 560–563. Shortly after the appearance of Thayer's criticism, the Court, in a case in which the presumption-of-innocence instruction was given, retreated from its conclusion that the presumption of innocence is evidence to be weighed by the jury. See *Agnew* v. *United States*, 165 U. S. 36, 51–52 (1897).

It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; *i. e.*, to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it." Wigmore 407. The principal inaccuracy is the fact that it is not technically a "presumption"—a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an "assumption" that is indulged in the absence of contrary evidence. *Carr* v. *State*, 192 Miss. 152, 156, 4 So. 2d 887, 888 (1941); accord, McCormick 806.

> cence] does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i. e.,* no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases." Wigmore 407.

This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. See, *e. g., Estelle* v. *Williams,* 425 U. S. 501 (1976). And it long has been recognized that an instruction on the presumption is one way of impressing upon the jury the importance of that right. See, *e. g., United States* v. *Thaxton,* 483 F. 2d 1071, 1073 (CA5 1973); *Reynolds* v. *United States,* 238 F. 2d 460, 463, and n. 4 (CA9 1956); *People* v. *Hill,* 182 Colo. 253, 257–258, 512 P. 2d 257, 259 (1973); *Carr* v. *State,* 192 Miss. 152, 157, 4 So. 2d 887, 888 (1941); *State* v. *Rivers,* 206 Minn. 85, 93, 287 N. W. 790, 794 (1939); *Commonwealth* v. *Madeiros,* 255 Mass. 304, 316, 151 N. E. 297, 300 (1926); *Reeves* v. *State,* 29 Fla. 527, 542, 10 So. 901, 905 (1892). See also *Holt* v. *United States,* 218 U. S. 245, 253–254 (1910); *Agnew* v. *United States,* 165 U. S. 36, 51–52 (1897). While use of the particular phrase "presumption of innocence"—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the

Fourteenth Amendment must be held to safeguard "against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle* v. *Williams, supra,* at 503. The "purging" effect of an instruction on the presumption of innocence, *Thaxton, supra,* at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.[13]

## III

Petitioner argues that in the circumstances of this case, the purging effect of an instruction on the presumption of innocence was essential to a fair trial. He points out that the trial court's instructions were themselves skeletal, placing little emphasis on the prosecution's duty to prove the case beyond a reasonable doubt and none at all on the jury's duty to judge petitioner only on the basis of the testimony heard at trial.

Against the background of the court's rather Spartan instructions, the prosecutor's closing argument ranged far and wide, asking the jury to draw inferences about petitioner's conduct from "facts" not in evidence, but propounded by the prosecutor. For example, he described the reasonable-doubt standard by declaring that petitioner, *"like every other defendant* who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proved guilty beyond a reasonable doubt." App. 45 (emphasis added). This statement linked petitioner to every de-

[13] *Estelle* v. *Williams* quite clearly relates the concept of presumption of innocence to the cognate requirements of finding guilt only on the basis of the evidence and beyond a reasonable doubt. 425 U. S., at 503. In this sense, it is possible to interpret the extended historical discussion of the presumption of innocence in *Coffin* v. *United States,* 156 U. S. 432, 453–460 (1895), as supporting the conclusion that an instruction emphasizing for the jury the first of those two requirements is an element of Fourteenth Amendment due process, an essential of a civilized system of criminal procedure. See *Johnson* v. *Louisiana,* 406 U. S. 356, 360 n. 2 (1972).

fendant who turned out to be guilty and was sentenced to imprisonment. It could be viewed as an invitation to the jury to consider petitioner's status as a defendant as evidence tending to prove his guilt. Similarly, in responding to defense counsel's rhetorical query as to the whereabouts of the items stolen from Maddox, the prosecutor declared that "[o]ne of the first things *defendants do after they rip someone off,* they get rid of the evidence as fast and as quickly as they can." *Ibid.* (emphasis added). This statement also implied that all defendants are guilty and invited the jury to consider that proposition in determining petitioner's guilt or innocence.[14]

Additionally, the prosecutor observed in his opening statement that Maddox "took out" a warrant against petitioner and that the grand jury had returned an indictment, which the prosecutor read to the jury. Thus, the jury not only was invited to consider the petitioner's status as a defendant, but also was permitted to draw inferences of guilt from the fact of arrest and indictment.[15] The prosecutor's description of those events was not necessarily improper, but the combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated

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[14] We do not suggest that such prosecutorial comments, standing alone, would rise to the level of reversible error, an issue not raised in this case. But they are relevant to the need for carefully framed instructions designed to assure that the accused be judged only on the evidence.

[15] As noted above, see *supra,* at 480–481, the trial court also refused petitioner's request for an instruction that the indictment was not evidence. This permitted the prosecutor's reference to the indictment to serve as one more extraneous, negative circumstance which may have influenced the jury's deliberations. Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.

suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial. That risk was heightened because the trial essentially was a swearing contest between victim and accused.[16]

## IV

Against the need for a presumption-of-innocence instruction, the Commonwealth argues first that such an instruction is not required where, as here, the jury is instructed as to the burden of proof beyond a reasonable doubt. The trial court's truncated discussion of reasonable doubt, however, was hardly a model of clarity. It defined reasonable doubt as "a substantial doubt, a real doubt." *Id.*, at 40. This definition, though perhaps not in itself reversible error, often has been criticized as confusing. See, *e. g.*, *United States* v. *Muckenstrum*, 515 F. 2d 568, 571 (CA5), cert. denied, 423 U. S. 1032 (1975); *United States* v. *Christy*, 444 F. 2d 448, 450 (CA6), cert. denied, 404 U. S. 949 (1971). And even if the instruction on reasonable doubt had been more clearly stated, the Commonwealth's argument ignores both the special purpose of a presumption-of-innocence instruction and the particular need for such an instruction in this case.

The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for

[16] While we do not necessarily approve of the presumption-of-innocence instruction requested by petitioner, it appears to have been well suited to forestalling the jury's consideration of extraneous matters, that is, to performing the purging function described in Part II, above. The requested instruction noted that petitioner, "although accused, [began] the trial with a 'clean slate.'" It emphasized that the law would permit "nothing but legal evidence presented before a jury to be considered in support of any charge against the accused."

instructions by the court. *United States* v. *Nelson,* 498 F. 2d 1247 (CA5 1974). Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably. See *Estelle* v. *Williams,* 425 U. S., at 503.[17]

Finally, the Commonwealth argues that *Howard* v. *Fleming,* 191 U. S. 126 (1903), established that the Fourteenth Amendment does not require instructions on the presumption of innocence. In *Howard,* however, the trial court had instructed the jury to consider only the evidence and the law as received from the court.[18] The argument in *Howard* was not that

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[17] See ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 1.1 (a) (App. Draft 1972):

"The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose."

[18] The trial court had given the following instructions:

"Now, gentlemen, in the trial of this cause the court admonishes you to divest yourselves of any possible feeling or prejudice which you might have against the defendants as well as any sympathy that you might entertain for them on account of their misfortune, and try this case upon the law and the evidence as the court has endeavored to lay it down to you. When you do this you have responded to the high responsibilities which rest upon you as jurors. It matters not whether your verdict accords with public sentiment or not. You are supposed to be indifferent to any such influences and for such to influence you would be a failure to perform your duty. I need not say to you that the offense with which the defendants are charged is a grave one under the law, and if guilty they should be

failure to give an explicit instruction on the presumption of innocence raised a danger that the jury might judge defendants on matters other than the evidence. Instead, plaintiffs-in-error relied on *Coffin* for the erroneous proposition that the presumption of innocence is "evidence" to be weighed in the accused's favor. Brief for Appellants in *Howard* v. *Fleming*, O. T. 1903, Nos. 44 and 45, pp. 111–113. The Court had discarded this view some years before. See n. 12, *supra*. Thus, *Howard* held only that the accused is not entitled to an instruction that the presumption of innocence is "evidence." It did not cast doubt upon the additional function of the presumption as an admonition to consider only the evidence actually introduced, since such an instruction had been given.

V

We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. The judgment of conviction is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*So ordered.*

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion because in reversing petitioner's conviction it reaffirms that "the 'presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice,'" *ante*, at 479, quoting *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976). It follows from this proposition, as is clear from the

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convicted, but while this is true they are entitled under the constitution and laws of your State to a fair and honest trial at your hands, and I feel sure that you will give them such." Record in *Howard* v. *Fleming*, O. T. 1903, Nos. 44 and 45, p. 120.

Court's opinion, that trial judges should instruct the jury on a criminal defendant's entitlement to a presumption of innocence in all cases where such an instruction is requested.

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In a federal court it is reversible error to refuse a request for a proper instruction on the presumption of innocence. *Coffin* v. *United States,* 156 U. S. 432, 460–461.[1] That is not, however, a sufficient reason for holding that such an instruction is constitutionally required in every criminal trial.[2]

The function of the instruction is to make it clear that the burden of persuasion rests entirely on the prosecutor. The same function is performed by the instruction requiring proof beyond a reasonable doubt.[3] One standard instruction adds emphasis to the other. Neither should be omitted, but an "omission, or an incomplete instruction, is less likely to be prejudical than a misstatement of the law." *Henderson* v. *Kibbe,* 431 U. S. 145, 155. In some cases the omission may be fatal, but the Court wisely avoids a holding that this is always so.

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[1] Although that decision rested on the erroneous notion that "the presumption of innocence is evidence in favor of the accused," 156 U. S., at 460; cf. J. Thayer, A Preliminary Treatise on Evidence 566–575 (1898), the rule in *Coffin* is surely sound.

[2] "Before a federal court may overturn a conviction resulting from a state trial [on the basis of an error in the instructions to the jury], it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp* v. *Naughten,* 414 U. S. 141, 146.

[3] The instruction may also give the jury a "hint," 9 J. Wigmore, Evidence § 2511 (3d ed. 1940), that arrest, indictment, and arraignment should not count against the accused. But when an instruction on this point is necessary, it should be explicit. An instruction on the presumption of innocence is not an adequate substitute for stating expressly that the indictment is not evidence.

In this case the omission did not violate a specific constitutional guarantee, such as the privilege against compulsory self-incrimination.[4] Nor did it deny the defendant his fundamental right to a fair trial. An instruction on reasonable doubt, admittedly brief, was given. The *voir dire* had made clear to each juror the defendant's right to be presumed innocent despite his indictment.[5] The prosecutor's closing argument did not precipitate any objection from defense counsel who listened to it; it may not, therefore, provide the basis for a reversal. Cf. *Estelle* v. *Williams,* 425 U. S. 501, 506–513. Although the Court's appraisal is not unreasonable, for this was by no means a perfect trial, I do not believe that constitutional error was committed. Accordingly, I respectfully dissent.

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[4] Cf. *Lakeside* v. *Oregon,* 435 U. S. 333, 342 (STEVENS, J., dissenting).

[5] Petitioner's lawyer asked the jurors the following questions:

"You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way. It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence?

. . . . .

"I'm sure you all will agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty?

"Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I made it sufficiently clear.

"I take it by your silence that each of you does understand."

# GENERAL ATOMIC CO. *v.* FELTER, JUDGE, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

No. 77–1237. Decided May 30, 1978

In *General Atomic Co.* v. *Felter,* 434 U. S. 12, it was held that a New Mexico state court under the Supremacy Clause of the Constitution lacked power to enjoin petitioner from filing and prosecuting *in personam* actions in federal court relating to the subject matter of the state suit or to interfere with petitioner's efforts to obtain arbitration in federal forums on the ground that petitioner is not entitled to arbitration or for any reason whatsoever. Nevertheless, the New Mexico court, on remand, issued orders staying federal arbitration proceedings demanded by petitioner on the ground, *inter alia,* that petitioner had waived any right to arbitration because its demand therefor was untimely. *Held:* Under this Court's prior judgment, petitioner has an absolute right to present its claims to federal forums, and therefore its motion for leave to file a petition for writ of mandamus directing the New Mexico court to vacate its orders staying federal arbitration proceedings is granted because of that court's refusal or failure to comply with this Court's mandate.

PER CURIAM.

Petitioner has filed a motion for leave to file a petition for a writ of mandamus and requests that a writ of mandamus issue to the District Court for the First Judicial District, Santa Fe County, N. M., directing the court to vacate two orders on the ground that they violated this Court's mandate in *General Atomic Co.* v. *Felter,* 434 U. S. 12 (1977).

In that opinion, we held that under the Supremacy Clause of the United States Constitution the Santa Fe court lacked power to enjoin the General Atomic Co. (GAC) from filing and prosecuting *in personam* actions against the United Nuclear Corp. (UNC) in federal court. Upon remand, the Santa Fe court modified its injunction "to exclude from its terms and conditions all *in personam* actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction by the opinion of

the United States Supreme Court, dated October 31, 1977." Shortly thereafter, GAC filed a demand for arbitration with UNC of issues growing out of the 1973 uranium supply agreement around which the litigation between the parties revolves. This demand, filed with the American Arbitration Association, relied upon the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.* (1976 ed.), and the arbitration clause of the 1973 agreement. GAC also filed demands for arbitration against UNC in the federal arbitration proceedings involving Duke Power Co. (Duke) and moved for permission to file a cross-claim against UNC in the arbitration proceedings involving Commonwealth Edison Co. (Commonwealth). Finally, GAC requested the Santa Fe court to stay its own trial proceedings with respect to issues subject to these arbitration demands. UNC, in addition to opposing this motion, also asked the court to stay the arbitration proceedings.

On December 16, 1977, the Santa Fe court issued a decision in which it concluded that GAC had waived any right to arbitration with UNC which it might have had because it failed to demand arbitration in a timely manner and that neither the Duke nor Commonwealth agreements gave GAC any right to demand arbitration with UNC. On the basis of these conclusions, Judge Felter filed the following order staying the arbitration proceedings:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, be and the same hereby is granted.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that further arbitration proceedings predicated upon the following demands for arbitration made by Defendant General Atomic Company against Plaintiff United Nuclear Corporation in the following arbitration proceedings, viz:
>
> "A. The Demand for Arbitration filed by General Atomic

> Company on November 29, 1977 with the American Arbitration Association for arbitration of the disputes arising under the 1973 Supply Agreement, a copy of which is attached to GAC's Motion to Stay Proceedings,
>
> "B. *Duke Power Company* v. *GAC,* Case No. 31–10–0009–76, in Charlotte, North Carolina,
>
> "C. *Commonwealth Edison Company* v. *UNC, GAC and Gulf,* Case No. 51–10–0106–74–C in Chicago, Illinois
>
> "shall be, and each of them hereby are, stayed until the further order of the Court, Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.
>
> "IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff United Nuclear Corporation."

On December 27, 1977, the court formally denied GAC's motion to stay the trial pending completion of the arbitration proceedings.

During the course of our opinion in *General Atomic Co.,* we specifically addressed the restrictions placed by the Santa Fe court's previous injunction upon GAC's attempt to assert what it believed to be federally guaranteed arbitration rights in other forums:

> "What the New Mexico Supreme Court has described as 'harassment' is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities.[11] This, of course, is something which GAC has every right to attempt to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act. . . . The right to pursue federal

remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan* [v. *Dallas*, 377 U. S. 408 (1964)]. Federal courts are fully capable of preventing their misuse for purposes of harassment." 434 U. S., at 18–19.

Footnote 11 specifically addressed arbitration proceedings which are the subject of Judge Felter's new stay order:

"The injunction has also prevented GAC from asserting claims against UNC under the arbitration provision of the 1973 uranium supply agreement in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth prior to its issuance, even though the District Court granted Commonwealth's demand for arbitration and the Seventh Circuit has affirmed. *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (ND Ill. 1975), aff'd, 541 F. 2d 1263 (1976). In addition, the Western District of North Carolina federal court has refused to stay arbitration between Duke and GAC in a proceeding also instituted prior to the injunction, despite GAC's contention that UNC was an indispensable party to any such arbitration proceeding which it was prevented from impleading by the injunction. The court acknowledged, however, that UNC would be a proper party to the proceeding. *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (1976)."

In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration.[1] Clearly, our

[1] Although the court stated that its order staying the arbitration proceedings "shall not in and of itself operate to preclude Defendant General Atomic Company from asserting its claimed federal rights in appropriate judicial proceedings," the only plausible reading of this provision in light

prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. But, as demonstrated *supra,* we have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums.

As was recently reaffirmed in *Vendo Co.* v. *Lektro-Vend Corp.,* 434 U. S. 425 (1978), if a lower court "mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled . . . by a writ of mandamus to execute the mandate of this Court." *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255 (1895). A litigant who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court. In light of the prior proceedings in this matter, it is inconceivable that upon remand from this Court the Santa Fe court was free to again impede GAC's attempt to assert its arbitration claims in federal forums. Because the Santa Fe court has refused or failed to comply with the judgment of this Court, petitioner's motion for leave to file a petition for a writ of mandamus is granted. Assuming as we do that the Santa Fe court will now conform to our previous judgment by promptly vacating or modifying its order of December 16, 1977, to the extent that it places any restriction whatsoever upon GAC's exercise

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of the stay order is that the court did not view the proceedings in question as "appropriate."

of its right to litigate arbitration claims in federal forums, we do not at present issue a formal writ of mandamus.[2] See *Bucolo* v. *Adkins*, 424 U. S. 641 (1976); *Deen* v. *Hickman*, 358 U. S. 57 (1958).

*It is so ordered.*

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[2] We do not read the December 27, 1977, order as restricting GAC from pursuing its arbitration claims in other forums. Consequently there is no occasion to disturb it.

Syllabus

# MICHIGAN *v.* TYLER ET AL.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 76–1608. Argued January 10, 1978—Decided May 31, 1978

Shortly before midnight on January 21, 1970, a fire broke out in respondents' furniture store, to which the local fire department responded. When the fire chief arrived at about 2 a. m., as the smoldering embers were being doused, the discovery of plastic containers of flammable liquid was reported to him, and after he had entered the building to examine the containers, he summoned a police detective to investigate possible arson. The detective took several pictures but ceased further investigation because of the smoke and steam. By 4 a. m. the fire had been extinguished and the firefighters departed. The fire chief and detective removed the containers and left. At 8 a. m. the chief and his assistant returned for a cursory examination of the building. About an hour later the assistant and the detective made another examination and removed pieces of evidence. On February 16 a member of the state police arson section took photographs at the store and made an inspection, which was followed by several other visits, at which time additional evidence and information were obtained. Respondents were subsequently charged with conspiracy to burn real property and other offenses. Evidence secured from the building and the testimony of the arson specialist were used at respondents' trial, which resulted in their convictions, notwithstanding their objections that no warrants or consent had been obtained for entries and inspection of the building and seizure of evidentiary items. The State Supreme Court reversed respondents' convictions and remanded the case for a new trial, concluding that "[once] the blaze [has been] extinguished and the firefighters have left the premises, a warrant is required to re-enter and search the premises, unless there is consent or the premises have been abandoned." *Held:*

1. Official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment as made applicable to the States by the Fourteenth Amendment. Since all the entries in this case were "without proper consent" and were not "authorized by a valid search warrant," each one is illegal unless it falls within one of the "certain carefully defined classes of cases" for which warrants are not mandatory. *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529. Pp. 504–509.

(a) There is no diminution in a person's reasonable expectation of privacy or in the protection of the Fourth Amendment simply because

the official conducting the search is a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists. Pp. 505–506.

(b) To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion, on the one hand, and the threat of disruption to the occupant, on the other. Pp. 506–508.

2. A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable," and, once in the building to extinguish a blaze, and for a reasonable time thereafter, firefighters may seize evidence of arson that is in plain view and investigate the causes of the fire. Thus no Fourth and Fourteenth Amendment violations were committed by the firemen's entry to extinguish the blaze at respondents' store, nor by the fire chief's removal of the plastic containers. P. 509.

3. On the facts of this case, moreover, no warrant was necessary for the morning re-entries of the building and seizure of evidence on January 22 after the 4 a. m. departure of the fire chief and other personnel since these were a continuation of the first entry, which was temporarily interrupted by poor visibility. Pp. 510–511.

4. The post-January 22 entries were clearly detached from the initial exigency, and since these entries were made without warrants and without consent, they violated the Fourth and Fourteenth Amendments. Evidence obtained from such entries must be excluded at respondents' retrial. P. 511.

399 Mich. 564, 250 N. W. 2d 467, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, J., joined; in all but Part IV–A of which WHITE and MARSHALL, JJ., joined; in Parts I, III, and IV of which STEVENS, J., joined; and in Parts I, III, and IV–A of which BLACKMUN, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 512. WHITE, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 514. REHNQUIST, J., filed a dissenting opinion, *post*, p. 516. BRENNAN, J., took no part in the consideration or decision of the case.

*Jeffrey Butler* argued the cause *pro hac vice* for petitioner. With him on the brief was *L. Brooks Patterson.*

*Jesse R. Bacalis* argued the cause and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, Loren Tyler and Robert Tompkins, were convicted in a Michigan trial court of conspiracy to burn real property in violation of Mich. Comp. Laws § 750.157a (1970).[1] Various pieces of physical evidence and testimony based on personal observation, all obtained through unconsented and warrantless entries by police and fire officials onto the burned premises, were admitted into evidence at the respondents' trial. On appeal, the Michigan Supreme Court reversed the convictions, holding that "the warrantless searches were unconstitutional and that the evidence obtained was therefore inadmissible." 399 Mich. 564, 584, 250 N. W. 2d 467, 477 (1977). We granted certiorari to consider the applicability of the Fourth and Fourteenth Amendments to official entries onto fire-damaged premises. 434 U. S. 814.

I

Shortly before midnight on January 21, 1970, a fire broke out at Tyler's Auction, a furniture store in Oakland County, Mich. The building was leased to respondent Loren Tyler, who conducted the business in association with respondent Robert Tompkins. According to the trial testimony of various witnesses, the fire department responded to the fire and was "just watering down smoldering embers" when Fire Chief See arrived on the scene around 2 a. m. It was Chief See's responsibility "to determine the cause and make out all reports." Chief See was met by Lt. Lawson, who informed him that two

[1] In addition, Tyler was convicted of the substantive offenses of burning real property, Mich. Comp. Laws § 750.73 (1970), and burning insured property with intent to defraud, Mich. Comp. Laws § 750.75 (1970).

plastic containers of flammable liquid had been found in the building. Using portable lights, they entered the gutted store, which was filled with smoke and steam, to examine the containers. Concluding that the fire "could possibly have been an arson," Chief See called Police Detective Webb, who arrived around 3:30 a. m. Detective Webb took several pictures of the containers and of the interior of the store, but finally abandoned his efforts because of the smoke and steam. Chief See briefly "[l]ooked throughout the rest of the building to see if there was any further evidence, to determine what the cause of the fire was." By 4 a. m. the fire had been extinguished and the firefighters departed. See and Webb took the two containers to the fire station, where they were turned over to Webb for safekeeping. There was neither consent nor a warrant for any of these entries into the building, nor for the removal of the containers. The respondents challenged the introduction of these containers at trial, but abandoned their objection in the State Supreme Court. 399 Mich., at 570, 250 N. W. 2d, at 470.

Four hours after he had left Tyler's Auction, Chief See returned with Assistant Chief Somerville, whose job was to determine the "origin of all fires that occur within the Township." The fire had been extinguished and the building was empty. After a cursory examination they left, and Somerville returned with Detective Webb around 9 a. m. In Webb's words, they discovered suspicious "burn marks in the carpet, which [Webb] could not see earlier that morning, because of the heat, steam, and the darkness." They also found "pieces of tape, with burn marks, on the stairway." After leaving the building to obtain tools, they returned and removed pieces of the carpet and sections of the stairs to preserve these bits of evidence suggestive of a fuse trail. Somerville also searched through the rubble "looking for any other signs or evidence that showed how this fire was caused." Again, there was neither consent nor a warrant for these entries and seizures.

Both at trial and on appeal, the respondents objected to the introduction of evidence thereby obtained.

On February 16 Sergeant Hoffman of the Michigan State Police Arson Section returned to Tyler's Auction to take photographs.[2] During this visit or during another at about the same time, he checked the circuit breakers, had someone inspect the furnace, and had a television repairman examine the remains of several television sets found in the ashes. He also found a piece of fuse. Over the course of his several visits, Hoffman secured physical evidence and formed opinions that played a substantial role at trial in establishing arson as the cause of the fire and in refuting the respondents' testimony about what furniture had been lost. His entries into the building were without warrants or Tyler's consent, and were for the sole purpose "of making an investigation and seizing evidence." At the trial, respondents' attorney objected to the admission of physical evidence obtained during these visits, and also moved to strike all of Hoffman's testimony "because it was got in an illegal manner." [3]

The Michigan Supreme Court held that with only a few exceptions, any entry onto fire-damaged private property by fire or police officials is subject to the warrant requirements of the Fourth and Fourteenth Amendments. "[Once] the blaze [has been] extinguished and the firefighters have left the premises, a warrant is required to reenter and search the premises, unless there is consent or the premises have been abandoned." 399 Mich., at 583, 250 N. W. 2d, at 477. Apply-

[2] Sergeant Hoffman had entered the premises with other officials at least twice before, on January 26 and 29. No physical evidence was obtained as a result of these warrantless entries.

[3] The State's case was substantially buttressed by the testimony of Oscar Frisch, a former employee of the respondents. He described helping Tyler and Tompkins move valuable items from the store and old furniture into the store a few days before the fire. He also related that the respondents had told him there would be a fire on January 21, and had instructed him to place mattresses on top of other objects so that they would burn better.

ing this principle, the court ruled that the series of warrantless entries that began after the blaze had been extinguished at 4 a. m. on January 22 violated the Fourth and Fourteenth Amendments.[4] It found that the "record does not factually support a conclusion that Tyler had abandoned the fire-damaged premises" and accepted the lower court's finding that " '[c]onsent for the numerous searches was never obtained from defendant Tyler.' " *Id.*, at 583, 570–571, 250 N. W. 2d, at 476, 470. Accordingly, the court reversed the respondents' convictions and ordered a new trial.

## II

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara* v. *Municipal Court,* 387 U. S. 523, 528, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be

[4] Having concluded that warrants should have been secured for the post-fire searches, the court explained that different standards of probable cause governed searches to determine the cause of a fire and searches to gather evidence of crime. It then described what standard of probable cause should govern all the searches in this case:

"While it may be no easy task under some circumstances to distinguish as a factual matter between an administrative inspection and a criminal investigation, in the instant case the Court is not faced with that task. Having lawfully discovered the plastic containers of flammable liquid and other evidence of arson before the fire was extinguished, Fire Chief See focused his attention on assembling proof of arson and began a criminal investigation. At that point there was probable cause for issuance of a criminal investigative search warrant." 399 Mich., at 577, 250 N. W. 2d, at 474 (citations omitted).

sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See* v. *Seattle,* 387 U. S. 541; *Marshall* v. *Barlow's, Inc., ante,* at 311–313. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

The petitioner argues, however, that an entry to investigate the cause of a recent fire is outside that protection because no individual privacy interests are threatened. If the occupant of the premises set the blaze, then, in the words of the petitioner's brief, his "actions show that he has no expectation of privacy" because "he has abandoned those premises within the meaning of the Fourth Amendment." And if the fire had other causes, "the occupants of the premises are treated as victims by police and fire officials." In the petitioner's view, "[t]he likelihood that they will be aggrieved by a possible intrusion into what little remains of their privacy in badly burned premises is negligible."

This argument is not persuasive. For even if the petitioner's contention that arson establishes abandonment be accepted, its second proposition—that innocent fire victims inevitably have no protectible expectations of privacy in whatever remains of their property—is contrary to common experience. People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. The petitioner may be correct in the view that most innocent fire victims are treated courteously and welcome inspections of their property to ascertain the origin of the blaze, but "even if true, [this contention] is irrelevant to the question whether the . . . inspection is reasonable within the meaning of the Fourth Amendment." *Camara, supra,* at 536. Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the petitioner's argument unravels. For it is, of course, impossible to justify a warrantless search on the ground of abandonment by arson

when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction.

Thus, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara, supra,* at 528–529. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search,[5] but the necessity for the warrant persists.

The petitioner argues that no purpose would be served by requiring warrants to investigate the cause of a fire. This argument is grounded on the premise that the only fact that need be shown to justify an investigatory search is that a fire of undetermined origin has occurred on those premises. The

[5] For administrative searches conducted to enforce local building, health, or fire codes, " 'probable cause' to issue a warrant to inspect . . . exist[s] if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e. g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Camara,* 387 U. S., at 538; *Marshall* v. *Barlow's, Inc., ante,* at 320–321. See LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 Sup. Ct. Rev. 1, 18–20.

petitioner contends that this consideration distinguishes this case from *Camara,* which concerned the necessity for warrants to conduct routine building inspections. Whereas the occupant of premises subjected to an unexpected building inspection may have no way of knowing the purpose or lawfulness of the entry, it is argued that the occupant of burned premises can hardly question the factual basis for fire officials' wanting access to his property. And whereas a magistrate performs the significant function of assuring that an agency's decision to conduct a routine inspection of a particular dwelling conforms with reasonable legislative or administrative standards, he can do little more than rubberstamp an application to search fire-damaged premises for the cause of the blaze. In short, where the justification for the search is as simple and as obvious to everyone as the fact of a recent fire, a magistrate's review would be a time-consuming formality of negligible protection to the occupant.

The petitioner's argument fails primarily because it is built on a faulty premise. To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital

social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum. See *See* v. *Seattle,* 387 U. S., at 544–545; *United States* v. *Chadwick,* 433 U. S. 1, 9; *Marshall* v. *Barlow's, Inc., ante,* at 323.

In addition, even if fire victims can be deemed aware of the factual justification for investigatory searches, it does not follow that they will also recognize the legal authority for such searches. As the Court stated in *Camara,* "when the inspector demands entry [without a warrant], the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U. S., at 532. Thus, a major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality. See *United States* v. *Chadwick, supra,* at 9.

In short, the warrant requirement provides significant protection for fire victims in this context, just as it does for property owners faced with routine building inspections. As a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment. In the words of the Michigan Supreme Court: "Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution." But "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply." 399 Mich., at 584, 250 N. W. 2d, at 477. Since all

the entries in this case were "without proper consent" and were not "authorized by a valid search warrant," each one is illegal unless it falls within one of the "certain carefully defined classes of cases" for which warrants are not mandatory. *Camara,* 387 U. S., at 528–529.

## III

Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant. *Warden* v. *Hayden,* 387 U. S. 294 (warrantless entry of house by police in hot pursuit of armed robber); *Ker* v. *California,* 374 U. S. 23 (warrantless and unannounced entry of dwelling by police to prevent imminent destruction of evidence). Similarly, in the regulatory field, our cases have recognized the importance of "prompt inspections, even without a warrant, . . . in emergency situations." *Camara, supra,* at 539, citing *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (seizure of unwholesome food); *Jacobson* v. *Massachusetts,* 197 U. S. 11 (compulsory smallpox vaccination); *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380 (health quarantine).

A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 465–466. Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.

Although the Michigan Supreme Court appears to have accepted this principle, its opinion may be read as holding that

the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. 399 Mich., at 579, 250 N. W. 2d, at 475. We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.[6] And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

## IV

### A

The respondents argue, however, that the Michigan Supreme Court was correct in holding that the departure by the fire

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[6] The circumstances of particular fires and the role of firemen and investigating officials will vary widely. A fire in a single-family dwelling that clearly is extinguished at some identifiable time presents fewer complexities than those likely to attend a fire that spreads through a large apartment complex or that engulfs numerous buildings. In the latter situations, it may be necessary for officials—pursuing their duty both to extinguish the fire and to ascertain its origin—to remain on the scene for an extended period of time repeatedly entering or re-entering the building or buildings, or portions thereof. In determining what constitutes a "reasonable time to investigate," appropriate recognition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy.

officials from Tyler's Auction at 4 a. m. ended any license they might have had to conduct a warrantless search. Hence, they say that even if the firemen might have been entitled to remain in the building without a warrant to investigate the cause of the fire, their re-entry four hours after their departure required a warrant.

On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries on January 22. As the fire was being extinguished, Chief See and his assistants began their investigation, but visibility was severely hindered by darkness, steam, and smoke. Thus they departed at 4 a. m. and returned shortly after daylight to continue their investigation. Little purpose would have been served by their remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning. Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.

B

The entries occurring after January 22, however, were clearly detached from the initial exigency and warrantless entry. Since all of these searches were conducted without valid warrants and without consent, they were invalid under the Fourth and Fourteenth Amendments, and any evidence obtained as a result of those entries must, therefore, be excluded at the respondents' retrial.

V

In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. See *Camara,* 387 U. S., at 534–539; *See* v. *Seattle,* 387 U. S., at 544–545; *Marshall* v.

*Barlow's, Inc., ante,* at 320–321. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. *United States* v. *Ventresca,* 380 U. S. 102.

These principles require that we affirm the judgment of the Michigan Supreme Court ordering a new trial.[7]

*Affirmed.*

MR. JUSTICE BLACKMUN joins the judgment of the Court and Parts I, III, and IV–A of its opinion.

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

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

Because Part II of the Court's opinion in this case, like the opinion in *Camara* v. *Municipal Court,* 387 U. S. 523, seems to

[7] The petitioner alleges that respondent Tompkins lacks standing to object to the unconstitutional searches and seizures. The Michigan Supreme Court refused to consider the State's argument, however, because the prosecutor failed to raise the issue in the trial court or in the Michigan Court of Appeals. 399 Mich., at 571, 250 N. W. 2d, at 470–471. We read the state court's opinion to mean that in the absence of a timely objection by the State, a defendant will be presumed to have standing. Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. *Henry* v. *Mississippi,* 379 U. S. 443, 447. See *Safeway Stores* v. *Oklahoma Grocers,* 360 U. S. 334, 342 n. 7; *Cardinale* v. *Louisiana,* 394 U. S. 437, 438. The petitioner does not claim that Michigan's procedural rule serves no legitimate purpose. Accordingly, we do not entertain the petitioner's standing claim which the state court refused to consider because of procedural default.

assume that an official search must either be conducted pursuant to a warrant or not take place at all, I cannot join its reasoning.

In particular, I cannot agree with the Court's suggestion that, if no showing of probable cause could be made, "the warrant procedures governing administrative searches," *ante,* at 511, would have complied with the Fourth Amendment. In my opinion, an "administrative search warrant" does not satisfy the requirements of the Warrant Clause.[1] See *Marshall* v. *Barlow's, Inc., ante,* p. 325 (STEVENS, J., dissenting). Nor does such a warrant make an otherwise unreasonable search reasonable.

A warrant provides authority for an unannounced, immediate entry and search. No notice is given when an application for a warrant is made and no notice precedes its execution; when issued, it authorizes entry by force.[2] In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry,[3] the Fourth Amendment neither requires nor sanctions an abrupt and peremptory confronta-

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[1] The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] See *Wyman* v. *James,* 400 U. S. 309, 323–324. As the Court observed in *Wyman,* a warrant is not simply a device providing procedural protections for the citizen; it also grants the government increased authority to invade the citizen's privacy. See *Miller* v. *United States,* 357 U. S. 301, 307–308.

[3] In this case, there obviously was a special enforcement need justifying the initial entry to extinguish the fire, and I agree that the search on the morning after the fire was a continuation of that entirely legal entry. A special enforcement need can, of course, be established on more than a case-by-case basis, especially if there is a relevant legislative determination of need. See *Marshall* v. *Barlow's, Inc., ante,* p. 325 (STEVENS, J., dissenting).

tion between sovereign and citizen.[4] In such a case, to comply with the constitutional requirement of reasonableness, I believe the sovereign must provide fair notice of an inspection.[5]

The Fourth Amendment interests involved in this case could have been protected in either of two ways—by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed. Since the entry on February 16 was not authorized by a warrant and not preceded by advance notice, I concur in the Court's judgment and in Parts I, III, and IV of its opinion.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join in all but Part IV–A of the opinion, from which I dissent. I agree with the Court that:

> "[A]n entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of

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[4] The Fourth Amendment ensures "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures." (Emphasis added.) Surely this broad protection encompasses the expectation that the government cannot demand immediate entry when it has neither probable cause to suspect illegality nor any other pressing enforcement concern. Yet under the rationale in Part II of the Court's opinion, the less reason an officer has to suspect illegality, the less justification he need give the magistrate in order to conduct an unannounced search. Under this rationale, the police will have no incentive—indeed they have a disincentive—to establish probable cause before obtaining authority to conduct an unannounced search.

[5] See LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 Sup. Ct. Rev. 1. The requirement of giving notice before conducting a routine administrative search is hardly unprecedented. It closely parallels existing procedures for administrative subpoenas, see, *e. g.*, 15 U. S. C. § 1312 (1976 ed.), and is, as Professor LaFave points out, embodied in English law and practice. See LaFave, *supra*, at 31–32.

> the fire must be made pursuant to the warrant procedures governing administrative searches." *Ante,* at 511.

The Michigan Supreme Court found that the warrantless searches, at 8 and 9 a. m. were not, in fact, continuations of the earlier entry under exigent circumstances* and therefore ruled inadmissible all evidence derived from those searches. The Court offers no sound basis for overturning this conclusion of the state court that the subsequent re-entries were distinct from the original entry. Even if, under the Court's "reasonable time" criterion, the firemen might have stayed in the building for an additional four hours—a proposition which is by no means clear—the fact remains that the firemen did not choose to remain and continue their search, but instead locked the door and departed from the premises entirely. The fact that the firemen were willing to leave demonstrates that the exigent circumstances justifying their original warrantless entry were no longer present. The situation is thus analogous to that in *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 358–359 (1977):

> "The agents' own action . . . in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, is sufficient to support the District Court's implicit finding that there were no exigent circumstances. . . ."

To hold that some subsequent re-entries are "continuations"

*The Michigan Supreme Court recognized that "[i]f there are exigent circumstances, such as reason to believe that the destruction of evidence is imminent or that a further entry of the premises is necessary to prevent the recurrence of the fire, no warrant is required and evidence discovered is admissible." 399 Mich. 564, 578, 250 N. W. 2d 467, 474 (1977). It found, however, that "[i]n the instant case there were no exigent circumstances justifying the searches made hours, days or weeks after the fire was extinguished." *Id.,* at 579, 250 N. W. 2d, at 475.

of earlier ones will not aid firemen, but confuse them, for it will be difficult to predict in advance how a court might view a re-entry. In the end, valuable evidence may be excluded for failure to seek a warrant that might have easily been obtained.

Those investigating fires and their causes deserve a clear demarcation of the constitutional limits of their authority. Today's opinion recognizes the need for speed and focuses attention on fighting an ongoing blaze. The firetruck need not stop at the courthouse in rushing to the flames. But once the fire has been extinguished and the firemen have left the premises, the emergency is over. Further intrusion on private property can and should be accompanied by a warrant indicating the authority under which the firemen presume to enter and search.

There is another reason for holding that re-entry after the initial departure required a proper warrant. The state courts found that at the time of the first re-entry a criminal investigation was under way and that the purpose of the officers in re-entering was to gather evidence of crime. Unless we are to ignore these findings, a warrant was necessary. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), and *See* v. *Seattle,* 387 U. S. 541 (1967), did not differ with *Frank* v. *Maryland,* 359 U. S. 360 (1959), that searches for criminal evidence are of special significance under the Fourth Amendment.

MR. JUSTICE REHNQUIST, dissenting.

I agree with my Brother STEVENS, for the reasons expressed in his dissenting opinion in *Marshall* v. *Barlow's, Inc., ante,* at 328, that the "Warrant Clause has no application to routine, regulatory inspections of commercial premises." Since in my opinion the searches involved in this case fall within that category, I think the only appropriate inquiry is whether they were reasonable. The Court does not dispute that the entries which occurred at the time of the fire and the next morning were entirely justified, and I see nothing to indicate that the

subsequent searches were not also eminently reasonable in light of all the circumstances.

In evaluating the reasonableness of the later searches, their most obvious feature is that they occurred after a fire which had done substantial damage to the premises, including the destruction of most of the interior. Thereafter the premises were not being used and very likely could not have been used for business purposes, at least until substantial repairs had taken place. Indeed, there is no indication in the record that after the fire Tyler ever made any attempt to secure the premises. As a result, the fire department was forced to lock up the building to prevent curious bystanders from entering and suffering injury. And as far as the record reveals, Tyler never objected to this procedure or attempted to reclaim the premises for himself.

Thus, regardless of whether the premises were technically "abandoned" within the meaning of the Fourth Amendment, cf. *Abel* v. *United States,* 362 U. S. 217, 241 (1960); *Hester* v. *United States,* 265 U. S. 57 (1924), it is clear to me that no purpose would have been served by giving Tyler notice of the intended search or by requiring that the search take place during the hours which in other situations might be considered the only "reasonable" hours to conduct a regulatory search. In fact, as I read the record, it appears that Tyler not only had notice that the investigators were occasionally entering the premises for the purpose of determining the cause of the fire, but he never voiced the slightest objection to these searches and actually accompanied the investigators on at least one occasion. App. 54–57. In fact, while accompanying the investigators during one of these searches, Tyler himself suggested that the fire very well may have been caused by arson. *Id.,* at 56. This observation, coupled with all the other circumstances, including Tyler's knowledge of, and apparent acquiescence in, the searches, would have been taken by any sensible person as an indication that Tyler thought the

searches ought to continue until the culprit was discovered; at the very least they indicated that he had no objection to these searches. Thus, regardless of what sources may serve to inform one's sense of what is reasonable, in the circumstances of this case I see nothing to indicate that these searches were in any way unreasonable for purposes of the Fourth Amendment.

Since the later searches were just as reasonable as the search the morning immediately after the fire in light of all these circumstances, the admission of evidence derived therefrom did not, in my opinion, violate respondents' Fourth and Fourteenth Amendment rights. I would accordingly reverse the judgment of the Supreme Court of Michigan which held to the contrary.

Syllabus

# CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.

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

No. 76–1114. Argued December 7, 1977—Reargued April 17, 1978—Decided May 31, 1978*

In 1925, Gulf Oil Corp. executed a lease under which it paid royalties for the exclusive right to produce and market oil and gas from certain land for 50 years. Thereafter, the lessors sold their mineral fee interest to respondents. In 1951 Gulf contracted to sell casinghead gas from the leased property to petitioner El Paso Natural Gas Co., an interstate pipeline. Subsequently, Gulf obtained from the Federal Power Commission a certificate of public convenience and necessity of unlimited duration authorizing the service to El Paso. When Gulf's original lease expired in 1975, its interest as lessee in the remaining gas reserves terminated and reverted to respondents. Just before the lease expired, respondents arranged to sell the remaining casinghead gas to an intrastate purchaser. El Paso, in order to preserve one of its sources of supply, petitioned the FPC for a determination that the remaining gas reserves could not be diverted to the intrastate market without abandonment authorization pursuant to § 7 (b) of the Natural Gas Act (Act). The FPC agreed, holding that once gas began to flow in interstate commerce from a field subject to a certificate of unlimited duration, such flow could not be terminated unless the FPC authorized abandonment of service. On respondents' petition for review, the Court of Appeals reversed, holding that Gulf, as a tenant for a term of years, could not legally dedicate that portion of the gas that respondents might own upon the lease's expiration. *Held:* The FPC acted within its statutory powers in requiring that respondents obtain permission to abandon interstate service. The issuance of the certificate of unlimited duration created a federal obligation to serve the interstate market until abandonment authorization had been obtained, and the FPC reasonably concluded that under the Act the obligation to continue service attached to the

*Together with 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.,* also on certiorari to the same court.

gas, not as a matter of contract but as a matter of law, and bound all those with dominion and power of sale over the gas, including the lessors to whom it reverted. The service obligation imposed by the FPC survived the expiration of the private agreement that gave rise to the FPC's jurisdiction. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137. Pp. 523–531.

543 F. 2d 1134, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 531. STEWART and POWELL, JJ., took no part in the consideration or decision of the cases.

*Randolph W. Deutsch* reargued the cause for petitioners in No. 76–1114. With him on the briefs were *Janice E. Kerr* and *J. Calvin Simpson*. *Deputy Solicitor General Barnett* reargued the cause for petitioner in No. 76–1587. On the briefs were *Solicitor General McCree, Richard A. Allen, Robert W. Perdue,* and *Philip R. Telleen*. *C. Frank Reifsnyder, Arthur R. Formanek,* and *Richard S. Morris* filed briefs for petitioner in No. 76–1133.

*J. Evans Attwell* reargued the cause for respondents in all cases. With him on the brief were *Martin N. Erck, Sherman S. Poland, Bernard A. Foster III,* and *Roger L. Brandt*. *William Pannill* and *F. H. Pannill* filed a brief for respondent Crane County Development Co.

*John L. Hill,* Attorney General, reargued the cause for the State of Texas as *amicus curiae* urging affirmance in all cases. With him on the brief were *David M. Kendall,* First Assistant Attorney General, *Steve Van,* Assistant Attorney General, and *Frank C. Cooksey*.†

†*Frederick Moring* and *James A. Wilderotter* filed a brief for the Associated Gas Distributors as *amicus curiae* urging reversal in all cases.

Briefs of *amici curiae* urging affirmance were filed by *James R. Patton, Jr., Harry E. Barsh, Jr., Edwin W. Edwards,* Governor, and *William J. Guste, Jr.,* Attorney General, for the State of Louisiana; and by *Toney*

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1925 the owners of certain acreage in Texas executed a lease which gave to Gulf Oil Corp., as lessee, the exclusive right to produce and market oil and gas from that land for the next 50 years.[1] Gulf was entitled to drill wells, string telephone and telegraph wires, and build storage facilities and pipelines on the land. Gulf would also have "such other privileges as are reasonably requisite for the conduct of said operations." App. 135. In exchange, the owners were to receive a royalty based on the quantity of natural gas produced and the number of producing wells, as well as other royalties and payments. The following year, the owners of the property sold one-half of their mineral fee interest to respondent Southland Royalty Co. and the rest to other respondents.

In 1951 Gulf contracted to sell casinghead gas from the leased property to the El Paso Natural Gas Co., an interstate pipeline. After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954), Gulf applied for a certificate of public convenience and necessity from the Federal Power Commission authorizing the sale in interstate commerce of 30,000 Mcf per day. By order dated May 28, 1956, the Commission granted a certificate of unlimited duration, and this certificate was among those construed as "permanent" by

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*Anaya,* Attorney General, *Vernon O. Henning,* Assistant Attorney General, and *William O. Jordan,* Special Assistant Attorney General, for the State of New Mexico.

*Peter H. Schiff* and *Richard A. Solomon* filed a brief for the Public Service Commission of the State of New York as *amicus curiae.*

[1] The "Waddell" lease, executed on July 14, 1925, covered 45,771 acres in Crane County, Tex. In the same year Gulf executed an identical lease, the "Goldsmith" lease, with the owners of 19,840 acres in Ector County, Tex. The gas remaining at the expiration of both leases is at issue in this litigation, but because the parties are in agreement that there are no material differences in the language or history of these leases, we shall discuss only the Waddell lease.

this Court in *Sun Oil Co.* v. *FPC*, 364 U. S. 170, 175 (1960).[2] Gulf entered into a second contract to sell additional volumes of gas to El Paso in 1972, and obtained a certificate of unlimited duration for those volumes in 1973.

The original 50-year lease obtained by Gulf expired on July 14, 1975, and, under local law, the lessee's interest in the remaining oil and gas reserves terminated and reverted to respondents. See *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S. W. 2d 547 (Tex. 1973). Just prior to expiration of the lease, respondents arranged to sell the remaining casinghead gas to an intrastate purchaser, at the higher prices available in the intrastate market.

El Paso, in order to preserve one of its sources of supply, then filed a petition with the Commission seeking a determination that the remaining gas reserves could not be diverted to the intrastate market without abandonment authorization pursuant to § 7 (b) of the Natural Gas Act of 1938, 52 Stat. 824, as amended, 15 U. S. C. § 717f (b) (1976 ed.).[3] The Commission agreed with this contention, relying on the "principle established by Section 7 (b) that 'service' may not be abandoned without our permission and approval." *El Paso Natural Gas Co.*, 54 F. P. C. 145, 150, 10 P. U. R. 4th 344, 348 (1975). The Commission held that respondents could not,

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[2] The Commission's order of May 28, 1956, had granted more than 100 certificates with identical language. This Court's decision in *Sun Oil*, though prompted by a dispute over a specific certificate, interpreted the Commission's order as it applied to the entire "batch of certificates." 364 U. S., at 175.

[3] Texaco, Inc., owner of a 25% interest in the reversion under the Goldsmith Lease, see n. 1, *supra*, also filed a petition with the Commission, seeking a declaration that upon expiration of the lease the fee owners would be free to sell the remaining gas to intrastate purchasers. Although Texaco's interest was adverse to El Paso, Texaco's petition raised the same issues as El Paso's petition and was therefore consolidated with it. The State of California and its Public Utilities Commission intervened in the consolidated proceeding.

upon termination of the lease, sell gas in intrastate commerce without prior permission from the Commission under § 7 (b) of the Natural Gas Act and that Gulf was also obligated to seek abandonment permission. The Commission reaffirmed this view in an order denying rehearing, but added language insuring that any deliveries of gas to El Paso during the period that the Commission's order was under review would not constitute a dedication of those reserves to the interstate market. *El Paso Natural Gas Co.*, 54 F. P. C. 2821, 11 P. U. R. 4th 488 (1975).

On respondents' petition for review, the Court of Appeals for the Fifth Circuit reversed. *Southland Royalty Co.* v. *FPC*, 543 F. 2d 1134 (1976). The court held that Gulf, as a tenant for a term of years, could not legally dedicate that portion of the gas which Southland and other respondents might own upon expiration of the lease. Because of the importance of the question presented to the authority of the Federal Power Commission, now the Federal Energy Regulatory Commission, we granted the petition for certiorari. 433 U. S. 907. We reverse.

The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 147, 151–154 (1960); *Atlantic Refining Co.* v. *Public Serv. Comm'n of New York*, 360 U. S. 378, 388 (1959). To this end, not only must those who would serve the interstate market obtain a certificate of public convenience and necessity but also, under § 7 (b) of the Act:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the con-

tinuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U. S. C. § 717f (b) (1976 ed.).

The Commission may therefore control both the terms on which a service is provided to the interstate market and the conditions on which it will cease:

> "An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.' " *Sunray Mid-Continent Oil Co., supra,* at 156.

The Act was "so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Serv. Comm'n of New York, supra,* at 388.

The jurisdiction of the Commission extends to the transportation of natural gas in interstate commerce or the sale in interstate commerce for resale to consumers. § 1 (b), 15 U. S. C. § 717 (b) (1976 ed.). Gas which flows across state lines for resale is dedicated to interstate commerce regardless of the intentions of the producer. *California* v. *Lo-Vaca Co.,* 379 U. S. 366 (1965). The Court there approved an approach to questions of the Commission's jurisdiction based on the physical flow of the gas:

> "We said in *Connecticut Co.* v. *Federal Power Comm'n,* 324 U. S. 515, 529, 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.' And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself

> has substituted a so-called legal standard for the technological one. *Id.*, at 530–531." *Id.*, at 369.

The Court reasoned that in the circumstances of that case,[4] "[t]he fact that a substantial part of the gas will be resold [in interstate commerce] . . . invokes federal jurisdiction at the outset over the entire transaction." *Ibid.*

In this litigation the Commission held that once gas began to flow in interstate commerce from a field subject to a certificate of unlimited duration, that flow could not be terminated unless the Commission authorized an abandonment of service. The initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate. The expiration of a lease on the field of gas did not affect the obligation to continue the flow of gas, a service obligation imposed by the Act.

We think that the Commission's interpretation of the abandonment provision of the Natural Gas Act is a permissible one. In *Sunray Mid-Continent Oil Co.* v. *FPC,* the Court recognized that the obligation to serve the interstate market imposed by a certificate of unlimited duration could not be terminated by private contractual arrangements. In that case, a producing company which had contracted with a pipeline to supply gas for 20 years sought a certificate from the Commission limited to that period. The Commission insisted on a permanent certificate; and this Court upheld its authority to do so, holding that even after the contract had expired, the producer would remain under an obligation to supply gas to

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[4] In *California* v. *Lo-Vaca Co.,* an interstate pipeline had entered into a private contractual arrangement with a producer that all gas purchased pursuant to the agreement would be for internal use only. Despite this explicit reservation intended to remove this gas from the jurisdiction of the Commission, the Court held that the Commission had jurisdiction over the entire transaction because at least some part of the contract gas, physically commingled in the pipeline with gas from other sources, would be sold to other interstate purchasers.

the pipeline, unless permission to abandon service had been obtained. The obligation on the producer which survived after the contract term "will not be one imposed by contract but by the Act." 364 U. S., at 155. The obligation to continue the service despite the provisions of the sales contract was held essential to effectuate the purposes of the Act; otherwise producers and pipelines would be free to make arrangements that would circumvent the ratemaking and supply goals of the statute. *Id.*, at 142–147.

Similar principles control this litigation. This issuance of a certificate of unlimited duration covering the gas at issue here created a federal obligation to serve the interstate market until abandonment authorization had been obtained. The Commission reasonably concluded that under the statute the obligation to continue service attached to the gas, not as a matter of contract but as a matter of law, and bound all those with dominion and power of sale over the gas, including the lessors to whom it reverted. Just as in *Sunray,* the service obligation imposed by the Commission survived the expiration of the private agreement which gave rise to the Commission's jurisdiction.

Respondents seek to distinguish *Sunray* on the ground that the producer in that case owned all of the gas covered by the certificate, but the central theme of that opinion is that the Act is concerned with the continuation of "service" rather than with particular sales of gas or contract rights. The Court traced the language of the statute to show that "all the matters for which a certificate is required—the construction of facilities or their extension, as well as the making of jurisdictional sales—must be justified in terms of a 'service' to which they relate." *Id.*, at 150. The Court specifically noted that "§ 7 (b) does not refer to the abandonment of the continuation of sales, but rather to the abandonment of 'services.'" *Id.*, at 150 n. 17. The Commission "[had] long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifesta-

tion—the contractual relationship—which that service takes at a given moment." *Id.*, at 152. Just as the federal obligation to continue service was held paramount to private arrangements in *Sunray,* that obligation must be recognized here. Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7 (b) required that the Commission's permission be obtained prior to the discontinuance of "any service rendered by means of such facilities." Private contractual arrangements might shift control of the facilities and thereby determine *who* is obligated to provide that service, but the parties may not simply agree to terminate the service obligation without the Commission's permission.

Respondents contend that the gas at issue here was never impressed with an obligation to serve the interstate market because it was never "dedicated" to an interstate sale. The core of their argument is that "no man can dedicate what he does not own." Brief for Respondent Southland Royalty Co. et al. 8. This maxim has an appealing resonance, but only because it takes unfair advantage of an ambiguity in the term "dedicate." For most lawyers, as well as laymen, to "dedicate" is to "give, present, or surrender to public use." Webster's Third New International Dictionary 589 (1961). But gas which is "dedicated" pursuant to the Natural Gas Act is not surrendered to the public; it is simply placed within the jurisdiction of the Commission, so that it may be sold to the public at the "just and reasonable" rates specified by § 4 (a) of the Act, 15 U. S. C. § 717c (a) (1976 ed.). Judicial review insures that those rates will not be confiscatory. See *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942); *FPC* v. *Hope Gas Co.*, 320 U. S. 591, 602–603 (1944). Thus, by "dedicating" gas to the interstate market, a producer does not effect a gift or even a sale of that gas, but only changes its regulatory status.[5]

[5] An analogy in state law may be found in the power of a tenant to seek a change in the zoning status of leased property. See, *e. g.*, *Newport*

Here, the lessee dedicated the gas by seeking and receiving a certificate of unlimited duration from the Commission. Respondents apparently had no objection, for they could have intervened in those proceedings but did not do so. *El Paso Natural Gas Co.*, 54 F. P. C. 917, 919 n. 3 (1975).

Respondents also appear to argue that they should not be viewed as "natural gas companies" with respect to the Waddell Ranch gas because they have not voluntarily committed any act that would place them within the Commission's jurisdiction. As we have seen, this argument is somewhat beside the point, for the obligation to serve the interstate market had already attached to the *gas,* and respondents became obligated to continue that service when they assumed control of the gas. In the Commission's language, "the dedication involved is not the dedication of an individual party or producer, but the dedication of gas." 54 F. P. C., at 149, 10 P. U. R. 4th, at 348.

In any event, we perceive no unfairness in holding respondents, as lessors, responsible for continuation of the service until abandonment is obtained. Respondents were "mineral lease owners who entered into a lease that permitted the lease holders to make interstate sales." 54 F. P. C., at 920. They did not object when Gulf sought a certificate from the Commission. Indeed, as the Commission pointed out, Gulf may even have been under a duty to seek interstate purchasers for the gas. *Id.*, at 919. Gas leases are typically construed to include a duty diligently to develop and market, see, *e. g.*, 5 H. Williams & C. Meyers, Oil and Gas Law § 853 (1977), and at the time the certificate was sought the interstate market was the major outlet for gas, see *Atlantic Refining Co.* v. *Public Serv. Comm'n of New York,* 360 U. S., at 394. Having authorized Gulf to make interstate

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*Associates, Inc.* v. *Solow,* 30 N. Y. 2d 263, 283 N. E. 2d 600 (1972), cert. denied, 410 U. S. 931 (1973); *Richman* v. *Philadelphia Zoning Board of Adjustment,* 391 Pa. 254, 258, 137 A. 2d 280, 283 (1958).

sales of gas, respondents could not have expected those sales to be free from the rules and restrictions that from time to time would cover the interstate market. Cf. *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 482 (1911).[6]

In *Sunray,* the Court discussed the "practical consequences" for the consumer if the term of the sales contract limited the term of the certificate. 364 U. S., at 143, 142–147. The Court reasoned:

"If petitioner's contentions . . . were . . . sustained, the

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[6] Moreover, the type of regulation which the Commission has here imposed is not without precedent. As we recognized in *Sunray,* § 7 (b) of the Natural Gas Act "follows a common pattern in federal utility regulation." 364 U. S., at 141–142. Section 1 (18) of the Interstate Commerce Act, 49 U. S. C. § 1 (18), similarly provides that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." At a very early date the Interstate Commerce Commission interpreted this provision to require that a certificate of abandonment be obtained prior to the cessation of operations over leased tracks, even though the lease had expired by its own terms. *Chicago & Alton R. Co.* v. *Toledo, Peoria & Western R. Co.,* 146 I. C. C. 171 (1928). In *Lehigh Valley R. Co. Proposed Abandonment of Operation,* 202 I. C. C. 659 (1935), the Commission held that even a lessor which had ceased to operate as a railroad prior to enactment of the Interstate Commerce Act would be required to seek permission to abandon a railroad line which had reverted to it upon expiration of a lease. Long before Gulf applied for its certificate, this Court approved these decisions. See *Smith* v. *Hoboken R., Warehouse & S. S. Connecting Co.,* 328 U. S. 123, 130 (1946) ("[A] certificate is required under § 1 (18) whether the lessee or the lessor is abandoning operations"); *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 144–145 (1946) ("[T]he fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1 (18), are applicable to contracts made before as well as after its enactment"). These precedents demonstrate that the specific type of obligation imposed here—an obligation to continue interstate service until abandonment has been obtained—is within the range of regulatory possibilities that must be anticipated by one profiting from interstate operations.

> way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammelled by Commission regulation, to reassess whether it desired to continue serving the interstate market." *Id.*, at 142.

A "local economy which had grown dependent on natural gas as a fuel" might experience disruption or significantly higher prices. *Id.*, at 143. These observations are equally pertinent to private arrangements by way of leases. If the expiration of a lease to mineral rights terminated all obligation to provide interstate service, producers would be free to structure their leasing arrangements to frustrate the aims and goals of the Natural Gas Act.

Respondents suggest that the Commission could require a voluntary assumption of the service obligation by the lessor as a condition to certificates issued in the future. It is obvious that this solution does nothing to protect those communities presently depending on the flow of gas pursuant to a certificate of unlimited duration already issued. Moreover, the Court questioned in *Sunray* whether the conditioning power could be used to achieve indirectly what the Act did not authorize the Commission to do directly. *Id.*, at 152. In light of this tension, the Court concluded that "the Commission's power to protect the public interest under § 7 (e) need not be restricted to these indirect and dubious methods." *Ibid.*

We conclude that the Commission acted within its statutory powers in requiring that respondents obtain permission to abandon interstate service. "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392, 400 (1965). By tying the concept of dedication to local property law, respondents would cripple the authority of the Commission at a time when the need for decisive action is greatest. Guided by

*Sunray,* we believe that the structure and purposes of the Natural Gas Act require a broader view of the Commission's authority.

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

*So ordered.*

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

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

The disparity between the regulated price of natural gas in the interstate market and the unregulated price in the Texas market gives this case its importance.[1] The legal issue depends on the meaning of § 7 (b), the abandonment provision of the Natural Gas Act.[2] Speaking for the United States

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[1] At the time the Court of Appeals for the Fifth Circuit delivered its opinion in this case, there was a "gross imbalance between controlled prices at which interstate natural gas [was] sold and the substantially higher values set by the free market for gas . . . ." *Southland Royalty Co.* v. *FPC,* 543 F. 2d 1134, 1135 (1976) (citation omitted). Although the Federal Power Commission (now the Federal Energy Regulatory Commission) has taken some action to correct this imbalance, see *National Rates for Natural Gas,* 56 F. P. C. 2698, 15 P. U. R. 4th 21 (1976), aff'd *sub nom. American Public Gas Assn.* v. *FPC,* 186 U. S. App. D. C. 23, 567 F. 2d 1016 (1977), a "substantial disparity" still exists. Brief for Petitioner in No. 76–1587, pp. 6–7, n. 9.

[2] "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U. S. C. § 717f (b) (1976 ed.).

Court of Appeals for the Fifth Circuit, Judge Clark framed the question in this way:

> "Does the lessee under a 50-year fixed-term mineral lease, by making certificated sales of leasehold natural gas in interstate commerce, thereby dedicate to interstate commerce the gas which remains in the ground at the end of the 50th year?" *Southland Royalty Co.* v. *FPC*, 543 F. 2d 1134, 1136 (1976).

In my opinion, the Fifth Circuit correctly answered that question in the negative and ruled that the lessors did not have to seek the Commission's abandonment approval under § 7 (b).

Through two separate leases executed in 1925, Gulf Oil Corp. obtained the right to explore, produce, and market oil and gas from specified acreage in Texas.[3] The leases were for a fixed term of 50 years, and the reversionary interests in the minerals were shared by a number of fee owners (respondents), of which Southland Royalty Co. is the largest.[4] As lessors of the property, respondents received a royalty based on the quantity of natural gas produced and the number of producing wells.[5] Gulf's interest in the leased gas terminated, as a matter of Texas law, in 1975, and the mineral rights reverted to respondents. See *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S. W. 2d 547 (Tex. 1973).

In 1951, well before its leasehold interest expired, Gulf

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[3] See *ante*, at 521 n. 1.

[4] Southland acquired one-half of the mineral fee interest in the Waddell lease in 1926; the remaining fractional interests are owned by over 100 other companies and persons. The ownership of the reversionary mineral estate of the Goldsmith lease is also dispersed; Texaco, Inc., is apparently the largest single owner, having acquired a one-fourth interest in 1929.

[5] Respondents' royalty interest was ⅛ of 4¢ per Mcf (thousand cubic feet) for all casinghead gas produced and sold from the lease; they had no right to take gas in kind or to receive a royalty based on the price received by the lessee for the gas. App. 135–140.

contracted to sell casinghead gas [6] to the El Paso Natural Gas Co., an interstate pipeline.[7] Thereafter, Gulf applied for, and the Federal Power Commission issued, a certificate of public convenience and necessity authorizing its sale of natural gas to El Paso, to be effective as long as Gulf continued its authorized operations in accordance with the statute and applicable regulations. See n. 13, *infra*. The price of the gas sold by Gulf to El Paso was then regulated by the Commission. The price of gas on the intrastate market was, however, not subject to such regulation. Shortly before the expiration of the leases, Southland and the other mineral fee owners therefore made plans to sell their casinghead gas in the intrastate market as soon as the leases expired.[8] In order to preserve one of its sources of supply, El Paso filed a petition with the Commission seeking a determination that the leasehold gas had been dedicated to interstate commerce and could not be withdrawn from that market without Commission approval.[9]

The Commission held that Southland and the other mineral interest owners may not divert leasehold gas into the local market without prior Commission approval. The Commission noted that its decision was not supported by direct

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[6] Casinghead gas is found in association with crude oil; it is to be distinguished from "gas-well gas."

[7] Gulf sold its gas from the Goldsmith lease to Phillips Petroleum Co., which processed the gas and sold it to El Paso, which in turn transported the gas in interstate commerce for subsequent resale. For the purposes of this case, the parties have agreed that there are no material differences between the Goldsmith and Waddell leases. See *ante*, at 521 n. 1.

[8] Southland entered into a contract with Intratex Gas Co. and Intrastate Pipeline Co., which primarily serves a distributor in Houston, Tex.

[9] Docket No. CP75–209, commenced by El Paso on January 20, 1975, related to the Waddell lease. Docket No. CI75–594, relating to the Goldsmith lease, was commenced by Texaco on April 8, 1975. Although the interest of Texaco was adverse to El Paso, its petition for a declaratory order raised the same issue as did the El Paso petition in No. CP75–209.

precedent, but reasoned that Gulf had made a dedication of the leasehold gas which imposed a service obligation on the gas itself, rather than on any particular party.[10]

On respondents' petition for review, the Court of Appeals reversed. The court held that Gulf, as a tenant for a term of years, could not legally dedicate that portion of the gas which Southland and the other reversioners might own upon expiration of the lease. It rejected the Commission's argument that since Gulf had an unquantified right during the 50-year term, it had a legal right to withdraw all of the leased gas, and therefore was empowered to dedicate the entire supply to the interstate market. The court reasoned that Gulf's interest in the gas was contingent upon its removal within 50 years and that its right to dedicate the gas to interstate commerce was subject to the same contingency.[11] The Commission's alternative argument that the acceptance of royalty payments constituted ratification of the dedication to interstate commerce was rejected on the ground that the holders of the reversionary interest had no right to control Gulf's sale of the gas during the lease term.

In this Court, petitioners[12] argue that a *lessee's* acceptance

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[10] "In our opinion the various mineral interest reversioners may not sell gas from the two leaseholds in intrastate commerce without prior permission and approval of the Commission. Although we have discovered no case directly on point, we are of the opinion that the cases and the purpose of the Natural Gas Act inevitably lead to this view. . . . [T]he dedication involved is not the dedication of an individual party or producer, but the dedication of gas." *El Paso Natural Gas Co.*, 54 F. P. C. 145, 149, 10 P. U. R. 4th 344, 347–348 (1975).

[11] "To the extent that Gulf's present interest in all of the natural gas is contingent upon its removal within 50 years, the right to dedicate that gas removed to interstate commerce is likewise contingent. Whatever gas is left under the lease lands at the end of the 50 years is not Gulf's gas and, by the plain terms of the limited leasehold estate, never belonged to it from day one forward." 543 F. 2d, at 1138.

[12] Petitioners in this case are the Commission, El Paso, and the State of

of a certificate of convenience and necessity of unlimited duration creates a service obligation which the *lessors* may never abandon without Commission authorization. They rely primarily on this Court's decision in *Sunray Mid-Continental Oil Co.* v. *FPC,* 364 U. S. 137; secondarily on somewhat analogous cases arising under the Interstate Commerce Act; and finally on their analysis of the practical consequences of the Court of Appeals' interpretation of the statute. I consider these arguments in turn.

I

Although *Sunray Oil* is of immediate concern, that decision must be considered in the context of the jurisdictional development of the Natural Gas Act that began in 1954 with *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. In *Phillips,* the Court held that sales of natural gas by an independent producer to an interstate pipeline were subject to the jurisdiction of the Federal Power Commission. The Court rejected the independent producer's claim that the Act was concerned only with regulating interstate pipelines and, instead, held that the FPC's jurisdiction was based on the broader concept of interstate "sales" of natural gas. One obvious result of *Phillips* was the sudden expansion of the Commission's jurisdictional responsibilities. *Permian Basin Area Rate Cases,* 390 U. S. 747, 756–757.[13] Less obviously, but perhaps more importantly,

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California, which intervened in the suit below on the ground that El Paso was one of its major suppliers of natural gas.

[13] After the decision in *Phillips,* the natural gas companies already supplying gas to the interstate market had to apply for Commission approval of that service. The certificate issued to Gulf in this case in 1956 was one of a large number which were issued in a post-*Phillips* consolidated proceeding. The certificate stated in relevant part:

"The Commission *orders*

"(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Com-

it marked the first step in the development of a regulatory scheme for natural gas that is unique in public utility regulation. As Mr. Justice Harlan observed, "[p]roducers of natural gas cannot usefully be classed as public utilities." *Id.*, at 756. "Unlike other public utility situations, the relationship which ultimately may subject the independent producer to regulation under the Natural Gas Act has its usual inception in a contract between a producer . . . of natural gas . . . and an interstate pipeline . . . ." 5 W. Summers, Law of Oil and Gas § 924, p. 7 (1966). But while the voluntary sale of natural gas to an interstate pipeline is the event that normally activates the jurisdiction of the Commission,[14] the contractual terms of the sale do not define the limits of that jurisdiction.

In *Sunray Oil*, the Court held that a natural gas company had made a dedication of gas to interstate commerce of unlimited duration even though its sales contract with the interstate pipeline was for a fixed term of 20 years. The company had applied to the Commission for a limited certificate of convenience and necessity authorizing interstate

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mission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

"(B) The certificate issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicant within 30 days from issuance of this order.

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission." App. 37. See *Sun Oil Co.* v. *FPC*, 364 U. S. 170, 171–172.

In 1972, Gulf entered into a second contract with El Paso covering gas produced from wells covered by the leases in question, and the Commission granted Gulf another certificate covering sales under that contract.

[14] As this Court has previously noted, "the scheme of the Act was one which built the regulatory system on a foundation of private contracts." *Sunray Oil*, 364 U. S., at 154; see also *United Gas Pipe Line Co.* v. *Mobil Gas Service Corp.*, 350 U. S. 332.

sales only for the term of the contract. The Commission, however, tendered the company an unlimited certificate. The Court ruled that by accepting that certificate and by exercising the authority granted by it, the company undertook a service obligation that survived the expiration of the 20-year contract and that it could not abandon without Commission approval.

The Court explained that the company's statutory obligation was not limited to the contractual commitment it had voluntarily assumed. "[T]he service in which the producer engages [the sale of natural gas] is distinct from the contract which regulates his relationship with the transmission company in performing the service." 364 U. S., at 153. The duty to continue that service is an obligation imposed by the Act, not by contract. *Id.*, at 155.[15]

And later in the opinion the Court added:

> "An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself.' [*Atlantic Refining Co.* v. *Public Serv. Comm'n of New York,*] 360 U. S., at 389." *Id.*, at 156.

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[15] The Court's statement was made in response to the company's argument that *United Gas Pipe Line Co.* v. *Mobil Gas Service Corp., supra,* established the principle that the Act preserved the integrity of private contracts, and that therefore the Commission should not be allowed to compel it to enlarge its contractual undertaking. The holding in *Mobil* was that the seller could not file for a rate increase that would violate the terms of his contract. In *Sunray,* however, no violation of an existing contract was required or permitted by the Commission.

The petitioners argue that like reasoning controls this case. Because the certificate issued to Gulf was not limited by the duration of its leasehold interests, they contend that respondents must supply leasehold gas to El Paso until they obtain permission to abandon that service pursuant to § 7 (b) of the Act. The argument misconceives the nature of the issue resolved by *Sunray*.

In *Sunray* the issue before the Court was whether a private contract between a producer and a pipeline company could supplant the Commission's authority to determine how long the producer's gas would be subject to interstate dedication. There was no question that the producer had dedicated the gas to the interstate market, and there was no question that the producer owned the gas that he had dedicated. In the case at hand, however, respondents have not themselves dedicated *any* gas to interstate commerce, and they strenuously urge that Gulf's power to dedicate their gas was limited by the character of Gulf's leasehold interest. The issue here, therefore, is one step removed from that in *Sunray*. Nevertheless petitioners claim that *Sunray* controls. Their "syllogism" is that since a private contract is not determinative of the scope of a dedication, a private lease should not be determinative of whether there has been a dedication. But the syllogism is a non sequitur.[16] Moreover, *Sunray* cannot, consistently with the purposes and structure of the Natural Gas Act, be expanded in this fashion.

The Natural Gas Act, as this Court has repeatedly stated, does not represent an exercise of Congress' full power under the Commerce Clause. See, *e. g.*, *FPC* v. *Panhandle Eastern*

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[16] The fact that Sunray's contract with its customers did not limit the *scope* of Sunray's dedication of its own gas does not logically compel any answer to the question *whether* Gulf had the power to dedicate gas owned by its lessors after the termination of the lease. See generally Conine & Niebrugge, Dedication under the Natural Gas Act: Extent and Escape, 30 Okla. L. Rev. 735, 821–825 (1977).

*Pipe Line Co.*, 337 U. S. 498, 502. Instead, § 1 (b) limits the Act's reach to interstate transportation and sales of natural gas, 15 U. S. C. § 717 (b) (1976 ed.), and this same restriction is reflected in the abandonment provision. Section 7 (b) provides that "[n]o *natural gas company* shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities . . . ." 15 U. S. C. § 717f (b) (1976 ed.) (emphasis added). "Natural gas company," in turn, is defined as "a person engaged in the transportation of natural gas in interstate commerce, or the *sale* in interstate commerce of such gas for resale." 15 U. S. C. § 717a (6) (1976 ed.) (emphasis added).

While Gulf, like the oil company in *Sunray*, is a "natural gas company" within this definition, it is clear that, at least prior to the lease termination, the respondents were not. They clearly did not transport gas, and their retention of a standard, fixed royalty interest did not constitute a "sale" of gas in interstate commerce.[17] This latter point follows from the rule that the royalty provisions of an oil and gas lease are not subject to the Natural Gas Act. *Mobil Oil Corp.* v. *FPC*, 149 U. S. App. D. C. 310, 463 F. 2d 256 (1972), cert. denied *sub nom. Mobil Oil Corp.* v. *Matzen*, 406 U. S. 976. The reasoning of the Court of Appeals in that case is applicable here:

> "When we come to an ordinary lease by the landowner to the producer there is neither a 'customary' sale in interstate commerce nor its equivalent in economic effect. Such a lease is a transaction that is itself customary and conventional, but one that precedes the 'conventional' sales in interstate commerce with which Congress was concerned, indeed even precedes the 'production and gathering' which § 1 (b) visualized as preceding the sale

[17] Of course, the sale at issue is the alleged sale in this case; it is irrelevant that some of the respondents may have sold natural gas from other fields under other contracts in interstate commerce for resale.

> in interstate commerce over which jurisdiction was being established.
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> . . . . .
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> "The FPC is limited by the provision establishing its jurisdiction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments." [18]

The Commission does not challenge this rule; instead, it argues that "lessors who succeed to the interest of their natural gas company lessees would be natural gas companies within the meaning of the Act." Brief for Petitioner in No. 76–1587, p. 29. But neither the Commission nor any court has held that a lessor succeeds to the interest of his lessee when a lease expires by its terms. The Commission has held that a purchaser or assignee charged with notice of the burdens imposed on the acquired estate by its former owner must seek abandonment approval under § 7 (b). See, *e. g., Cumberland Natural Gas Co.,* 34 F. P. C. 132 (1965). The Commission has reasoned that, in these situations, the successor-in-interest has "stepp[ed] into the shoes of his predecessor." *Graridge Corp.,* 30 F. P. C. 1156, 1162 (1963); see also *Phillips Petroleum Co.* v. *FPC,* 556 F. 2d 466 (CA10 1977); but see *El Paso Natural Gas Co.,* 48 F. P. C. 1269 (1972).

That analysis does not apply in this case. The character of the fee owner's reversionary interest was defined when the leasehold estate was created. Respondents did not "step into" Gulf's leasehold interest; that interest expired. This is, of

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[18] 149 U. S. App. D. C., at 316–317, 463 F. 2d, at 262–263. As the District of Columbia Circuit correctly observed, the issue is the extent to which royalty payments under a lease are related to the concept of a jurisdictional "sale" under the Act. An entirely different analysis might be appropriate if the lessee or lessor sought to abandon permanent facilities for the interstate transportation of gas, such as a pipeline.

course, merely another way of expressing the well-settled doctrine of property law that "one having a limited estate in land cannot, as against the person entitled in reversion or remainder, create an estate to endure beyond the normal time for termination of his own estate." 1 H. Tiffany, Law of Real Property § 153, p. 247 (3d ed. 1939).[19]

Petitioners rejoin that strict concepts of property law or state definitions of ownership cannot control the scope of the federal Act. But this proposition, though valid, does not support petitioners' position. As the Court has previously stated, "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law," *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392, 400, and the Court must instead look to the economic reality of the transaction. But in this case respondents, as royalty owners, had "no control over any incident of such [gas] sale either as to the quantity to be sold, the price to be paid, the identity of the purchaser or whether it [should] be sold in interstate or intrastate commerce." *Mobil Oil Corp.* v. *FPC, supra,* at 316, 463 F. 2d, at 262. There is no claim that the lease was terminated prematurely in order to withdraw the gas from the interstate market or to evade the Commission's ratemaking authority. And, in fact, this case does not even present the specter of evasion or bad faith since the lease was negotiated at arm's length and executed years before the statute was passed.

My conclusion that Congress did not intend to allow a lessee to dedicate a lessor's gas in this situation is supported not

[19] Petitioners argue that, since Gulf had the right to extract *all* the natural gas from the leased land, the respondents are, in effect, stepping into the remainder of a burdened interest. This argument is based on a highly selective reading of the lease agreement which simply ignores the express limitation placed on that right to extract "all" the gas. Gulf only had the right to produce and market the gas it found, developed, and sold during the specified 50-year term. See *Southland Royalty Co.* v. *FPC,* 543 F. 2d, at 1137–1138.

only by the statutory provisions discussed above, but also by the legislative history which clearly counsels restraint in judicial interpretation of the Act. Both the House and Senate Reports state that the Act only "provides for regulation along recognized and more or less standardized lines. There is nothing novel in its provisions, and it is believed that no constitutional question is presented." H. R. Rep. No. 709, 75th Cong., 1st Sess., 3 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 3 (1937). I cannot believe that, in a statute described as containing "nothing novel," Congress intended to allow a natural gas company, operating under a fixed-term lease, to impose a permanent service burden on the royalty owner over that party's objection.

## II

Based on the preceding analysis, it is apparent that this Court's railroad abandonment cases do not support petitioners. They rely on *Smith* v. *Hoboken R., Warehouse & S. S. Connecting Co.*, 328 U. S. 123, and *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, two companion cases decided in 1946, in which the Court held that § 1 (18) of the Interstate Commerce Act [20] required Commission approval of the abandonment of the lessee's operations and the lessor had standing to seek that approval.[21] These cases make it clear that a lessee's statutory

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[20] "Section 1 (18) provides in part:

"[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." 49 U. S. C. § 1 (18).

[21] In both cases the Court relied on the alternative ground that the lessee was the debtor in a reorganization proceeding in which § 77 of the Bankruptcy Act required the Commission to prepare the plan of reorganization. See *Hoboken*, 328 U. S., at 130–133; *Thompson*, 328 U. S., at 142–144. In the *Thompson* case, which involved a trackage agreement, the Court also relied on the Commission's jurisdiction under § 5 (2) (a) of

duty to continue operations until a regulatory commission has given its approval to a proposed abandonment may qualify the contractual rights of the lessor. The cases do not, however, shed any light on the question whether a regulated lessee may impose any statutory duties on an unregulated lessor.

The railroad cases did not involve any question concerning the scope of the dedication to interstate commerce, or any attempt to impose an obligation on a party which was not subject to the Commission's jurisdiction. The question was *which* of the two companies subject to the jurisdiction of the Commission should operate—not *whether* the operation should continue. Neither the lessor nor the lessee wanted to have the regulated operation cease; both recognized that the common carrier's obligation to provide service to the public existed independently of the lease and survived its termination. In short, in neither case was there any question but that the lessor was a "common carrier" under the Interstate Commerce Act and subject to the obligations imposed by the Act.

The importance of this distinction is highlighted by subsequent lower court cases interpreting the railroad abandonment provision of § 1 (18). In particular, the Court of Appeals for the Second Circuit has concluded that *Hoboken* and *Thompson* do not "hold or imply that a noncarrier, by merely leasing its properties to a carrier, becomes a 'carrier by railroad,' thus subjecting itself to an obligation to carry on the operations of its lessee's railroad . . . ." *Meyers* v. *Famous Realty, Inc.*, 271 F. 2d 811, 814 (1959), cert. denied, 362 U. S. 910; [22]

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the Interstate Commerce Act to fix the terms and conditions, including rentals, for any trackage agreements created after the effective date of the Transportation Act of 1940. See 328 U. S., at 146–150.

[22] The Commission points out that in *Meyers* the lessee had previously obtained abandonment authorization from the Interstate Commerce Commission. The Second Circuit did not, however, rely on that fact, see 271 F. 2d, at 814, and, in any event, I fail to see how that distinction sup-

see also *City of New York* v. *United States,* 337 F. Supp. 150, 153 (EDNY 1972) (three-judge panel); Friendly, Amendment of the Railroad Reorganization Act, 36 Colum. L. Rev. 27, 47–49 (1936). Thus, instead of supporting the petitioners' position in this case, the cases dealing with railroad abandonment merely illustrate the extent to which petitioners' claim is unprecedented.

III

Finally, petitioners argue that the Court of Appeals' ruling should be reversed in order to prevent parties from diverting natural gas production from the interstate market at will. The answer to this contention is implicit in the discussion of *Sunray* and the Natural Gas Act, Part I, *supra,* but I will address it separately because this Court has long recognized that one of the central purposes of the Act is "to protect consumers against exploitation at the hands of natural gas companies." *FPC* v. *Hope Gas Co.,* 320 U. S. 591, 610. The Commission argues that unless abandonment authorization is required in this case, the natural gas companies will be able to manipulate and restructure their leases to avoid the Commission's ratemaking authority. There are three answers to this concern.

First, there are few short-term development leases in existence. The magnitude of the capital investment required for exploration and development of oil and gas production makes it extremely unattractive for any natural gas company to accept a short-term production lease. Indeed, the literature

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ports the Commission's theory in this case, since it argues that the gas supply itself was dedicated to interstate commerce. Furthermore, it should be noted that Gulf did apply for abandonment authorization, an application which the Commission staff considered "superfluous." 54 F. P. C., at 151, 10 P. U. R. 4th, at 349. The Commission ruled that the application was appropriate on the ground that "[w]e should have all the significant parties before us . . . ." *Ibid.* The question whether Gulf was under a duty to request abandonment approval is not before us.

indicates that the fixed-term leases involved in this case are an almost extinct species, and that development leases typically survive for as long as production is economically feasible.[23]

Second, nothing in the Fifth Circuit's decision affects the Commission's power to require future applicants for certificates to describe the details of their supply arrangements and to withhold approval pending the receipt of appropriate evidence of consent to an unlimited dedication by all interested parties. See *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137.[24]

Finally, the decision of the Fifth Circuit does not in any way allow natural gas companies to exercise an "unregulated choice" over whether to continue serving the interstate market. See *FPC* v. *Moss*, 424 U. S. 494, 506 (BURGER, C. J., concurring in judgment). The Commission's error in this case was its conclusion that the need to obtain abandonment authorization was "like an ancient covenant running with the land," *El Paso Natural Gas Co.*, 54 F. P. C. 145, 150, 10 P. U. R. 4th 344, 348 (1975), which enabled a lessee for a limited term to impose

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[23] See 3 H. Williams, Oil and Gas Law § 601.1 (1977); Walker, The Nature of the Property Interests Created by an Oil Gas Lease in Texas, 7 Texas L. Rev. 1 (1928).

[24] Contrary to the Court's suggestion, this case has nothing whatsoever to do with the question in *Sunray* of "whether the conditioning power could be used to achieve indirectly what the Act did not authorize the Commission to do directly." *Ante*, at 530. In *Sunray* petitioner argued that the Commission could *only* approve what the applicant itself proposed. The Court rejected that argument. It then observed in passing that if it had accepted petitioner's position, the Commission could probably not have used its "conditioning" power to award a certificate of longer duration than that prayed for, since that would simply allow the Commission to accomplish indirectly what it could not accomplish directly.

No one questions in this case the Commission's *direct* power to withhold a certificate pending receipt of evidence that the applicant has the power to make an unlimited dedication. Indeed, no one has ever suggested that that might be an issue. *Sunray*'s observation with respect to indirect power is, therefore, simply irrelevant.

a burden on the lessor's interest after the expiration of the lease. As both the language and history of the Act show, Congress did not intend to work such a revolution in property interests touching natural gas. It confined the applicability of the abandonment provisions to "natural gas companies." But that term is sufficiently flexible to enable the Commission to analyze the economic and practical significance of transfers of interests in natural gas regardless of the particular label applied to any transfer. See *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392.[25] The Commission has ample authority to prevent manipulation of the Act's regulatory provisions.

Despite the Act's flexibility, I would not stretch it to reach this case. The lessors, as royalty owners, had no control over the interstate sales, and even with the lease running without interruption, the lessee's interest was limited to a 50-year term. There is no authority in the statute for imposing a permanent service obligation on the lessors in this situation. Accordingly I would affirm the decision of the Court of Appeals.

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[25] In *United Gas Improvement*, producers of gas had long-term sales contracts with an interstate pipeline. After the *Phillips* decision, see *supra*, at 535–536, the parties withdrew their sales contracts and entered into lease arrangements which substantially preserved the terms of the prior contracts. The Court held that these transactions, however characterized by the parties, amounted to "sales" under the Act. Similarly, parties to a contract cannot avoid the Commission's jurisdiction simply by stating that their sale of natural gas in interstate commerce " 'is not subject to the jurisdiction of the Federal Power Commission.' " See *California* v. *Lo-Vaca Co.*, 379 U. S. 366, 367–368.

Syllabus

# ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET AL. *v.* STANFORD DAILY ET AL.

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

No. 76–1484. Argued January 17, 1978—Decided May 31, 1978*

Respondents, a student newspaper that had published articles and photographs of a clash between demonstrators and police at a hospital, and staff members, brought this action under 42 U. S. C. § 1983 against, among others, petitioners, law enforcement and district attorney personnel, claiming that a search pursuant to a warrant issued on a judge's finding of probable cause that the newspaper (which was not involved in the unlawful acts) possessed photographs and negatives revealing the identities of demonstrators who had assaulted police officers at the hospital had deprived respondents of their constitutional rights. The District Court granted declaratory relief, holding that the Fourth Amendment as made applicable to the States by the Fourteenth forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause, based on facts presented in a sworn affidavit, to believe that a subpoena *duces tecum* would be impracticable. Failure to honor the subpoena would not alone justify issuance of a warrant; it would also have to appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The court also held that where the innocent object of the search is a newspaper First Amendment interests make the search constitutionally permissible "only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." The Court of Appeals affirmed. *Held:*

1. A State is not prevented by the Fourth and Fourteenth Amendments from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement. The critical element in a reasonable search is not that the property owner is suspected of crime but that there is reasonable cause to believe that the "things" to be searched for and seized are located on the property to which entry is sought. Pp. 553–560.

2. The District Court's new rule denying search warrants against third

*Together with No. 76–1600, *Bergna, District Attorney of Santa Clara County, et al.* v. *Stanford Daily et al.*, also on certiorari to the same court.

parties and insisting on subpoenas would undermine law enforcement efforts since search warrants are often used early in an investigation before all the perpetrators of a crime have been identified; and the seemingly blameless third party may be implicated. The delay in employing a subpoena *duces tecum* could easily result in disappearance of the evidence. Nor would the cause of privacy be served since search warrants are more difficult to obtain than subpoenas. Pp. 560–563.

3. Properly administered, the preconditions for a search warrant (probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness), which must be applied with particular exactitude when First Amendment interests would be endangered by the search, are adequate safeguards against the interference with the press' ability to gather, analyze, and disseminate news that respondents claim would ensue from use of warrants for third-party searches of newspaper offices. Pp. 563–567.

550 F. 2d 464, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 568. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 570. STEVENS, J., filed a dissenting opinion, *post*, p. 577. BRENNAN, J., took no part in the consideration or decision of the cases.

*Robert K. Booth, Jr.*, argued the cause for petitioners in No. 76–1484. With him on the briefs were *Marilyn Norek Taketa*, *Melville A. Toff*, and *Stephen L. Newton*.

*W. Eric Collins*, Deputy Attorney General of California, argued the cause for petitioners in No. 76–1600. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, *Patrick G. Golden* and *Eugene W. Kaster*, Deputy Attorneys General, *Selby Brown, Jr.*, and *Richard K. Abdalah*.

*Jerome B. Falk, Jr.*, argued the cause for respondents in both cases. With him on the briefs was *Anthony G. Amsterdam*.†

†A brief of *amici curiae* urging reversal was filed for their respective States by *William J. Baxley*, Attorney General of Alabama; *Avrum M.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The terms of the Fourth Amendment, applicable to the States by virtue of the Fourteenth Amendment, are familiar:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As heretofore understood, the Amendment has not been a barrier to warrants to search property on which there is

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*Gross*, Attorney General of Alaska; *Evelle J. Younger*, Attorney General of California, and *W. Eric Collins* and *Dane R. Gillette*, Deputy Attorneys General; *Arthur K. Bolton*, Attorney General of Georgia; *Wayne L. Kidwell*, Attorney General of Idaho; *William J. Scott*, Attorney General of Illinois; *Theodore L. Sendak*, Attorney General of Indiana; *Francis B. Burch*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *A. F. Summer*, Attorney General of Mississippi; *Paul L. Douglas*, Attorney General of Nebraska; *David H. Souter*, Attorney General of New Hampshire; *Toney Anaya*, Attorney General of New Mexico; *James A. Redden*, Attorney General of Oregon; *Robert P. Kane*, Attorney General of Pennsylvania; *Robert B. Hansen*, Attorney General of Utah; and *Anthony F. Troy*, Attorney General of Virginia. A brief of *amici curiae* urging reversal was filed by *Frank Carrington, Wayne W. Schmidt, Glen R. Murphy, James P. Costello, Robert Smith*, and *Richard F. Mayer* for Americans for Effective Law Enforcement, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Dominic P. Gentile, John E. Ackerman*, and *Joseph Beeler* for the National Association of Criminal Defense Lawyers, Inc.; and by *Lloyd N. Cutler, Dennis M. Flannery, William T. Lake, A. Stephen Hut, Jr., Arthur B. Hanson, James R. Cregan, Erwin G. Krasnow, Richard M. Schmidt, Jr., J. Laurent Scharff, Christopher B. Fager, David S. Barr*, and *Mortimer Becker* for the Reporters Committee for Freedom of the Press et al.

Briefs of *amici curiae* were filed by *Solicitor General McCree, Assistant Attorney General Civiletti, Deputy Solicitor General Frey, Harriet S. Shapiro*, and *Elliot Schulder* for the United States; and by *Edwin L. Miller, Jr., Richard D. Huffman*, and *Peter C. Lehman* for the National District Attorneys Assn. et al.

probable cause to believe that fruits, instrumentalities, or evidence of crime is located, whether or not the owner or possessor of the premises to be searched is himself reasonably suspected of complicity in the crime being investigated. We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be located there should not issue except in the most unusual circumstances, and that except in such circumstances, a subpoena *duces tecum* must be relied upon to recover the objects or evidence sought.

I

Late in the day on Friday, April 9, 1971, officers of the Palo Alto Police Department and of the Santa Clara County Sheriff's Department responded to a call from the director of the Stanford University Hospital requesting the removal of a large group of demonstrators who had seized the hospital's administrative offices and occupied them since the previous afternoon. After several futile efforts to persuade the demonstrators to leave peacefully, more drastic measures were employed. The demonstrators had barricaded the doors at both ends of a hall adjacent to the administrative offices. The police chose to force their way in at the west end of the corridor. As they did so, a group of demonstrators emerged through the doors at the east end and, armed with sticks and clubs, attacked the group of nine police officers stationed there. One officer was knocked to the floor and struck repeatedly on the head; another suffered a broken shoulder. All nine were injured.[1] There were no police photographers at the east doors, and most bystanders and reporters were on the west side. The officers themselves were able to identify only two of their

[1] There was extensive damage to the administrative offices resulting from the occupation and the removal of the demonstrators.

assailants, but one of them did see at least one person photographing the assault at the east doors.

On Sunday, April 11, a special edition of the Stanford Daily (Daily), a student newspaper published at Stanford University, carried articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police. The photographs carried the byline of a Daily staff member and indicated that he had been at the east end of the hospital hallway where he could have photographed the assault on the nine officers. The next day, the Santa Clara County District Attorney's Office secured a warrant from the Municipal Court for an immediate search of the Daily's offices for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9. The warrant issued on a finding of "just, probable and reasonable cause for believing that: Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer, and Assault with Deadly Weapon, will be located [on the premises of the Daily]." App. 31–32. The warrant affidavit contained no allegation or indication that members of the Daily staff were in any way involved in unlawful acts at the hospital.

The search pursuant to the warrant was conducted later that day by four police officers and took place in the presence of some members of the Daily staff. The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. The officers apparently had opportunity to read notes and correspondence during the search; but, contrary to claims of the staff, the officers denied that they had exceeded the limits of the warrant.[2] They had not been advised by the staff that the areas they were searching contained confidential materials. The search revealed only the photographs that had already

[2] The District Court did not find it necessary to resolve this dispute.

been published on April 11, and no materials were removed from the Daily's office.

A month later the Daily and various members of its staff, respondents here, brought a civil action in the United States District Court for the Northern District of California seeking declaratory and injunctive relief under 42 U. S. C. § 1983 against the police officers who conducted the search, the chief of police, the district attorney and one of his deputies, and the judge who had issued the warrant. The complaint alleged that the search of the Daily's office had deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments of the United States Constitution.

The District Court denied the request for an injunction but, on respondents' motion for summary judgment, granted declaratory relief. 353 F. Supp. 124 (1972). The court did not question the existence of probable cause to believe that a crime had been committed and to believe that relevant evidence would be found on the Daily's premises. It held, however, that the Fourth and Fourteenth Amendments forbade the issuance of a warrant to search for materials in possession of one not suspected of crime unless there is probable cause to believe, based on facts presented in a sworn affidavit, that a subpoena *duces tecum* would be impracticable. Moreover, the failure to honor a subpoena would not alone justify a warrant; it must also appear that the possessor of the objects sought would disregard a court order not to remove or destroy them. The District Court further held that where the innocent object of the search is a newspaper, First Amendment interests are also involved and that such a search is constitutionally permissible "only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." *Id.*, at 135. Since these preconditions to a valid warrant had not been satisfied here,

the search of the Daily's offices was declared to have been illegal. The Court of Appeals affirmed *per curiam,* adopting the opinion of the District Court. 550 F. 2d 464 (CA9 1977).[3] We issued the writs of certiorari requested by petitioners. 434 U. S. 816 (1977).[4] We reverse.

II

The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring. Because under the District Court's rule impracticability can be shown only by furnishing facts demonstrating that the third party will not only disobey the subpoena but also ignore a restraining order not to move or destroy the property, it is apparent that only in unusual situations could the State satisfy such a severe burden and that for all practical purposes the effect of the rule is that fruits, instrumentalities, and evidence of crime may be recovered from third parties only by subpoena, not by search warrant. At least, we assume that the District Court did not intend its rule to be toothless and anticipated that only subpoenas would be available in many cases where without the rule a search warrant would issue.

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[3] The Court of Appeals also approved the award of attorney's fees to respondents pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1976 ed.). We do not consider the propriety of this award in light of our disposition on the merits reversing the judgment upon which the award was predicated.

[4] Petitioners in No. 76–1484 are the chief of police and the officers under his command who conducted the search. Petitioners in No. 76–1600 are the district attorney and a deputy district attorney who participated in the obtaining of the search warrant. The action against the judge who issued the warrant was subsequently dismissed upon the motion of respondents.

It is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment.[5] Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found. Nothing on the face of the Amendment suggests that a third-party search warrant should not normally issue. The Warrant Clause speaks of search warrants issued on "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." In situations where the State does not seek to seize "persons" but only those "things" which there is probable cause to believe are located on the place to be searched, there is no apparent basis in the language of the Amendment for also imposing the requirements for a valid arrest—probable cause to believe that the third party is implicated in the crime.

As the Fourth Amendment has been construed and applied by this Court, "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." *Fisher* v. *United States,* 425 U. S. 391, 400 (1976). In *Camara* v. *Municipal Court,* 387 U. S. 523, 534–535 (1967), we indicated that in applying the "probable cause" standard "by which a particular decision to search is

[5] Respondents rely on four state cases to support the holding that a warrant may not issue unless it is shown that a subpoena is impracticable: *Owens* v. *Way,* 141 Ga. 796, 82 S. E. 132 (1914); *Newberry* v. *Carpenter,* 107 Mich. 567, 65 N. W. 530 (1895); *People* v. *Carver,* 172 Misc. 820, 16 N. Y. S. 2d 268 (County Ct. 1939); and *Commodity Mfg. Co.* v. *Moore,* 198 N. Y. S. 45 (Sup. Ct. 1923). None of these cases, however, stands for the proposition arrived at by the District Court and urged by respondents. The District Court also drew upon *Bacon* v. *United States,* 449 F. 2d 933 (CA9 1971), but that case dealt with arrest of a material witness and is unpersuasive with respect to the search for criminal evidence.

tested against the constitutional mandate of reasonableness," it is necessary "to focus upon the governmental interest which allegedly justifies official intrusion" and that in criminal investigations a warrant to search for recoverable items is reasonable "only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." Search warrants are not directed at persons; they authorize the search of "place[s]" and the seizure of "things," and as a constitutional matter they need not even name the person from whom the things will be seized. *United States* v. *Kahn,* 415 U. S. 143, 155 n. 15 (1974).

Because the State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not, the premise of the District Court's holding appears to be that state entitlement to a search warrant depends on the culpability of the owner or possessor of the place to be searched and on the State's right to arrest him. The cases are to the contrary. Prior to *Camara* v. *Municipal Court, supra,* and *See* v. *Seattle,* 387 U. S. 541 (1967), the central purpose of the Fourth Amendment was seen to be the protection of the individual against official searches for evidence to convict him of a crime. Entries upon property for civil purposes, where the occupant was suspected of no criminal conduct whatsoever, involved a more peripheral concern and the less intense "right to be secure from intrusion into personal privacy." *Frank* v. *Maryland,* 359 U. S. 360, 365 (1959); *Camara* v. *Municipal Court, supra,* at 530. Such searches could proceed without warrant, as long as the State's interest was sufficiently substantial. Under this view, the Fourth Amendment was *more* protective where the place to be searched was occupied by one suspected of crime and the search was for evidence to use against him. *Camara* and *See,* disagreeing with *Frank* to this extent, held that a warrant *is* required where entry is sought for *civil* purposes, as well as when criminal law enforcement is involved. Neither

case, however, suggested that to secure a search warrant the owner or occupant of the place to be inspected or searched must be suspected of criminal involvement. Indeed, both cases held that a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor.

We have suggested nothing to the contrary since *Camara* and *See*. Indeed, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), and *United States* v. *Biswell*, 406 U. S. 311 (1972), dispensed with the warrant requirement in cases involving limited types of inspections and searches.

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.[6] In *Carroll* v. *United States*, 267 U. S. 132

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[6] The same view has been expressed by those who have given close attention to the Fourth Amendment. "It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases. . . .

"This means, for one thing, that while probable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it, a search warrant may be issued on a complaint which does not identify any particular person as the likely offender. Because the complaint for a search warrant is not 'filed as the basis of a criminal prosecution,' it need not identify the person in charge of the premises or name the person in possession or any other person as the offender." LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," U. Ill. Law Forum 255, 260–261 (1966) (footnotes omitted).

"Furthermore, a warrant may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever." T. Taylor, Two Studies in Constitutional Interpretation 48–49 (1969). "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause—that is, reasonable grounds to

(1925), it was claimed that the seizure of liquor was unconstitutional because the occupant of a car stopped with probable cause to believe that it was carrying illegal liquor was not subject to arrest. The Court, however, said:

> "If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Id.*, at 158–159.

The Court's ultimate conclusion was that "the officers here had justification for the search and seizure," that is, a reasonable "belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.*, at 162. See also *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931).

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believe—that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 358 (1974) (footnotes omitted).

"Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe'—sometimes stated 'probable cause to believe'—that a felony has been committed by the person to be arrested. Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.

"In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." Comment, 28 U. Chi. L. Rev. 664, 687 (1961) (footnotes omitted).

Federal Rule Crim. Proc. 41, which reflects "[t]he Fourth Amendment's policy against unreasonable searches and seizures," *United States* v. *Ventresca,* 380 U. S. 102, 105 n. 1 (1965), authorizes warrants to search for contraband, fruits or instrumentalities of crime, or "any . . . property that constitutes evidence of the commission of a criminal offense . . . ." Upon proper showing, the warrant is to issue "identifying the property and naming or describing the person or place to be searched." Probable cause for the warrant must be presented, but there is nothing in the Rule indicating that the officers must be entitled to arrest the owner of the "place" to be searched before a search warrant may issue and the "property" may be searched for and seized. The Rule deals with warrants to search, and is unrelated to arrests. Nor is there anything in the Fourth Amendment indicating that absent probable cause to arrest a third party, resort must be had to a subpoena.[7]

The Court of Appeals for the Sixth Circuit expressed the correct view of Rule 41 and of the Fourth Amendment when, contrary to the decisions of the Court of Appeals and the District Court in the present litigation, it ruled that "[o]nce it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime." *United States* v. *Manufacturers Nat. Bank of Detroit,* 536 F. 2d 699, 703 (1976), cert. denied *sub nom. Wingate* v. *United States,* 429 U. S. 1039 (1977). Accord, *State* v. *Tunnel Citgo Services,* 149 N. J. Super. 427, 433, 374 A. 2d 32, 35 (1977).

The net of the matter is that "[s]earches and seizures, in a

[7] Petitioners assert that third-party searches have long been authorized under Cal. Penal Code Ann. § 1524 (West 1970), which provides that fruits, instrumentalities, and evidence of crime "may be taken on the warrant from any place, or from any person in whose possession [they] may be." The District Court did not advert to this provision.

technical sense, are independent of, rather than ancillary to, arrest and arraignment." ALI, A Model Code of Pre-Arraignment Procedure, Commentary 491 (Proposed Off. Draft 1975). The Model Code provides that the warrant application "shall describe with particularity the individuals or places to be searched and the individuals or things to be seized, and shall be supported by one or more affidavits particularly setting forth the facts and circumstances tending to show that such individuals or things are or will be in the places, or the things are or will be in possession of the individuals, to be searched." § SS 220.1 (3). There is no suggestion that the occupant of the place to be searched must himself be implicated in misconduct.

Against this background, it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. And if those considered free of criminal involvement may nevertheless be searched or inspected under civil statutes, it is difficult to understand why the Fourth Amendment would prevent entry onto their property to recover evidence of a crime not committed by them but by others. As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises. The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena *duces tecum,* whether on the theory that the latter is a less intrusive alternative or otherwise.

This is not to question that "reasonableness" is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never

be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized. We do hold, however, that the courts may not, in the name of Fourth Amendment reasonableness, prohibit the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement.

III

In any event, the reasons presented by the District Court and adopted by the Court of Appeals for arriving at its remarkable conclusion do not withstand analysis. First, as we have said, it is apparent that whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same; and it is the seeming innocence of the property owner that the District Court relied on to foreclose the warrant to search. But, as respondents themselves now concede, if the third party knows that contraband or other illegal materials are on his property, he is sufficiently culpable to justify the issuance of a search warrant. Similarly, if his ethical stance is the determining factor, it seems to us that whether or not he knows that the sought-after articles are secreted on his property and whether or not he knows that the articles are in fact the fruits, instrumentalities, or evidence of crime, he will be so informed when the search warrant is served, and it is doubtful that he should then be permitted to object to the search, to withhold, if it is there, the evidence of crime reasonably believed to be possessed by him or secreted on his property, and to forbid the search and insist that the officers serve him with a subpoena *duces tecum*.

Second, we are unpersuaded that the District Court's new rule denying search warrants against third parties and insisting on subpoenas would substantially further privacy interests without seriously undermining law enforcement efforts. Because of the fundamental public interest in implementing

the criminal law, the search warrant, a heretofore effective and constitutionally acceptable enforcement tool, should not be suppressed on the basis of surmise and without solid evidence supporting the change. As the District Court understands it, denying third-party search warrants would not have substantial adverse effects on criminal investigations because the nonsuspect third party, once served with a subpoena, will preserve the evidence and ultimately lawfully respond. The difficulty with this assumption is that search warrants are often employed early in an investigation, perhaps before the identity of any likely criminal and certainly before all the perpetrators are or could be known. The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum,* offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party.

Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime, involves hazards to criminal investigation much more serious than the District Court believed; and the record is barren of anything but the District Court's assumptions to support its conclusions.[8] At the very least, the

[8] It is also far from clear, even apart from the dangers of destruction and removal, whether the use of the subpoena *duces tecum* under circumstances where there is probable cause to believe that a crime has been committed and that the materials sought constitute evidence of its commission will result in the production of evidence with sufficient regularity to satisfy the public interest in law enforcement. Unlike the individual whose privacy is invaded by a search, the recipient of a subpoena may assert the Fifth

burden of justifying a major revision of the Fourth Amendment has not been carried.

We are also not convinced that the net gain to privacy interests by the District Court's new rule would be worth the candle.[9] In the normal course of events, search warrants are

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Amendment privilege against self-incrimination in response to a summons to produce evidence or give testimony. See *Maness* v. *Meyers*, 419 U. S. 449 (1975). This privilege is not restricted to suspects. We have construed it broadly as covering any individual who might be incriminated by the evidence in connection with which the privilege is asserted. *Hoffman* v. *United States*, 341 U. S. 479 (1951). The burden of overcoming an assertion of the Fifth Amendment privilege, even if prompted by a desire not to cooperate rather than any real fear of self-incrimination, is one which prosecutors would rarely be able to meet in the early stages of an investigation despite the fact they did not regard the witness as a suspect. Even time spent litigating such matters could seriously impede criminal investigations.

[9] We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects. 353 F. Supp. 124, 131–132 (1972). In *Alderman* v. *United States*, 394 U. S. 165 (1969), we expressly ruled that suppression of the fruits of a Fourth Amendment violation may be urged only by those whose rights were infringed by the search itself and not by those aggrieved solely by the introduction of incriminating evidence. The predicate for this holding was that the additional deterrent effect of permitting defendants whose Fourth Amendment rights had not been violated to challenge infringements of the privacy interests of others did not "justify 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." *Id.*, at 175. For similar reasons, we conclude that the interest in deterring illegal third-party searches does not justify a rule such as that adopted by the District Court. It is probably seldom that police during the investigatory stage when most searches occur will be so convinced that no potential defendant will have standing to exclude evidence on Fourth Amendment grounds that they will feel free to ignore constitutional restraints. In any event, it would be placing the cart before the horse to prohibit searches otherwise conforming to the Fourth Amendment because of a perception that the deterrence provided by the

more difficult to obtain than subpoenas, since the latter do not involve the judiciary and do not require proof of probable cause. Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when choice is available under local law and the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course. His choice is more likely to be based on the solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case, that the warranted search is necessary to secure and to avoid the destruction of evidence.[10]

## IV

The District Court held, and respondents assert here, that whatever may be true of third-party searches generally, where the third party is a newspaper, there are additional factors derived from the First Amendment that justify a nearly *per se* rule forbidding the search warrant and permitting only the subpoena *duces tecum*. The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. This is said to be true for several reasons: First, searches will be physically disruptive to such an extent that timely publication will be impeded. Second, confidential sources of infor-

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existing rules of standing is insufficient to discourage illegal searches. Cf. *Warden* v. *Hayden*, 387 U. S. 294, 309 (1967). Finally, the District Court overlooked the fact that the California Supreme Court has ruled as a matter of state law that the legality of a search and seizure may be challenged by anyone against whom evidence thus obtained is used. *Kaplan* v. *Superior Court*, 6 Cal. 3d 150, 491 P. 2d 1 (1971).

[10] Petitioners assert that the District Court ignored the realities of California law and practice that are said to preclude or make very difficult the use of subpoenas as investigatory techniques. If true, the choice of procedures may not always be open to the diligent prosecutor in the State of California.

mation will dry up, and the press will also lose opportunities to cover various events because of fears of the participants that press files will be readily available to the authorities. Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure. Fourth, the processing of news and its dissemination will be chilled by the prospects that searches will disclose internal editorial deliberations. Fifth, the press will resort to self-censorship to conceal its possession of information of potential interest to the police.

It is true that the struggle from which the Fourth Amendment emerged "is largely a history of conflict between the Crown and the press," *Stanford* v. *Texas,* 379 U. S. 476, 482 (1965), and that in issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant,* 367 U. S. 717, 729 (1961). Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford* v. *Texas, supra,* at 485. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden* v. *Kentucky,* 413 U. S. 496, 501 (1973). Hence, in *Stanford* v. *Texas,* the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relating to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgments about books and papers and was the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment. Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field.

Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to "focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant, supra,* at 732; *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 210 (1964); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U. S. 636, 637 (1968); *Roaden* v. *Kentucky, supra,* at 502; *Heller* v. *New York,* 413 U. S. 483, 489 (1973).

Neither the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants, however, call for imposing the regime ordered by the District Court. Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort. Nor are we convinced, any more than we were in *Branzburg* v. *Hayes,* 408 U. S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

The fact is that respondents and *amici* have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated—nor should it be.

Respondents also insist that the press should be afforded opportunity to litigate the State's entitlement to the material it seeks before it is turned over or seized and that whereas the search warrant procedure is defective in this respect, resort to the subpoena would solve the problem. The Court has held that a restraining order imposing a prior restraint upon free expression is invalid for want of notice and opportunity for a hearing, *Carroll* v. *Princess Anne,* 393 U. S. 175 (1968), and that seizures not merely for use as evidence but entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial

finding of obscenity. *A Quantity of Books* v. *Kansas, supra.* But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. *Heller* v. *New York, supra.* And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.

We note finally that if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash. Further, Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment. Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants.

## V

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been

unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here persuaded us that the Amendments forbade this search. It follows that the judgment of the Court of Appeals is reversed.

*So ordered.*

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

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and I write simply to emphasize what I take to be the fundamental error of MR. JUSTICE STEWART's dissenting opinion. As I understand that opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure. Even aside from the difficulties involved in deciding on a case-by-case basis whether a subpoena can serve as an adequate substitute,[1] I agree with the Court that there is no constitutional basis for such a reading.

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[1] For example, respondents had announced a policy of destroying any photographs that might aid prosecution of protesters. App. 118, 152–153. While this policy probably reflected the deep feelings of the Vietnam era, and one may assume that under normal circumstances few, if any, press entities would adopt a policy so hostile to law enforcement, respondents' policy at least illustrates the possibility of such hostility. Use of a subpoena, as proposed by the dissent, would be of no utility in face of a policy of destroying evidence. And unless the policy were publicly announced, it probably would be difficult to show the impracticality of a subpoena as opposed to a search warrant.

At oral argument, counsel for respondents stated that the announced policy of the Stanford Daily conceivably could have extended to the destruction of evidence of *any* crime:

"QUESTION: Let us assume you had a picture of the commission of a crime. For example, in banks they take pictures regularly of, not only

If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the Fourth Amendment to reflect that belief. As the opinion of the Court points out, the struggle from which the Fourth Amendment emerged was that between Crown and press. *Ante,* at 564. The Framers were painfully aware of that history, and their response to it was the Fourth Amendment. *Ante,* at 565. Hence, there is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press, as to every other person.

This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a

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of robbery but of murder committed in a bank and there have been pictures taken of the actual pulling of the trigger or the pointing of the gun and pulling of the trigger. There is a very famous one related to the assassination of President Kennedy.

"What would the policy of the *Stanford Daily* be with respect to that? Would it feel free to destroy it at any time before a subpoena had been served?

"MR. FALK: The—literally read, the policy of the *Daily* requires me to give an affirmative answer. I find it hard to believe that in an example such as that, that the policy would have been carried out. It was not addressed to a picture of that kind or in that context.

"QUESTION: Well, I am sure you were right. I was just getting to the scope of your theory.

"MR. FALK: Our—

"QUESTION: What is the difference between the pictures Justice Powell just described and the pictures they were thought to have?

"MR. FALK: Well, it simply is a distinction that—

"QUESTION: Attacking police officers instead of the President. That is the only difference." Tr. of Oral Arg. 39–40.

While the existence of this policy was not before the magistrate at the time of the warrant's issuance, 353 F. Supp. 124, 135 n. 16 (ND Cal. 1972), it illustrates the possible dangers of creating separate standards for the press alone.

newspaper office. As the Court's opinion makes clear, *ante*, at 564–565, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment—such as those highlighted by MR. JUSTICE STEWART—when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.[2] *Ibid.*

In any event, considerations such as these are the province of the Fourth Amendment. There is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach.[3]

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

Believing that the search by the police of the offices of the

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[2] Similarly, the magnitude of a proposed search directed at *any* third party and the nature and significance of the material sought are factors properly considered as bearing on the reasonableness and particularity requirements. Moreover, there is no reason why police officers executing a warrant should not seek the cooperation of the subject party, in order to prevent needless disruption.

[3] The concurring opinion in *Branzburg* v. *Hayes*, 408 U. S. 665, 709–710 (1972) (POWELL, J.), does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment. That opinion noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. The concurrence expressed no doubt as to the applicability of the subpoena procedure to members of the press. Rather than advocating the creation of a special procedural exception for

Stanford Daily infringed the First and Fourteenth Amendments' guarantee of a free press, I respectfully dissent.[1]

I

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time [2] will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that

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the press, it approved recognition of First Amendment concerns within the applicable procedure. The concurring opinion may, however, properly be read as supporting the view expressed in the text above, and in the Court's opinion, that under the warrant requirement of the Fourth Amendment, the magistrate should consider the values of a free press as well as the societal interest in enforcing the criminal laws.

[1] I agree with the Court that the *Fourth* Amendment does not forbid the issuance of search warrants "simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement." *Ante,* at 560. Thus, contrary to the understanding expressed in the concurring opinion, I do not "read" anything "into the Fourth Amendment." *Ante,* at 568. Instead, I would simply enforce the provisions of the *First* Amendment.

[2] One search of a radio station in Los Angeles lasted over eight hours. Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 Stan. L. Rev. 957, 957–959 (1976).

the press can fulfill its constitutionally designated function of informing the public,[3] because important information can often be obtained only by an assurance that the source will not be revealed. *Branzburg* v. *Hayes,* 408 U. S. 665, 725–736 (dissenting opinion).[4] And the Court has recognized that " 'without some protection for seeking out the news, freedom of the press could be eviscerated.' " *Pell* v. *Procunier,* 417 U. S. 817, 833.

Today the Court does not question the existence of this constitutional protection, but says only that it is not "convinced . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches." *Ante,* at 566. This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom.[5] Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's

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[3] See *Mills* v. *Alabama,* 384 U. S. 214, 219; *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250.

[4] Recognizing the importance of this confidential relationship, at least 26 States have enacted so-called "shield laws" protecting reporters. Note, The Newsman's Privilege After *Branzburg:* The Case for a Federal Shield Law, 24 UCLA L. Rev. 160, 167 n. 41 (1976).

[5] In this case, the policemen executing the search warrant were concededly in a position to read confidential material unrelated to the object of their search; whether they in fact did so is disputed.

access to information, and thus the public's, will thereby be impaired.[6]

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant,[7] while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

One need not rely on mere intuition to reach this conclusion. The record in this case includes affidavits not only from members of the staff of the Stanford Daily but also from many professional journalists and editors, attesting to precisely such personal experience.[8] Despite the Court's rejection of this

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[6] This prospect of losing access to confidential sources may cause reporters to engage in "self-censorship," in order to avoid publicizing the fact that they may have confidential information. See *New York Times Co.* v. *Sullivan, supra,* at 279; *Smith* v. *California,* 361 U. S. 147, 154. Or journalists may destroy notes and photographs rather than save them for reference and use in future stories. Either of these indirect effects of police searches would further lessen the flow of news to the public.

[7] The Court says that "if the requirements of specificity and reasonableness are properly applied, policed, and observed" there will be no opportunity for the police to "rummage at large in newspaper files." *Ante,* at 566. But in order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches.

[8] According to these uncontradicted affidavits, when it becomes known that a newsman cannot guarantee confidentiality, potential sources of infor-

uncontroverted evidence, I believe it clearly establishes that unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public.

II

In *Branzburg* v. *Hayes, supra,* the more limited disclosure of a journalist's sources caused by compelling him to testify was held to be justified by the necessity of "pursuing and prosecuting those crimes reported to the press by informants and . . . thus deterring the commission of such crimes in the future." 408 U. S., at 695. The Court found that these important societal interests would be frustrated if a reporter were able to claim an absolute privilege for his confidential sources. In the present case, however, the respondents do not claim that any of the evidence sought was privileged from disclosure; they claim only that a subpoena would have served equally well to produce that evidence. Thus, we are not concerned with the principle, central to *Branzburg,* that " 'the public . . . has a right to every man's evidence,' " *id.,* at 688, but only with whether any significant societal interest would be impaired if the police were generally required to obtain evidence from the press by means of a subpoena rather than a search.

It is well to recall the actual circumstances of this litigation. The application for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an

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mation often become unavailable. Moreover, efforts are sometimes made, occasionally by force, to prevent reporters and photographers from covering newsworthy events, because of fear that the police will seize the newsman's notes or photographs as evidence. The affidavits of the members of the staff of the Stanford Daily give examples of how this very search produced such an impact on the Daily's own journalistic functions.

immediate search. The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any member of its staff was suspected of criminal activity. And there was no showing that the Daily would not respond to a subpoena commanding production of the photographs, or that for any other reason a subpoena could not be obtained. Surely, then, a subpoena *duces tecum* would have been just as effective as a police raid in obtaining the production of the material sought by the Santa Clara County District Attorney.

The District Court and the Court of Appeals clearly recognized that *if* the affidavits submitted with a search warrant application should demonstrate probable cause to believe that a subpoena would be impractical, the magistrate must have the authority to issue a warrant. In such a case, by definition, a subpoena would not be adequate to protect the relevant societal interest. But they held, and I agree, that a warrant should issue only after the magistrate has performed the careful "balanc[ing] of these vital constitutional and societal interests." *Branzburg* v. *Hayes, supra,* at 710 (POWELL, J., concurring).[9]

The decisions of this Court establish that a prior adversary judicial hearing is generally required to assess in advance any threatened invasion of First Amendment liberty.[10] A search by police officers affords no timely opportunity for such a

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[9] The petitioners have argued here that in fact there was reason to believe that the Daily would not honor a subpoena. Regardless of the probative value of this information, it is irrelevant, since it was not before the magistrate when he issued the warrant. *Whiteley* v. *Warden,* 401 U. S. 560, 565 n. 8; *Spinelli* v. *United States,* 393 U. S. 410, 413 n. 3; *Aguilar* v. *Texas,* 378 U. S. 108, 109 n. 1; see *Johnson* v. *United States,* 333 U. S. 10, 13–14.

[10] *E. g., United States* v. *Thirty-seven Photographs,* 402 U. S. 363; *Carroll* v. *Princess Anne,* 393 U. S. 175; *Freedman* v. *Maryland,* 380 U. S. 51. Cf. *Roaden* v. *Kentucky,* 413 U. S. 496; *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrant,* 367 U. S. 717.

hearing, since a search warrant is ordinarily issued *ex parte* upon the affidavit of a policeman or prosecutor. There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional protection of the newspaper has been irretrievably invaded.

On the other hand, a subpoena would allow a newspaper, through a motion to quash, an opportunity for an adversary hearing with respect to the production of any material which a prosecutor might think is in its possession. This very principle was emphasized in the *Branzburg* case:

> "[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." 408 U. S., at 710 (POWELL, J., concurring).

See also *id.*, at 707–708 (opinion of Court). If, in the present litigation, the Stanford Daily had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist. The legitimate needs of government thus would have been served without infringing the freedom of the press.

## III

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press.

For these reasons I would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

The novel problem presented by this case is an outgrowth of the profound change in Fourth Amendment law that occurred in 1967, when *Warden* v. *Hayden,* 387 U. S. 294, was decided. The question is what kind of "probable cause" must be established in order to obtain a warrant to conduct an unannounced search for documentary evidence in the private files of a person not suspected of involvement in any criminal activity. The Court holds that a reasonable belief that the files contain relevant evidence is a sufficient justification. This holding rests on a misconstruction of history and of the Fourth Amendment's purposely broad language.

The Amendment contains two Clauses, one protecting "persons, houses, papers, and effects, against unreasonable searches and seizures," the other regulating the issuance of warrants: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." When these words were written, the procedures of the Warrant Clause were not the primary protection against oppressive searches. It is unlikely that the authors expected private papers ever to be among the "things" that could be seized with a warrant, for only a few years earlier, in 1765, Lord Camden had delivered his famous opinion denying that any magistrate had power to authorize the seizure of private papers.[1] Because all such

[1] "Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority

seizures were considered unreasonable, the Warrant Clause was not framed to protect against them.

Nonetheless, the authors of the Clause used words that were adequate for situations not expressly contemplated at the time. As Mr. Justice Black noted, the Amendment does not "attempt to describe with precision what was meant by its words 'probable cause' "; the words of the Amendment are deliberately "imprecise and flexible." [2] And MR. JUSTICE STEWART, when confronted with the problem of applying the probable-cause standard in an unprecedented situation, observed that "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." [3] Today, for the first time, the Court has an opportunity to consider the kind of showing that is necessary to justify the vastly expanded "degree of intrusion" upon privacy that is authorized by the opinion in *Warden* v. *Hayden, supra.*

In the pre-*Hayden* era warrants were used to search for contraband,[4] weapons, and plunder, but not for "mere evi-

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to pronounce a practice legal, which would be subversive of all the comforts of society." *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1066 (1765).

[2] "Obviously, those who wrote this Fourth Amendment knew from experience that searches and seizures were too valuable to law enforcement to prohibit them entirely, but also knew at the same time that while searches or seizures must not be stopped, they should be slowed down, and warrants should be issued only after studied caution. This accounts for use of the imprecise and flexible term, 'unreasonable,' the key word permeating this whole Amendment. Also it is noticeable that this Amendment contains no appropriate language, as does the Fifth, to forbid the use and introduction of search and seizure evidence even though secured 'unreasonably.' Nor does this Fourth Amendment attempt to describe with precision what was meant by its words, 'probable cause'; nor by whom the 'Oath or affirmation' should be taken; nor what it need contain." *Berger* v. *New York,* 388 U. S. 41, 75 (Black, J., dissenting).

[3] *Id.,* at 69 (STEWART, J., concurring in result).

[4] It was stated in 1967 that about 95% of the search warrants obtained by the office of the District Attorney for New York County were for the

dence." [5] The practical effect of the rule prohibiting the issuance of warrants to search for mere evidence was to narrowly limit not only the category of objects, but also the category of persons and the character of the privacy interests that might be affected by an unannounced police search.

Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object.[6] The search for the documents described in a warrant may involve the inspection

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purpose of seizing narcotics and arresting the possessors. See T. Taylor, Two Studies in Constitutional Interpretation 48, and n. 85 (1969).

[5] Until 1967, when *Warden* v. *Hayden* was decided, our cases interpreting the Fourth Amendment had drawn a " 'distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.' " See *Warden* v. *Hayden,* 387 U. S., at 295–296, quoting from *Harris* v. *United States,* 331 U. S. 145, 154.

[6] The suggestion that, instead of setting standards, we should rely on the good judgment of the magistrate to prevent abuse represents an abdication of the responsibilities this Court previously accepted in carefully supervising the performance of the magistrate's warrant-issuing function. See *Aguilar* v. *Texas,* 378 U. S. 108, 111.

of files containing other private matter.[7] The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.[8]

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[7] "There are three considerations which support the conclusion that private papers are central to the concerns of the fourth amendment and which suggest that, in accord with the amendment's privacy rationale, private papers should occupy a type of preferred position. The first consideration is the very personal, private nature of such papers. This rationale has been cogently articulated on a number of occasions. Private papers have been said to be 'little more than an extension of [the owner's] person,' their seizure 'a particularly abrasive infringement of privacy,' and their protection 'impelled by the moral and symbolic need to recognize and defend the private aspect of personality.' In this sense, every governmental procurement of private papers, regardless of how it is accomplished, is uniquely intrusive. In addition to the nature of the papers themselves, a second reason for according them strict protection concerns the nature of the search for private papers. The fundamental evil at which the fourth amendment was directed was the sweeping, exploratory search conducted pursuant to a general warrant. A search involving private papers, it has been noted, invariably partakes of a similar generality, for 'even a search for a specific, identified paper may involve the same rude intrusion [of an exploratory search] if the quest for it leads to an examination of all of a man's private papers.' Thus, both their contents and the inherently intrusive nature of a search for them militates toward the position that private papers are deserving of the fullest possible fourth amendment protection. Finally, not only is a search involving private papers highly intrusive in fourth amendment terms, but the nature of the papers themselves may implicate the policies of other constitutional protections. In addition to the 'intimate' relation with fifth amendment values, the obtaining of private papers by the government touches upon the first amendment and the generalized right of privacy." McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Ind. L. J. 55, 68–69 (1977–1978) (footnotes omitted).

[8] "Whether the search be for rubbish or narcotics, both innocent and guilty will suffer the loss of the proprietary right of privacy. The search for evidence of crime, however, threatens the innocent with an injury not recognized in the cases. That is the damage to reputation resulting from an overt manifestation of official suspicion of crime. Connected with loss of reputation, standing, or credit may be humiliation and other mental suffering. The interests here at stake are the same which are recognized in

Of greatest importance, however, is the question whether the offensive intrusion on the privacy of the ordinary citizen is justified by the law enforcement interest it is intended to vindicate. Possession of contraband or the proceeds or tools of crime gives rise to two inferences: that the custodian is involved in the criminal activity, and that, if given notice of an intended search, he will conceal or destroy what is being sought. The probability of criminal culpability justifies the invasion of his privacy; the need to accomplish the law enforcement purpose of the search justifies acting without advance notice and by force, if necessary. By satisfying the probable-cause standard appropriate for weapons or plunder, the police effectively demonstrate that no less intrusive method of investigation will succeed.

Mere possession of documentary evidence, however, is much less likely to demonstrate that the custodian is guilty of any wrongdoing or that he will not honor a subpoena or informal request to produce it. In the pre-*Hayden* era, evidence of that kind was routinely obtained by procedures that presumed that the custodian would respect his obligation to obey subpoenas and to cooperate in the investigation of crime. These procedures had a constitutional dimension. For the innocent citizen's interest in the privacy of his papers and possessions is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment. Notice and an opportunity to object to the deprivation of the citizen's liberty are, therefore, the constitutionally mandated general rule.[9] An

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the common law actions for defamation and malicious prosecution. Indeed, the loss of reputation and the humiliation resulting from the search of one's home for evidence of a heinous crime may greatly exceed the injury caused by an ill-grounded prosecution for a minor offense." Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 701 (1961) (footnotes omitted).

[9] Only with great reluctance has this Court approved the seizure even of refrigerators or washing machines without notice and a prior adversary hearing; in doing so, the Court has relied on the distinction between loss

exception to that rule can only be justified by strict compliance with the Fourth Amendment. That Amendment flatly prohibits the issuance of any warrant unless justified by probable cause.

A showing of probable cause that was adequate to justify the issuance of a warrant to search for stolen goods in the 18th century does not automatically satisfy the new dimensions of the Fourth Amendment in the post-*Hayden* era.[10] In *Hayden* itself, the Court recognized that the meaning of probable cause should be reconsidered in the light of the new authority it conferred on the police.[11] The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search. Probable cause to believe that the

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of property, which can often be easily compensated, and loss of less tangible but more precious rights: " '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process.' " *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 611, quoting from *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597. See also *Michigan* v. *Tyler*, *ante*, at 514 (opinion of STEVENS, J.).

[10] Even before *Hayden* had repudiated the mere-evidence rule, scholars had recognized that such a change in the scope of the prosecutor's search authority would require a fresh examination of the probable-cause requirement. It was noted that the personal character of some evidentiary documents would "justify stringent limitation, if not total prohibition, of their seizure by exercise of official authority." Taylor, *supra*, n. 4, at 66.

It is ironic that the Court today should adopt a rigid interpretation of the Warrant Clause to uphold this search when the Court was prepared only a few years ago to rely on the flexibility of the Clause to create an entirely new warrant in order to preserve the government's power to conduct unannounced inspections of citizens' homes and businesses. See *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, and 538.

[11] "There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required." 387 U. S., at 307.

custodian is a criminal, or that he holds a criminal's weapons, spoils, or the like, justifies that fear,[12] and therefore such a showing complies with the Clause. But if nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable-cause requirement is not satisfied. In the absence of some other showing of reasonableness,[13] the ensuing search violates the Fourth Amendment.

In this case, the warrant application set forth no facts suggesting that respondents were involved in any wrongdoing or would destroy the desired evidence if given notice of what the police desired. I would therefore hold that the warrant did not comply with the Warrant Clause and that the search was unreasonable within the meaning of the first Clause of the Fourth Amendment.

I respectfully dissent.

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[12] "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Fuentes* v. *Shevin*, 407 U. S. 67, 93–94, n. 30.

[13] Cf. *Marshall* v. *Barlow's, Inc.*, *ante*, at 336–339, and nn. 9–11 (STEVENS, J., dissenting).

# ROBERTSON *v.* WEGMANN, EXECUTOR, ET AL.

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

No. 77–178. Argued March 21, 1978—Decided May 31, 1978

One Shaw filed an action for damages and injunctive relief under 42 U. S. C. § 1983 against petitioner and others, claiming that they had deprived him of his constitutional rights. Upon the death of Shaw before trial, respondent executor of his estate was substituted as plaintiff. Petitioner and the other defendants filed a motion to dismiss on the ground that Shaw's death abated the action. The District Court denied the motion. The court held that the applicable survivorship rule was governed by 42 U. S. C. § 1988, which provides that the jurisdiction conferred on district courts for the protection of civil rights shall be exercised conformably with federal laws so far as such laws are suitable "but in all cases where they . . . are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the [forum] State" shall apply as long as they are "not inconsistent with the Constitution and laws of the United States." The court found the federal civil rights laws to be "deficient in not providing for survival," and then held that under Louisiana law an action like Shaw's would survive only in favor of a spouse, children, parents, or siblings, none of whom was alive at the time of Shaw's death, but refused to apply the state law, finding it inconsistent with federal law. In place of the state law the court created "a federal common law of survival in civil rights actions in favor of the personal representative of the deceased." The Court of Appeals affirmed. *Held:* The District Court should have adopted the Louisiana survivorship law, which would have caused Shaw's action to abate. Pp. 590–595.

(a) There is nothing in § 1983, despite its broad sweep, to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship. No claim is made that Louisiana's survivorship laws do not in general comport with the underlying policies of § 1983 or that Louisiana's decision to restrict certain survivorship rights to the relations specified above is unreasonable. Pp. 590–592.

(b) The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing

as decedent's executor. And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate would not adversely affect § 1983's role in preventing official illegality, at least in situations such as the one here where there is no claim that the illegality caused plaintiff's death. P. 592.

545 F. 2d 980, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post*, p. 595.

*Malcolm W. Monroe* argued the cause for petitioner. With him on the briefs was *Eberhard P. Deutsch.*

Respondent *Edward F. Wegmann* argued the cause and filed a brief *pro se.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In early 1970, Clay L. Shaw filed a civil rights action under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of Louisiana. Four years later, before trial had commenced, Shaw died. The question presented is whether the District Court was required to adopt as federal law a Louisiana survivorship statute, which would have caused this action to abate, or was free instead to create a federal common-law rule allowing the action to survive. Resolution of this question turns on whether the state statute is "inconsistent with the Constitution and laws of the United States." 42 U. S. C. § 1988.[1]

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**Charles A. Bane, Thomas D. Barr, Robert A. Murphy, Richard S. Kohn, William E. Caldwell,* and *Norman J. Chachkin* filed a brief for the Lawyers' Committee for Civil Rights under Law as *amicus curiae* urging affirmance.

[1] Title 42 U. S. C. § 1988 provides in pertinent part:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of

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In 1969, Shaw was tried in a Louisiana state court on charges of having participated in a conspiracy to assassinate President John F. Kennedy. He was acquitted by a jury but within days was arrested on charges of having committed perjury in his testimony at the conspiracy trial. Alleging that these prosecutions were undertaken in bad faith, Shaw's § 1983 complaint named as defendants the then District Attorney of Orleans Parish, Jim Garrison, and five other persons, including petitioner Willard E. Robertson, who was alleged to have lent financial support to Garrison's investigation of Shaw through an organization known as "Truth or Consequences." On Shaw's application, the District Court enjoined prosecution of the perjury action, *Shaw* v. *Garrison,* 328 F. Supp. 390 (1971), and the Court of Appeals affirmed, 467 F. 2d 113 (CA5 1972).[2]

Since Shaw had filed an action seeking damages, the parties continued with discovery after the injunction issued. Trial was set for November 1974, but in August 1974 Shaw died. The executor of his estate, respondent Edward F. Wegmann (hereafter respondent), moved to be substituted as plaintiff,

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the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

[2] The Court of Appeals held that this Court's decision in *Younger* v. *Harris,* 401 U. S. 37 (1971), did not bar the enjoining of the state perjury prosecution, since the District Court's "finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger.*" 467 F. 2d, at 122.

and the District Court granted the motion.[3] Petitioner and other defendants then moved to dismiss the action on the ground that it had abated on Shaw's death.

The District Court denied the motion to dismiss. It began its analysis by referring to 42 U. S. C. § 1988; this statute provides that, when federal law is "deficient" with regard to "suitable remedies" in federal civil rights actions, federal courts are to be governed by

> "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States."

The court found the federal civil rights laws to be "deficient in not providing for survival." *Shaw* v. *Garrison,* 391 F. Supp. 1353, 1361 (1975). It then held that, under Louisiana law, an action like Shaw's would survive only in favor of a spouse, children, parents, or siblings. Since no person with the requisite relationship to Shaw was alive at the time of his death, his action would have abated had state law been adopted as the federal rule. But the court refused to apply state law, finding it inconsistent with federal law, and in its place created "a federal common law of survival in civil rights actions in favor of the personal representative of the deceased." *Id.,* at 1368.

On an interlocutory appeal taken pursuant to 28 U. S. C. § 1292 (b), the United States Court of Appeals for the Fifth Circuit affirmed. The court first noted that all parties agreed that, "if Louisiana law applies, Shaw's § 1983 claim

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[3] See Fed. Rule Civ. Proc. 25 (a)(1). As the Court of Appeals observed, this Rule "does not resolve the question [of] what law of survival of actions should be applied in this case. [It] simply describes the *manner* in which parties are to be substituted in federal court once it is determined that the applicable substantive law allows the action to survive a party's death." 545 F. 2d 980, 982 (CA5 1977) (emphasis in original).

abates." 545 F. 2d 980, 982 (1977). Like the District Court, the Court of Appeals applied 42 U. S. C. § 1988, found federal law "deficient" with regard to survivorship, and held Louisiana law "inconsistent with the broad remedial purposes embodied in the Civil Rights Acts." 545 F. 2d, at 983. It offered a number of justifications for creating a federal common-law rule allowing respondent to continue Shaw's action: Such a rule would better further the policies underlying § 1983, 545 F. 2d, at 984–985; would "foste[r] the uniform application of the civil rights laws," *id.*, at 985; and would be consistent with "[t]he marked tendency of the federal courts to allow actions to survive in other areas of particular federal concern," *ibid.* The court concluded that, "as a matter of federal common law, a § 1983 action instituted by a plaintiff prior to his death survives in favor of his estate." *Id.*, at 987.

We granted certiorari, 434 U. S. 983 (1977), and we now reverse.

II

As both courts below held, and as both parties here have assumed, the decision as to the applicable survivorship rule is governed by 42 U. S. C. § 1988. This statute recognizes that in certain areas "federal law is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." *Moor* v. *County of Alameda,* 411 U. S. 693, 703, 702 (1973), quoting 42 U. S. C. § 1988. When federal law is thus "deficient," § 1988 instructs us to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," as long as these are "not inconsistent with the Constitution and laws of the United States." See n. 1, *supra.* Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under § 1988 " 'is a federal rule responsive to the need whenever a federal right is impaired.' "

*Moor* v. *County of Alameda, supra,* at 703, quoting *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 240 (1969).

As we noted in *Moor* v. *County of Alameda,* and as was recognized by both courts below, one specific area not covered by federal law is that relating to "the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant." 411 U. S., at 702 n. 14.[4] State statutes governing the survival of state actions do exist, however. These statutes, which vary widely with regard to both the types of claims that survive and the parties as to whom survivorship is allowed, see W. Prosser, Law of Torts 900–901 (4th ed. 1971), were intended to modify the simple, if harsh, 19th-century common-law rule: "[A]n injured party's personal claim was [always] extinguished . . . upon the death of either the injured party himself or the alleged wrongdoer." *Moor* v. *County of Alameda, supra,* at 702 n. 14; see *Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 59, 67 (1913). Under § 1988, this state statutory law, modifying the common law,[5]

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[4] The dissenting opinion argues that, despite this lack of coverage, "the laws of the United States" are not necessarily "[un]suitable" or "deficient in the provisions necessary." 42 U. S. C. § 1988; see *post,* at 595. Both courts below found such a deficiency, however, and respondent here agrees with them. 545 F. 2d, at 983; *Shaw* v. *Garrison,* 391 F. Supp. 1353, 1358–1361 (1975); Brief for Respondent 6.

There is a survivorship provision in 42 U. S. C. § 1986, but this statute applies only with regard to "the wrongs . . . mentioned in [42 U. S. C.] section 1985." Although Shaw's complaint alleged causes of action under §§ 1985 and 1986, the District Court dismissed this part of the complaint for failure to state a claim upon which relief could be granted. 391 F. Supp., at 1356, 1369–1371. These dismissals were not challenged on the interlocutory appeal and are not at issue here.

[5] Section 1988's reference to "the common law" might be interpreted as a reference to the decisional law of the forum State, or as a reference to the kind of general common law that was an established part of our federal jurisprudence by the time of § 1988's passage in 1866, see *Swift* v. *Tyson,* 16 Pet. 1 (1842); cf. *Moor* v. *County of Alameda,* 411 U. S., at 702 n. 14 (referring to the survivorship rule "at common law"). The

provides the principal reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is "inconsistent with the Constitution and laws of the United States." Because of this proviso, the courts below refused to adopt as federal law the Louisiana survivorship statute and in its place created a federal common-law rule.

III

In resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at "the policies expressed in [them]." *Sullivan* v. *Little Hunting Park, Inc., supra,* at 240; see *Moor* v. *County of Alameda, supra,* at 703. Of particular importance is whether application of state law "would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc.,* 421 U. S. 454, 465 (1975). The instant cause of action arises under 42 U. S. C. § 1983, one of the "Reconstruction civil rights statutes" that this Court has accorded " 'a sweep as broad as [their] language.' " *Griffin* v. *Breckenridge,* 403 U. S. 88, 97 (1971), quoting *United States* v. *Price,* 383 U. S. 787, 801 (1966).

Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship. The

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latter interpretation has received some judicial and scholarly support. See, *e. g., Basista* v. *Weir,* 340 F. 2d 74, 85–86, n. 10 (CA3 1965); Theis, Shaw v. Garrison: Some Observations on 42 U. S. C. § 1988 and Federal Common Law, 36 La. L. Rev. 681, 684–685 (1976). See also *Carey* v. *Piphus,* 435 U. S. 247, 258 n. 13 (1978). It makes no difference for our purposes which interpretation is the correct one, because Louisiana has a survivorship statute that, under the terms of § 1988, plainly governs this case.

policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. See, *e. g., Carey* v. *Piphus,* 435 U. S. 247, 254 (1978); *Mitchum* v. *Foster,* 407 U. S. 225, 238–242 (1972); *Monroe* v. *Pape,* 365 U. S. 167, 172–187 (1961). No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, and indeed most Louisiana actions survive the plaintiff's death. See La. Code Civ. Proc. Ann., Art. 428 (West 1960); La. Civ. Code Ann., Art. 2315 (West 1971). Moreover, certain types of actions that would abate automatically on the plaintiff's death in many States—for example, actions for defamation and malicious prosecution—would apparently survive in Louisiana.[6] In actions other than those for damage to property, however, Louisiana does not allow the deceased's personal representative to be substituted as plaintiff; rather, the action survives only in favor of a spouse, children, parents, or siblings. See 391 F. Supp., at 1361–1363; La. Civ. Code Ann., Art. 2315 (West 1971); *J. Wilton Jones Co.* v. *Liberty Mutual Ins. Co.,* 248 So. 2d 878 (La. App. 1970 and 1971) (en banc).[7] But surely few persons are not

[6] An action for defamation abates on the plaintiff's death in the vast majority of States, see W. Prosser, Law of Torts 900–901 (4th ed. 1971), and a large number of States also provide for abatement of malicious prosecution actions, see, *e. g., Dean* v. *Shirer,* 547 F. 2d 227, 229–230 (CA4 1976) (South Carolina law); *Hall* v. *Wooten,* 506 F. 2d 564, 569 (CA6 1974) (Kentucky law). See also 391 F. Supp., at 1364 n. 17. In Louisiana, an action for defamation or malicious prosecution would apparently survive (assuming that one of the relatives specified in La. Civ. Code Ann., Art. 2315 (West 1971), survives the deceased, as discussed in text *infra*); such an action seems not to fall into the category of "strictly personal" actions, La. Code Civ. Proc. Ann., Art. 428 (West 1960), that automatically abate on the plaintiff's death. See Johnson, Death on the *Callais* Coach: The Mystery of Louisiana Wrongful Death and Survival Actions, 37 La. L. Rev. 1, 6 n. 23, 52, and n. 252 (1976). See also Official Revision Comment (c) to La. Code Civ. Proc. Ann., Art. 428.

[7] For those actions that do not abate automatically on the plaintiff's

survived by one of these close relatives, and in any event no contention is made here that Louisiana's decision to restrict certain survivorship rights in this manner is an unreasonable one.[8]

It is therefore difficult to see how any of § 1983's policies would be undermined if Shaw's action were to abate. The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate.[9] And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality, at least in situations in which there is no claim that the illegality caused the plaintiff's death. A state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of Louisiana survivorship law would hardly be influenced in his behavior by its provisions.[10]

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death, most States apparently allow the personal representative of the deceased to be substituted as plaintiff. See 391 F. Supp., at 1364, and n. 18.

[8] The reasonableness of Louisiana's approach is suggested by the fact that several federal statutes providing for survival take the same approach, limiting survival to specific named relatives. See, *e. g.*, 33 U. S. C. § 908 (d) (1970 ed., Supp. V) (Longshoremen's and Harbor Workers' Compensation Act); 45 U. S. C. § 59 (Federal Employers' Liability Act). The approach taken by federal statutes in other substantive areas cannot, of course, bind a federal court in a § 1983 action, nor does the fact that a state survivorship statute may be reasonable by itself resolve the question whether it is "inconsistent with the Constitution and laws of the United States." 42 U. S. C. § 1988.

[9] This does not, of course, preclude survival of a § 1983 action when such is allowed by state law, see *Moor* v. *County of Alameda*, 411 U. S., at 702–703, n. 14, nor does it preclude recovery by survivors who are suing under § 1983 for injury to their own interests.

[10] In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather

It is true that § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum* v. *Foster, supra,* at 239. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. Under the circumstances presented here, the fact that Shaw was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed "inconsistent with the Constitution and laws of the United States." 42 U. S. C. § 1988.[11]

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farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit (for reasons entirely unconnected with the official illegality) and who would not be survived by any close relatives.

[11] In addition to referring to the policies underlying § 1983, the Court of Appeals based its decision in part on the desirability of uniformity in the application of the civil rights laws and on the fact that the federal courts have allowed survival "in other areas of particular federal concern . . . where statutory guidance on the matter is lacking." 545 F. 2d, at 985; see *supra,* at 588. With regard to the latter point, however, we do not find "statutory guidance . . . lacking"; § 1988 instructs us to turn to state laws, unless an "inconsistency" with federal law is found. While the courts below found such an inconsistency, we do not agree, as discussed

## IV

Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. A different situation might well be presented, as the District Court noted, if state law "did not provide for survival of any tort actions," 391 F. Supp., at 1363, or if it significantly restricted the types of actions that survive. Cf. *Carey* v. *Piphus*, 435 U. S., at 258 (failure of common law to "recognize an analogous cause of action" is not sufficient reason to deny compensation to § 1983 plaintiff). We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death. See *supra*, at 592, and n. 10; cf. *Brazier* v. *Cherry*, 293 F. 2d 401 (CA5 1961) (deceased allegedly beaten to death by policemen; state survival law applied in favor of his widow and estate).

Here it is agreed that Shaw's death was not caused by the deprivation of rights for which he sued under § 1983, and Louisiana law provides for the survival of most tort actions. Respondent's only complaint about Louisiana law is that it would cause Shaw's action to abate. We conclude that the

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in text *supra*, and hence the survivorship rules in areas where the courts are free to develop federal common law—without first referring to state law and finding an inconsistency—can have no bearing on our decision here. Similarly, whatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

mere fact of abatement of a particular lawsuit is not sufficient ground to declare state law "inconsistent" with federal law.

Accordingly, the judgment of the Court of Appeals is

*Reversed.*

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

It is disturbing to see the Court, in this decision, although almost apologetically self-described as "a narrow one," *ante,* at 594, cut back on what is acknowledged, *ante,* at 590, to be the "broad sweep" of 42 U. S. C. § 1983. Accordingly, I dissent.

I do not read the emphasis of § 1988, as the Court does, *ante,* at 585 and 593–594, n. 11, to the effect that the Federal District Court "was required to adopt" the Louisiana statute, and was free to look to federal common law only as a secondary matter. It seems to me that this places the cart before the horse. Section 1988 requires the utilization of federal law ("shall be exercised and enforced in conformity with the laws of the United States"). It authorizes resort to the state statute only if the federal laws "are not adapted to the object" of "protection of all persons in the United States in their civil rights, and for their vindication" or are "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." Even then, state statutes are an alternative source of law only if "not inconsistent with the Constitution and laws of the United States." Surely, federal law is the rule and not the exception.

Accepting this as the proper starting point, it necessarily follows, it seems to me, that the judgment of the Court of Appeals must be affirmed, not reversed. To be sure, survivorship of a civil rights action under § 1983 upon the death of either party is not specifically covered by the federal statute. But that does not mean that "the laws of the United States" are not "suitable" or are "not adapted to the object" or are "deficient in the provisions necessary." The federal law and

the underlying federal policy stand bright and clear. And in the light of that brightness and of that clarity, I see no need to resort to the myriad of state rules governing the survival of state actions.

First. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), a case that concerned the availability of compensatory damages for a violation of § 1982, a remedial question, as here, not governed explicitly by any federal statute other than § 1988, Mr. Justice Douglas, writing for the Court, painted with a broad brush the scope of the federal court's choice-of-law authority:

> "[A]s we read § 1988, . . . both federal and state rules on damages may be utilized, *whichever better serves the policies expressed in the federal statutes.* . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." 396 U. S., at 240 (emphasis added).

The Court's present reading of § 1988 seems to me to be hyperlogical and sadly out of line with the precept set forth in that quoted material. The statute was intended to give courts flexibility to shape their procedures and remedies in accord with the underlying policies of the Civil Rights Acts, choosing whichever rule "*better* serves" those policies (emphasis added). I do not understand the Court to deny a federal court's authority under § 1988 to reject state law when to apply it seriously undermines substantial federal concerns. But I do not accept the Court's apparent conclusion that, absent such an extreme inconsistency, § 1988 restricts courts to state law on matters of procedure and remedy. That conclusion too often would interfere with the efficient redress of constitutional rights.

Second. The Court's reading of § 1988 cannot easily be squared with its treatment of the problems of immunity and damages under the Civil Rights Acts. Only this Term, in

*Carey* v. *Piphus,* 435 U. S. 247 (1978), the Court set a rule for the award of damages under § 1983 for deprivation of procedural due process by resort to "federal common law." Though the case arose from Illinois, the Court did not feel compelled to inquire into Illinois' statutory or decisional law of damages, nor to test that law for possible "inconsistency" with the federal scheme, before embracing a federal common-law rule. Instead, the Court fashioned a federal damages rule, from common-law sources and its view of the type of injury, to govern such cases uniformly State to State. 435 U. S., at 257–259, and n. 13.

Similarly, in constructing immunities under § 1983, the Court has consistently relied on federal common-law rules. As *Carey* v. *Piphus* recognizes, *id.,* at 258 n. 13, in attributing immunity to prosecutors, *Imbler* v. *Pachtman,* 424 U. S. 409, 417–419 (1976); to judges, *Pierson* v. *Ray,* 386 U. S. 547, 554–555 (1967); and to other officials, matters on which the language of § 1983 is silent, we have not felt bound by the tort immunities recognized in the particular forum State and, only after finding an "inconsistency" with federal standards, then considered a uniform federal rule. Instead, the immunities have been fashioned in light of historic common-law concerns and the policies of the Civil Rights Acts.[1]

Third. A flexible reading of § 1988, permitting resort to a federal rule of survival because it "better serves" the policies of the Civil Rights Acts, would be consistent with the methodology employed in the other major choice-of-law provision in the federal structure, namely, the Rules of Decision Act. 28

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[1] *Moor* v. *County of Alameda,* 411 U. S. 693 (1973), is not to the contrary. There, the Court held that § 1988 does not permit the importation from state law of a new cause of action. In passing dictum, 411 U. S., at 702 n. 14, the Court noted the approach taken to the survival problem by several lower federal courts. In those cases, because the applicable state statute permitted survival, the lower courts had little occasion to consider the need for a uniform federal rule.

U. S. C. § 1652.[2] That Act provides that state law is to govern a civil trial in a federal court "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." The exception has not been interpreted in a crabbed or wooden fashion, but, instead, has been used to give expression to important federal interests. Thus, for example, the exception has been used to apply a federal common law of labor contracts in suits under § 301 (a) of the Labor Management Relations Act, 1947, 29 U. S. C. § 185 (a), *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957); to apply federal common law to transactions in commercial paper issued by the United States where the United States is a party, *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943); and to avoid application of governing state law to the reservation of mineral rights in a land acquisition agreement to which the United States was a party and that bore heavily upon a federal wildlife regulatory program, *United States* v. *Little Lake Misere Land Co.,* 412 U. S. 580 (1973). See also *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 709 (1966): "[S]tate law is applied [under the Rules of Decision Act] only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires." (WHITE, J., dissenting.)

Just as the Rules of Decision Act cases disregard state law where there is conflict with federal *policy,* even though no explicit conflict with the terms of a federal statute, so, too, state remedial and procedural law must be disregarded under § 1988 where that law fails to give adequate expression to important federal concerns. See *Sullivan* v. *Little Hunting Park, Inc., supra.* The opponents of the 1866 Act were distinctly aware that the legislation that became § 1988 would

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[2] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

give the federal courts power to shape federal common-law rules. See, for example, the protesting remarks of Congressman Kerr relative to § 3 of the 1866 Act (which contained the predecessor version of § 1988):

> "I might go on and in this manner illustrate the practical working of this extraordinary measure. . . . [T]he authors of this bill feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions of this bill, and not to be thwarted by this difficulty, they confer upon the courts the power of judicial legislation, the power to make such other laws as they may think necessary. Such is the practical effect of the last clause of the third section [of § 1988] . . . .
>
> "That is to say, the Federal courts may, in such cases, make such rules and apply such law as they please, and call it *common law*" (emphasis in original). Cong. Globe, 39th Cong., 1st Sess., 1271 (1866).

Fourth. Section 1983's critical concerns are compensation of the victims of unconstitutional action, and deterrence of like misconduct in the future. Any crabbed rule of survivorship obviously interferes directly with the second critical interest and may well interfere with the first.

The unsuitability of Louisiana's law is shown by the very case at hand. It will happen not infrequently that a decedent's only survivor or survivors are nonrelatives or collateral relatives who do not fit within the four named classes of Louisiana statutory survivors. Though the Court surmises, *ante,* at 591–592, that "surely few persons are not survived" by a spouse, children, parents, or siblings, any lawyer who has had experience in estate planning or in probating estates knows that that situation is frequently encountered. The Louisiana survivorship rule applies no matter how malicious or ill-intentioned a defendant's action was. In this case, as

the Court acknowledges, *ante,* at 586 n. 2, the District Court found that defendant Garrison brought state perjury charges against plaintiff Shaw "in bad faith and for purposes of harassment," 328 F. Supp. 390, 400, a finding that the Court of Appeals affirmed as not clearly erroneous. 467 F. 2d 113, 122. The federal interest in specific deterrence, when there was malicious intention to deprive a person of his constitutional rights, is particularly strong, as *Carey* v. *Piphus* intimates, 435 U. S., at 257 n. 11. Insuring a specific deterrent under federal law gains importance from the very premise of the Civil Rights Act that state tort policy often is inadequate to deter violations of the constitutional rights of disfavored groups.

The Louisiana rule requiring abatement appears to apply even where the death was intentional and caused, say, by a beating delivered by a defendant. The Court does not deny this result, merely declaiming, *ante,* at 594, that in such a case it might reconsider the applicability of the Louisiana survivorship statute. But the Court does not explain how either certainty or federalism is served by such a variegated application of the Louisiana statute, nor how an abatement rule would be workable when made to depend on a fact of causation often requiring an entire trial to prove.

It makes no sense to me to make even a passing reference, *ante,* at 592, to behavioral influence. The Court opines that no official aware of the intricacies of Louisiana survivorship law would "be influenced in his behavior by its provisions." But the defendants in Shaw's litigation obviously have been "sweating it out" through the several years of proceedings and litigation in this case. One can imagine the relief occasioned when the realization dawned that Shaw's death might—just might—abate the action. To that extent, the deterrent against behavior such as that attributed to the defendants in this case surely has been lessened.

As to compensation, it is no answer to intimate, as the Court

does, *ante,* at 591–592, that Shaw's particular survivors were not personally injured, for obviously had Shaw been survived by parents or siblings, the cause of action would exist despite the absence in them of so deep and personal an affront, or any at all, as Shaw himself was alleged to have sustained. The Court propounds the unreasoned conclusion, *ibid.,* that the "goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." But the Court does not purport to explain why it is consistent with the purposes of § 1983 to recognize a derivative or independent interest in a brother or parent, while denying similar interest to a nephew, grandparent, or legatee.

Fifth. The Court regards the Louisiana system's structuring of survivorship rights as not unreasonable. *Ante,* at 592. The observation, of course, is a gratuitous one, for as the Court immediately observes, *id.,* at 592 n. 8, it does not resolve the issue that confronts us here. We are not concerned with the reasonableness of the Louisiana survivorship statute in allocating tort recoveries. We are concerned with its application in the face of a claim of civil rights guaranteed the decedent by federal law. Similarly, the Court's observation that the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 908 (d), 909 (d) (1970 ed., Supp. V), and Federal Employers' Liability Act, 45 U. S. C. § 59, limit survival to specific named relatives or dependents (albeit a larger class of survivors than the Louisiana statute allows) is gratuitous. Those statutes have as their main purpose loss shifting and compensation, rather than deterrence of unconstitutional conduct. And, although the Court does not mention it, any reference to the survival rule provided in 42 U. S. C. § 1986 governing that statute's principle of vicarious liability, would be off point. There it was the extraordinary character of the liability created by § 1986, of failing to *prevent* wrongful acts, that apparently induced Congress to limit recovery to

widows or next of kin in a specified amount of statutory damages. Cf. Cong. Globe, 42d Cong., 1st Sess., 749–752, 756–763 (1871); *Moor* v. *County of Alameda,* 411 U. S., at 710 n. 26.

The Court acknowledges, *ante,* at 590, "the broad sweep of § 1983," but seeks to justify the application of a rule of nonsurvivorship here because it feels that Louisiana is comparatively generous as to survivorship anyway. This grudging allowance of what the Louisiana statute does not give, just because it gives in part, seems to me to grind adversely against the statute's "broad sweep." Would the Court's decision be otherwise if actions for defamation and malicious prosecution in fact did not survive at all in Louisiana? The Court by omission admits, *ante,* at 591, and n. 6, that that question of survival has not been litigated in Louisiana. See Johnson, Death on the *Callais* Coach: The Mystery of Louisiana Wrongful Death and Survival Actions, 37 La. L. Rev. 1, 6 n. 23 (1976). Defamation and malicious prosecution actions wholly abate upon the death of the plaintiff in a large number of States, see *ante,* at 591, and n. 6. Does it make sense to apply a federal rule of survivorship in those States while preserving a different state rule, stingier than the federal rule, in Louisiana?

Sixth. A federal rule of survivorship allows uniformity, and counsel immediately know the answer. Litigants identically aggrieved in their federal civil rights, residing in geographically adjacent States, will not have differing results due to the vagaries of state law. Litigants need not engage in uncertain characterization of a § 1983 action in terms of its nearest tort cousin, a questionable procedure to begin with, since the interests protected by tort law and constitutional law may be quite different. Nor will federal rights depend on the arcane intricacies of state survival law—which differs in Louisiana according to whether the right is "strictly personal," La. Code Civ. Proc. Ann., Art. 428 (West 1960); whether the action concerns property damage, La. Civ. Code Ann., Art. 2315, ¶ 2

(West 1971); or whether it concerns "other damages," *id.*, ¶ 3. See 37 La. L. Rev., at 52.

The policies favoring so-called "absolute" survivorship, *viz.*, survivorship in favor of a decedent's nonrelated legatees in the absence of familial legatees, are the simple goals of uniformity, deterrence, and perhaps compensation. A defendant who has violated someone's constitutional rights has no legitimate interest in a windfall release upon the death of the victim. A plaintiff's interest in certainty, in an equal remedy, and in deterrence supports such an absolute rule. I regard as unanswered the justifications advanced by the District Court and the Court of Appeals: uniformity of decisions and fulfillment of the great purposes of § 1983. 391 F. Supp., at 1359, 1363–1365; 545 F. 2d, at 983.

Seventh. Rejecting Louisiana's survivorship limitations does not mean that state procedure and state remedies will cease to serve as important sources of civil rights law. State law, for instance, may well be a suitable source of statutes of limitation, since that is a rule for which litigants prudently can plan. Rejecting Louisiana's survivorship limitations means only that state rules are subject to some scrutiny for suitability. Here the deterrent purpose of § 1983 is disserved by Louisiana's rule of abatement.

It is unfortunate that the Court restricts the reach of § 1983 by today's decision construing § 1988. Congress now must act again if the gap in remedy is to be filled.

# ANDRUS, SECRETARY OF THE INTERIOR *v.* CHARLESTONE STONE PRODUCTS CO.

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

No. 77–380. Argued April 18, 1978—Decided May 31, 1978

The basic federal mining statute, 30 U. S. C. § 22, which derives from an 1872 law, provides that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase." Respondent, after purchasing a number of mining claims, discovered water on one of them (Claim 22) and used the water to prepare for commercial sale the sand and gravel removed from the claims. On review of unfavorable administrative decisions against respondent's claims in proceedings challenging their validity, the District Court held, *inter alia*, that respondent was entitled to access to Claim 22's water, and the Court of Appeals affirmed, adding *sua sponte* that Claim 22 itself is valid because of the water thereon. *Held:* Water is not a "valuable mineral" within the meaning of 30 U. S. C. § 22, and hence is not a locatable mineral thereunder. Pp. 610–617.

(a) The fact that water may be a "mineral" in the broadest sense of that word is not sufficient for a holding that a claimant has located a "valuable mineral deposit" under § 22; nor is the fact that water may be valuable or marketable enough to support a mining claim's validity based on the presence of water. In order for a claim to be valid, the substance discovered must not only be a "valuable mineral" within the dictionary definition of those words, it must also be the type of valuable mineral that the 1872 Congress intended to make the basis of a valid claim. Pp. 610–611.

(b) The relevant statutory provisions, which reflect the view that water is not a locatable mineral under the mining statutes and that private water rights on federal lands are to be governed by state and local law and custom; the history out of which such statutes arose; the decisions of the Department of the Interior construing the statutes in line with such view; and the practical problems that would arise if two overlapping systems for acquisition of private water rights were permitted, all support the conclusion that Congress did not intend water to be locatable under the federal mining law. Pp. 611–617.

553 F. 2d 1209, reversed.

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

*Sara Sun Beale* argued the cause for petitioner. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Barnett, Carl Strass,* and *Larry A. Boggs.*

*Gerry Levenberg* argued the cause for respondent. With him on the brief was *Warwick C. Lamoreaux.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under the basic federal mining statute, which derives from an 1872 law,[1] "all valuable mineral deposits in lands belonging to the United States" are declared "free and open to exploration and purchase." 30 U. S. C. § 22.[2] The question presented

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*A brief of *amici curiae* urging reversal was filed for their respective States by *Avrum Gross,* Attorney General of Alaska; *Bruce E. Babbitt,* Attorney General of Arizona, and *Dale Pontius,* Assistant Attorney General; *Evelle J. Younger,* Attorney General of California, and *Roderick Walston,* Deputy Attorney General; *J. D. MacFarlane,* Attorney General of Colorado, and *David W. Robbins,* Deputy Attorney General; *Wayne L. Kidwell,* Attorney General of Idaho, and *Josephine Beeman,* Assistant Attorney General; *Michael T. Greely,* Attorney General of Montana; *Paul L. Douglas,* Attorney General of Nebraska, and *Steven C. Smith,* Assistant Attorney General; *Robert List,* Attorney General of Nevada, and *George Campbell,* Deputy Attorney General; *Toney Anaya,* Attorney General of New Mexico, and *Richard A. Simms,* Special Assistant Attorney General; *Allen I. Olson,* Attorney General of North Dakota, and *Murray G. Sagsveen,* Assistant Attorney General; *James A. Redden,* Attorney General of Oregon, and *Clarence R. Kruger,* Assistant Attorney General; *William J. Janklow,* Attorney General of South Dakota, and *Warren R. Neufeld,* Assistant Attorney General; *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Senior Assistant Attorney General; and *V. Frank Mendicino,* Attorney General of Wyoming, and *Jack D. Palma II,* Special Assistant Attorney General.

*Maurice J. Nelson* filed a brief for J. Alan Steele as *amicus curiae.*

[1] Act of May 10, 1872, 17 Stat. 91.

[2] Title 30 U. S. C. § 22 provides in full:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they

is whether water is a "valuable mineral" as those words are used in the mining law.

I

A claim to federal land containing "valuable mineral deposits" may be "located" by complying with certain procedural requisites; one who locates a claim thereby gains the exclusive right to possession of the land, as well as the right to extract minerals from it. See generally 30 U. S. C. §§ 21–54; 1 American Law of Mining § 1.17 (1973). The claim at issue in this case, known as Claim 22, is one of a group of 23 claims near Las Vegas, Nev., that were located in 1942. In 1962, after respondent had purchased these claims, it discovered water on Claim 22 by drilling a well thereon. This water was used to prepare for commercial sale the sand and gravel removed from some of the 23 claims.

In 1965, the Secretary of the Interior filed a complaint with the Bureau of Land Management, seeking to have all of these claims declared invalid on the ground that the only minerals discovered on them were "common varieties" of sand and gravel, which had been expressly excluded from the definition of "valuable minerals" by a 1955 statute. § 3, 69 Stat. 368, 30 U. S. C. § 611.[3] At the administrative hearing

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are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

[3] Title 30 U. S. C. § 611 provides in pertinent part:

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in sections 601, 603, and 611 to 615 of this

on the Secretary's complaint, the principal issue was whether the sand and gravel deposits were "valuable" prior to the effective date of the 1955 legislation, in which case the claims would be valid.[4] The Administrative Law Judge concluded after hearing the evidence that respondent had established pre-1955 value only as to Claim 10. On appeals taken by both respondent and the Government, the Interior Board of Land Appeals (IBLA) affirmed the Administrative Law Judge in all respects here relevant. 9 I. B. L. A. 94 (1973).[5]

Respondent sought review in the United States District Court for the District of Nevada.[6] The court concluded that

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title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value . . . ."

[4] The question of value has traditionally been resolved by application of "complement[ary]" tests relating to whether " 'a person of ordinary prudence' " would have expended " 'his labor and means' " developing the claim at issue and whether the minerals thereon could have been " 'extracted, removed and marketed at a profit.' " *United States* v. *Coleman*, 390 U. S. 599, 600, 602 (1968), quoting decisions of the Secretary of the Interior in *Coleman* and in *Castle* v. *Womble*, 19 L. D. 455, 457 (1894).

[5] The Administrative Law Judge, in addition to holding that Claim 10 was valid based on its pre-1955 value, held that Claim 9 was valid because it provided reserve material for Claim 10. The IBLA reversed as to Claim 9, holding it invalid. 9 I. B. L. A., at 108.

The Secretary's complaint also named two other claims, numbered 12A and 13A, that were located by respondent in 1961. Since location occurred after the relevant 1955 date, the Administrative Law Judge held these claims invalid. His decision regarding Claims 12A and 13A was upheld by both the IBLA, 9 I. B. L. A., at 106, and the District Court, App. to Pet. for Cert. 25a, and was not contested in the Court of Appeals, see 553 F. 2d 1209, 1210 n. 1 (CA9 1977).

[6] Although the question of the District Court's subject-matter jurisdiction was not raised in this Court or apparently in either court below, we have an obligation to consider the question *sua sponte*. See, *e. g.*, *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Mansfield, Coldwater, & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884). Respondent's complaint alleged jurisdiction based on the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.*,

the decisions of the Administrative Law Judge and the IBLA were not supported by the evidence and that "at least" Claims 1 through 16 were valid. App. to Pet. for Cert. 26a. The court further held "that access to Claim No. 22 must be permitted so that the water produced from the well on that claim may be made available to the operations on the valid claims." *Ibid.* The IBLA's decision was accordingly vacated, and the case remanded to the Department of the Interior.

On the Government's appeal, the United States Court of Appeals for the Ninth Circuit affirmed. 553 F. 2d 1209 (1977). It agreed with the District Court as to Claims 1

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and 28 U. S. C. §§ 1361, 1391 (e). App. 27A. Title 28 U. S. C. § 1391 (e) is a venue statute and cannot itself confer jurisdiction.

With regard to the APA, while it may have appeared to be a proper basis of jurisdiction in the Ninth Circuit at the time the complaint was filed in 1973, see *Brandt* v. *Hickel*, 427 F. 2d 53, 55 (CA9 1970), we have since held that "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action," *Califano* v. *Sanders*, 430 U. S. 99, 107 (1977). We need not decide whether jurisdiction would lie here under 28 U. S. C. § 1361, because jurisdiction in this action to review a decision of the Secretary of the Interior is clearly conferred by 28 U. S. C. § 1331 (a).

This general federal-question statute was amended in 1976 to eliminate the amount-in-controversy requirement with regard to actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94–574 § 2, 90 Stat. 2721. Hence the fact that in 1973 respondent in its complaint did not allege $10,000 in controversy is now of no moment. See *Ralpho* v. *Bell*, 186 U. S. App. D. C. 368, 376–377, n. 51, 569 F. 2d 607, 615–616, n. 51 (1977); *Green* v. *Philbrook*, 427 F. Supp. 834, 836 (Vt. 1977). Nor does it matter that the complaint does not in so many words assert § 1331 (a) as a basis of jurisdiction, since the facts alleged in it are sufficient to establish such jurisdiction and the complaint appeared jurisdictionally correct when filed. See *Fort Sumter Tours, Inc.* v. *Andrus*, 564 F. 2d 1119, 1123 n. 4 (CA4 1977); *Harary* v. *Blumenthal*, 555 F. 2d 1113, 1115 n. 1 (CA2 1977); *Fitzgerald* v. *United States Civil Service Comm'n*, 180 U. S. App. D. C. 327, 329 n. 1, 554 F. 2d 1186, 1188 n. 1 (1977).

through 16 and also agreed that respondent was entitled to access to the water on Claim 22. It grounded the latter conclusion, however, "upon a rationale other than that relied upon by the District Court," *id.*, at 1215, a rationale that had not been briefed or argued in either the District Court or the Court of Appeals. Noting that "[s]ince early times, water has been regarded as a mineral," *ibid.*, the appellate court stated that it could not assume "that Congress was not aware of the necessary glove of water for the hand of mining and [that] Congress impliedly intended to reserve water from those minerals allowed to be located and recovered," *id.*, at 1216. Since the water at Claim 22 "has an intrinsic value in the desert area" and has additional value at the particular site "as a washing agent for . . . sand and gravel," the court ruled that respondent's "claim for the extraction of [Claim 22's] water is valid." *Ibid.*[7]

The difference between the District Court's and the Court of Appeals' rationales for allowing access to Claim 22 is a significant one. The District Court held only that respondent is entitled to use the water on the claim; the Court of Appeals, by contrast, held that the claim itself is valid. If the claim is indeed valid, respondent is not merely entitled to access to the water thereon, but also has exclusive possessory rights to the land and may keep others from making any use of it. By complying with certain procedures, moreover, respondent could secure a "patent" from the Government conveying fee simple title to the land. See 30 U. S. C. §§ 29, 37; 1 American Law of Mining § 1.23 (1973). See generally *Union Oil Co.* v. *Smith,* 249 U. S. 337, 348–349 (1919). In

[7] In reaching this conclusion, the court correctly noted, 553 F. 2d, at 1216, that water is not listed among the "common varieties" of minerals withdrawn from location by 30 U. S. C. § 611. Hence the fact that respondent did not discover water on Claim 22 until after 1955 is irrelevant to the question of the validity of the claim. See *supra,* at 606–607, and n. 3. See also *infra,* at 617.

view of the significance of the determination that a mining claim to federal land is valid, the Government sought review here of the Court of Appeals' *sua sponte* holding regarding Claim 22's validity. The single question presented in the petition is "[w]hether water is a locatable mineral under the mining law of 1872." Pet. for Cert. 2.

We granted certiorari, 434 U. S. 964 (1977), and we now reverse.

II

We may assume for purposes of this decision that the Court of Appeals was correct in concluding that water is a "mineral," in the broadest sense of that word, and that it is "valuable." Both of these facts are necessary to a holding that a claimant has located a "valuable mineral deposit" under the 1872 law, 30 U. S. C. § 22, but they are hardly sufficient.

This Court long ago recognized that the word "mineral," when used in an Act of Congress, cannot be given its broadest definition. In construing an Act granting certain public lands, except "mineral lands," to a railroad, the Court wrote:

> "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom . . . . Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: as 'any constituent of the earth's crust' . . . ." *Northern Pacific R. Co.* v. *Soderberg,* 188 U. S. 526, 530 (1903).

In the context of the 1872 mining law, similar conclusions must be drawn. As one court observed, if the term "mineral" in the statute were construed to encompass all substances that are conceivably mineral, "there would be justification for making mine locations on virtually every part of the earth's

surface," since "a very high proportion of the substances of the earth are in that sense 'mineral.' " *Rummell* v. *Bailey,* 7 Utah 2d 137, 140, 320 P. 2d 653, 655 (1958). See also *Robert L. Beery,* 25 I. B. L. A. 287, 294–296 (1976) (noting that "common dirt," while literally a mineral, cannot be considered locatable under the mining law); *Holman* v. *Utah,* 41 L. D. 314, 315 (1912); 1 American Law of Mining, *supra,* § 2.4, p. 168.

The fact that water may be valuable or marketable similarly is not enough to support a mining claim's validity based on the presence of water. Many substances present on the land may be of value, and indeed it seems likely that land itself—especially land located just 15 miles from downtown Las Vegas, see 553 F. 2d, at 1211—has, in the Court of Appeals' words, "an intrinsic value," *id.,* at 1216. Yet the federal mining law surely was not intended to be a general real estate law; as one commentator has written, "the Congressional mandate did not sanction the disposal of federal lands under the mining laws for purposes unrelated to mining." 1 American Law of Mining, *supra,* § 1.18, p. 56; cf. *Holman* v. *Utah, supra* (distinguishing mining law from homestead and other agricultural entry laws). In order for a claim to be valid, the substance discovered must not only be a "valuable mineral" within the dictionary definition of those words, but must also be the type of valuable mineral that the 1872 Congress intended to make the basis of a valid claim.[8]

## III

The 1872 law incorporates two provisions involving water rights that derive from earlier mining Acts. See 17 Stat. 94–95. In 1866, in Congress' first major effort to regulate

[8] By referring to the intent of the 1872 Congress, we do not mean to imply that the only minerals locatable are those that were known to exist in 1872. But Congress' general conception of what a "valuable mineral" was for purposes of mining claim location is of obvious relevance in construing the 1872 law.

mining on federal lands, it provided for the protection of the "vested rights" of "possessors and owners" "to the use of water for mining, agricultural, manufacturing or other purposes," to the extent that these rights derive from "priority of possession" and "are recognized and acknowledged by the local customs, laws, and the decisions of courts." 30 U. S. C. § 51.[9] In 1870, Congress again emphasized its view that water rights derive from "local" law, not federal law, making "[a]ll patents granted . . . subject to any vested and accrued water rights . . . as may have been acquired under or recognized by [the 1866 provision]." 30 U. S. C. § 52.[10]

In discussing these mining law provisions on the subject of water rights, this Court has often taken note of the history of mining in the arid Western States. In 1879 Mr. Justice Field of California, writing for the Court, described in vivid terms the influx of miners that had shaped the water rights law of his State and its neighbors:

> "The lands in which the precious metals were found belonged to the United States, and were unsurveyed . . . . Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and cañons,

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[9] Title 30 U. S. C. § 51 provides in full:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

[10] Title 30 U. S. C. § 52 provides in full:

"All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title."

> and probing the earth in all directions for the precious metals. . . . But the mines could not be worked without water. Without water the gold would remain for ever buried in the earth or rock. . . . The doctrines of the common law respecting the rights of riparian owners were not considered as applicable . . . to the condition of miners in the mountains. . . . Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of . . . ditches and flumes, and the protection of rights to water . . . ." *Jennison* v. *Kirk,* 98 U. S. 453, 457–458 (1879).

See also *Basey* v. *Gallagher,* 20 Wall. 670, 681–684 (1875) (Field, J.); *Atchison* v. *Peterson,* 20 Wall. 507, 510–515 (1874) (Field, J.). Over a half century later, Mr. Justice Sutherland set out this same history in *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 154–155 (1935). He then explained that the water rights provisions of the 1866 and 1870 laws were intended to

> "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *Id.,* at 155.

Our opinions thus recognize that, although mining law and water law developed together in the West prior to 1866, with respect to federal lands Congress chose to subject only mining to comprehensive federal regulation. When it passed the 1866 and 1870 mining laws, Congress clearly intended to preserve "*pre-existing* [water] *right*[*s*]." *Broder* v. *Natoma Water & Mining Co.,* 101 U. S. 274, 276 (1879). Less than 15 years after passage of the 1872 law, the Secretary of the Interior in two decisions ruled that water is not a locatable mineral under the law and that private water rights on federal lands are instead "governed by local customs and laws,"

pursuant to the 1866 and 1870 provisions. *Charles Lennig,* 5 L. D. 190, 191 (1886); see *William A. Chessman,* 2 L. D. 774, 775 (1883). The Interior Department, which is charged with principal responsibility for "regulating the acquisition of rights in the public lands," *Cameron* v. *United States,* 252 U. S. 450, 460 (1920), has recently reaffirmed this interpretation. *Robert L. Beery,* 25 I. B. L. A. 287 (1976).

In ruling to the contrary, the Court of Appeals did not refer to 30 U. S. C. §§ 51 and 52, which embody the 1866 and 1870 provisions; to our opinions construing these provisions; or to the consistent course of administrative rulings on this question. Instead, without benefit of briefing, the court below decided that "it would be incongruous . . . to hazard that Congress was not aware of the necessary glove of water for the hand of mining." 553 F. 2d, at 1216. Congress was indeed aware of this, so much aware that it expressly provided a water rights policy in the mining laws. But the policy adopted is a "passive" one, 2 Waters and Water Rights § 102.1, p. 53 (R. Clark ed. 1967); Congress three times (in 1866, 1870, and 1872) affirmed the view that private water rights on federal lands were to be governed by state and local law and custom. It defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights, and that it did so *sub silentio* through laws designed to regulate mining. In light of the 1866 and 1870 provisions, the history out of which they arose, and the decisions construing them in the context of the 1872 law, the notion that water is a "valuable mineral" under that law is simply untenable.

## IV

The conclusion that Congress did not intend water to be locatable under the federal mining law is reinforced by consideration of the practical consequences that could be expected to flow from a holding to the contrary.

A

Many problems would undoubtedly arise simply from the fact of having two overlapping systems for acquisition of private water rights. Under the appropriation doctrine prevailing in most of the Western States, the mere fact that a person controls land adjacent to a body of water means relatively little; instead, water rights belong to "[t]he first appropriator of water for a beneficial use," but only "to the extent of his actual use," *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* at 154; see *Jennison* v. *Kirk, supra,* at 458; W. Hutchins, Selected Problems in the Law of Water Rights in the West 30–32, 389–403 (1942); McGowen, The Development of Political Institutions on the Public Domain, 11 Wyo. L. J. 1, 14 (1957). Failure to use the water to which one is entitled for a certain period of time generally causes one's rights in that water to be deemed abandoned. See generally 2 W. Hutchins, Water Rights Laws in the Nineteen Western States 256–328 (1974).

With regard to minerals located under federal law, an entirely different theory prevails. The holder of a federal mining claim, by investing $100 annually in the claim, becomes entitled to possession of the land and may make any use, or no use, of the minerals involved. See 30 U. S. C. § 28. Once fee title by patent is obtained, see *supra,* at 609, even the $100 requirement is eliminated.

One can readily imagine the legal conflicts that might arise from these differing approaches if ordinary water were treated as a federally cognizable "'mineral." A federal claimant could, for example, utilize all of the water extracted from a well like respondent's, without regard for the settled prior appropriation rights of another user of the same water.[11] Or

[11] The holder of a valid mining claim is generally understood to have an unlimited right to extract minerals from the claim, "even to exhaustion." *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349 (1919). Respondent suggests that this right could be limited in the context of a mining-law

he might not use the water at all and yet prevent another from using it, thereby defeating the necessary Western policy in favor of "actual use" of scarce water resources. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S., at 154. As one respected commentator has written, allowing water to be the basis of a valid mining claim "could revive long abandoned common law rules of ground water ownership and capture, and . . . could raise horrendous problems of priority and extralateral rights." [12] We decline to effect so major an alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history.

B

A final indication that water should not be held to be a locatable mineral derives from Congress' 1955 decision to remove "common varieties" of certain minerals from the coverage of the mining law. 30 U. S. C. § 611; see *supra*, at 606–607, and n. 5. This decision was made in large part because of "abuses under the general mining laws by . . . persons who locate[d] mining claims on public lands for purposes other than that of legitimate mining activity." H. R. Rep. No. 730, 84th Cong., 1st Sess., 5 (1955); see S. Rep. No. 554, 84th Cong., 1st Sess., 4–5 (1955). Apparently, locating a claim and obtaining a patent to federal land were so inexpensive that many "use[d] the guise of mining locations for nonmining purposes," including the establishment of "filling stations, curio shops, cafes, . . . residence[s] [and] summer camp[s]." H. R. Rep. No. 730, p. 6; see S. Rep. No. 554, p. 5.

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claim to water, if the law were construed to require the claimant to respect water rights previously vested under state law. Brief for Respondent 31 n. 8; see *id.*, at 25–26.

[12] Trelease, Federal-State Problems in Packaging Water Rights, in Water Acquisition for Mineral Development Institute Paper 9, pp. 9–17 n. 47 (Rocky Mt. Min. L. Fdn., 1978).

Water, of course, is among the most common of the earth's elements. While it may not be as common in the federal lands subject to the mining law as it is elsewhere, it is nevertheless common enough to raise the possibility of abuse by those less interested in extracting mineral resources than in obtaining title to valuable land.[13] See *Robert L. Beery,* 25 I. B. L. A., at 296–297. Given the unprecedented nature of the Court of Appeals' decision, it is hardly surprising that the 1955 Congress did not include water on its list of "common varieties" of minerals that cannot confer validity on a mining claim. But the concerns that Congress addressed in the 1955 legislation indicate that water, like the listed minerals, should not be considered a locatable mineral under the 1872 mining law.

V

It has long been established that, when grants to federal land are at issue, any doubts "are resolved for the Government, not against it." *United States* v. *Union Pacific R. Co.,* 353 U. S. 112, 116 (1957). *A fortiori,* the Government must prevail in a case such as this, when the relevant statutory provisions, their historical context, consistent administrative and judicial decisions, and the practical problems with a contrary holding all weigh in its favor. Accordingly, the judgment of the Court of Appeals is

*Reversed.*

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[13] The Court of Appeals' suggestion that a claim to water might be validated simply because of the "intrinsic value" of water "in the desert area," 553 F. 2d, at 1216, makes abuse particularly likely, since the "intrinsic value" theory would substantially lessen a claimant's burden of showing the "valuable" nature of his claim. See n. 4, *supra.*

# MOBIL OIL CORP. *v.* HIGGINBOTHAM, ADMINISTRATRIX, ET AL.

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

No. 76-1726. Argued January 10, 11, 1978—Decided June 5, 1978

In an action for wrongful death on the high seas, the measure of damages is governed by the Death on the High Seas Act, 46 U. S. C. § 762, which limits a decedent's survivors' recovery to their "pecuniary loss," and hence the survivors are not entitled to recover additional damages under general maritime law for "loss of society." Pp. 620–626.

545 F. 2d 422, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 626. BRENNAN, J., took no part in the consideration or decision of the case.

*Carl J. Schumacher, Jr.,* argued the cause for petitioner. With him on the brief were *E. D. Vickery* and *Charles C. Gray.*

*Jack C. Benjamin* argued the cause for respondents. With him on the brief for respondent Shinn was *Arthur A. Crais, Jr. Charles M. Thompson, Jr.,* filed a brief for respondents Higginbotham et al. *I. P. Saal, Jr.,* filed a brief for respondent Nation.

MR. JUSTICE STEVENS delivered the opinion of the Court.

This case involves death on the high seas. The question is whether, in addition to the damages authorized by federal statute, a decedent's survivors may also recover damages under general maritime law. The United States Court of Appeals for the Fifth Circuit, disagreeing with the First Circuit, held

that survivors may recover for their "loss of society," as well as for their pecuniary loss.[1] We reverse.

Petitioner used a helicopter in connection with its oil drilling operations in the Gulf of Mexico about 100 miles from the Louisiana shore. On August 15, 1967, the helicopter crashed outside Louisiana's territorial waters, killing the pilot and three passengers. In a suit brought by the passengers' widows, in their representative capacities, the District Court accepted admiralty jurisdiction [2] and found that the deaths were caused by petitioner's negligence. The court awarded damages equal to the pecuniary losses suffered by the families of two passengers.[3] Although the court valued the two families' loss of society at $100,000 and $155,000, it held that the law did not authorize recovery for this loss.[4] The Court of Appeals reversed, holding that the plaintiffs were entitled to claim

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[1] Compare *Barbe* v. *Drummond*, 507 F. 2d 794, 800–802 (CA1 1974), with *Higginbotham* v. *Mobil Oil Corp.*, 545 F. 2d 422 (CA5 1977). The members of the *Higginbotham* panel expressed their agreement with *Barbe, supra*, but considered the issue foreclosed in their Circuit by *Law* v. *Sea Drilling Corp.*, 510 F. 2d 242, on rehearing, 523 F. 2d 793 (CA5 1975). In that case, another Fifth Circuit panel stated that the statutory remedy provided by the Death on the High Seas Act was no longer needed. *Id.*, at 798. See also n. 16, *infra*.

[2] 357 F. Supp. 1164, 1167 (WD La. 1973). The District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court. Cf. *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U. S. 249, 271–272.

[3] 360 F. Supp. 1140 (WD La. 1973). One family received $362,297, the other $163,400. The District Court held that the third passenger's family could claim benefits only under the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. § 901 *et seq.* The Court of Appeals reversed this ruling. 545 F. 2d, at 431–433.

[4] The former figure included $50,000 for one widow and $50,000 for her only daughter. The latter figure included $25,000 for the second widow and for each of two minor children, as well as $20,000 for each of four older children. 360 F. Supp., at 1144–1148.

damages for loss of society. We granted certiorari limited to this issue. 434 U. S. 816.

## I

In 1877, the steamer *Harrisburg* collided with a schooner in Massachusetts coastal waters. The schooner sank, and its first officer drowned. Some five years later, his widow brought a wrongful-death action against the *Harrisburg*. This Court held that admiralty afforded no remedy for wrongful death in the absence of an applicable state or federal statute. *The Harrisburg,* 119 U. S. 199. Thereafter, suits arising out of maritime fatalities were founded by necessity on state wrongful-death statutes. See, *e. g., The Hamilton,* 207 U. S. 398.

In 1920, Congress repudiated the rule of *The Harrisburg* for maritime deaths occurring beyond the territorial waters of any State. It passed the Death on the High Seas Act (hereinafter sometimes DOHSA),[5] creating a remedy in admiralty for wrongful deaths more than three miles from shore. This Act limits the class of beneficiaries to the decedent's "wife, husband, parent, child, or dependent relative," [6] establishes a two-year period of limitations,[7] allows suits filed by the victim to continue as wrongful-death actions if the victim dies of his injuries while suit is pending,[8] and provides that contributory negligence will not bar recovery.[9] With respect to damages, the statute declares: "The recovery . . . shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." [10]

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[5] 41 Stat. 537, 46 U. S. C. § 761 *et seq.*

[6] § 761.

[7] § 763.

[8] § 765.

[9] § 766. In addition, the statute preserved the applicability of local law on the Great Lakes, in the Panama Canal Zone, and within the States' territorial waters. § 767. Rights under foreign wrongful-death laws were also preserved. § 764.

[10] § 762.

In the half century between 1920 and 1970, deaths on the high seas gave rise to federal suits under DOHSA, while those in territorial waters were largely governed by state wrongful-death statutes.[11] DOHSA brought a measure of uniformity and predictability to the law on the high seas, but in territorial waters, where *The Harrisburg* made state law the only source of a wrongful-death remedy, the continuing impact of that decision produced uncertainty [12] and incongruity.[13] The reasoning of *The Harrisburg*, which was dubious at best in 1886,[14] became less and less satisfactory as the years passed.

In 1970, therefore, the Court overruled *The Harrisburg*. In *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, the Court held that a federal remedy for wrongful death does exist under general maritime law. The case concerned a death in Florida's territorial waters. The defendant argued that Congress, by limiting DOHSA to the high seas, had evidenced an intent to preclude federal judicial remedies in territorial waters. The Court concluded, however, that the reason Congress confined

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[11] The death of a seaman was an exception to this rule. The Jones Act gives a remedy to the dependents of a seaman killed in the course of employment by his employer's negligence, no matter where the wrong takes place. § 688.

[12] In *The Tungus* v. *Skovgaard*, 358 U. S. 588, for example, the Court could not definitively determine whether New Jersey law allowed recovery for unseaworthiness or required proof of negligence.

[13] Three anomalies were identified in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375. In States with limited wrongful-death remedies, shipowners were liable if their breach of a maritime duty caused injury but not if the breach caused death. Furthermore, deaths due to unseaworthiness had a remedy on the high seas, but often went unremedied inside the three-mile limit. Finally, "true" seamen were denied the benefit of state wrongful-death laws while longshoremen doing seamen's work could assert claims under state law. *Id.*, at 395–396.

[14] The Court in *The Harrisburg* arrived at its conclusion after rejecting arguments founded on nothing more than "good reason," "natural equity," and the experience of nations like France and Scotland. 119 U. S., at 212–213.

DOHSA to the high seas was to prevent the Act from abrogating, by its own force, the state remedies then available in state waters. *Id.,* at 400.

In *Moragne* the Court left various subsidiary questions concerning the nonstatutory death remedy—such as the schedule of beneficiaries and the limitations period—for "further sifting through the lower courts in future litigation." *Id.,* at 408. A few years later, in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S. 573, the Court confronted some of these questions. Among the issues addressed in *Gaudet* was the measure of survivors' damages.[15] The Court held that awards could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief. *Id.,* at 583–591. The Court recognized that DOHSA, which compensates only for pecuniary losses, did not allow awards for loss of society. But the accident in *Gaudet,* like that in *Moragne,* took place in territorial waters, where DOHSA does not apply. The Court chose not to adopt DOHSA's pecuniary-loss standard; instead it followed the "clear majority of States" and "the humanitarian policy of the maritime law," both of which favored recovery for loss of society. 414 U. S., at 587–588. In sum, the Court made a policy determination in *Gaudet* which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

## II

The *Gaudet* opinion was broadly written. It did not state that the place where death occurred had an influence on its

[15] The primary issue in *Gaudet* was whether a decedent's survivors could bring a *Moragne* action even though the decedent himself had sued and recovered damages before dying. DOHSA offered no guidance on this issue. 414 U. S., at 583 n. 10. In the course of providing its own answer, the Court addressed the contention that the survivors' recovery would simply duplicate the decedent's. The Court outlined the elements of damages under the new maritime-death remedy and noted that several were distinct from those available to the decedent himself.

analysis. *Gaudet* may be read, as it has been, to replace entirely the Death on the High Seas Act.[16] Its holding, however, applies only to coastal waters. We therefore must now decide which measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 or the rule chosen by this Court in *Gaudet*.

As the divergence of views among the States discloses, there are valid arguments both for and against allowing recovery for loss of society. Courts denying recovery cite two reasons: (1) that the loss is "not capable of measurement by any material or pecuniary standard," and (2) that an award for the loss "would obviously include elements of passion, sympathy and similar matters of improper character." 1 S. Speiser, Recovery for Wrongful Death § 3:49 (2d ed. 1974).[17] Courts allowing the award counter: (1) that the loss is real, however intangible it may be, and (2) that problems of measurement should not justify denying all relief. See generally *Sea-Land Services, Inc.* v. *Gaudet, supra,* at 588–590.

In this case, however, we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses. Respondents argue that Congress does not have the

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[16] As Chief Judge Brown put it in *Law* v. *Sea Drilling Corp.*, 523 F. 2d 793 (CA5 1975): "It is time that the dead hand of *The Harrisburg*—whether in the courts or on the elbow of the congressional draftsmen of DOHSA—follow the rest of the hulk to an honorable rest in the briney deep. . . . No longer does one need . . . DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters—any navigable waters—and it can be enforced in any court." *Id.*, at 798.

[17] The award contemplated by *Gaudet* is especially difficult to compute, for the jury must calculate the value of the lost love and affection without awarding damages for the survivors' grief and mental anguish, even though that grief is probably the most tangible expression of the survivors' emotional loss. See *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S., at 585–586, n. 17. See also G. Gilmore & C. Black, Law of Admiralty 372 (2d ed. 1975).

last word on this issue—that admiralty courts have traditionally undertaken to supplement maritime statutes and that such a step is necessary in this case to preserve the uniformity of maritime law. Neither argument is decisive.

We recognize today, as we did in *Moragne,* the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to the uniformity of maritime law.[18] Damages aside, none of the issues on which DOHSA is explicit have been settled to the contrary by this Court in either *Moragne* or *Gaudet.* Nor are other disparities likely to develop. As *Moragne* itself implied,[19] DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant,[20] a desire for uniformity cannot override the statute.

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[18] *Moragne* proclaimed the need for uniformity in a far more compelling context. When *Moragne* was decided, fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State. The only disparity that concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land.

[19] *Moragne* recognized that the courts would need to devise a limitations period and a schedule of beneficiaries for the new death remedy. The Court considered several alternative solutions to these problems. Only DOHSA, however, figured prominently in the discussion of both issues. 398 U. S., at 405–408.

[20] It remains to be seen whether the difference between awarding loss-of-society damages under *Gaudet* and denying them under DOHSA has a great practical significance. It may be argued that the competing views on awards for loss of society, see *supra,* at 623, can best be reconciled by allowing an award that is primarily symbolic, rather than a substantial portion of the survivors' recovery. We have not been asked to rule on the

We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. See nn. 6–10, *supra.* The Act does not address every issue of wrongful-death law, see, *e. g.,* n. 15, *supra,* but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

In *Moragne,* the Court recognized a wrongful-death remedy that supplements federal statutory remedies. But that holding depended on our conclusion that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies. 398 U. S., at 397–398. Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. See generally *Barbe* v. *Drummond,* 507 F. 2d 794, 801 n. 10 (CA1 1974); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (ND Cal. 1954). There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specificallly enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess

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propriety of the large sums that the District Court would have awarded for loss of society in this case. See n. 4, *supra.*

Similarly, there may be no great disparity between DOHSA and *Gaudet* on the issue of funeral expenses. *Gaudet* awards damages to dependents who have paid, or will pay, for the decedent's funeral, evidently on the theory that, but for the wrongful death, the decedent would have accumulated an estate large enough to pay for his own funeral. 414 U. S., at 591. On that theory, the cost of the funeral could also be considered a pecuniary loss suffered by the dependent as a result of the death.

today would enable us to do a better job of repudiating *The Harrisburg* than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

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.

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

Just a few years ago, in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S. 573 (1974), this Court held that, "under the maritime wrongful-death remedy, [a] decedent's dependents may recover damages for their loss of . . . society . . . ." *Id.,* at 584. The fact that the injury there occurred within three miles of shore, in the territorial waters of a State, had no bearing on the decision at the time it was rendered, as the majority today recognizes, *ante,* at 622–623. Nor did we place any emphasis on the situs of injury when we first upheld the maritime wrongful-death remedy, as a matter of "general maritime law," in *Moragne* v. *States Marine Lines, Inc.,* 398 U. S. 375, 409 (1970). Today the Court takes a narrow and unwarranted view of these cases, limiting them to their facts and making the availability of recovery for loss of society turn solely on a ship's distance from shore at the time of the injury causing death.

A unanimous Court concluded in *Moragne* that the distance of a ship from shore is a fortuity unrelated to the reasons for allowing a seaman's family to recover damages upon his death. See *id.,* at 395–396, 405. These reasons are rooted in the traditions of maritime law, which has always shown "a special solicitude for the welfare of those men who undert[ake] to

venture upon hazardous and unpredictable sea voyages." *Id.*, at 387. See also *Gaudet, supra,* at 588 ("humanitarian policy of the maritime law"). In light of this "special solicitude," Mr. Justice Harlan examined in *Moragne* a number of "anomalies," 398 U. S., at 395–396, that had resulted from the earlier rule of *The Harrisburg,* 119 U. S. 199 (1886), under which the availability of a cause of action for wrongful death at sea depended entirely on the existence of a statutory remedy.

The "anomaly" most relevant for present purposes was that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce[d] liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness . . . —but not within the territorial waters of a State whose local statute exclude[d] unseaworthiness claims." 398 U. S., at 395. The *Moragne* Court found "much force" in the argument of the United States (appearing as *amicus curiae*) that this difference in treatment based on location of the injury could not be supported by any "rational policy," especially since the underlying duty to furnish a seaworthy vessel is a federal one. *Id.*, at 395–396. Accordingly, because of this anomaly and others, the Court in *Moragne* declined to adhere any longer to "a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Id.*, at 405.

The Court today establishes a rule that, like the pre-*Moragne* rule, "produces different results . . . in situations that cannot be differentiated in policy." When death arises from injuries occurring within a State's territorial waters, dependents will be able to recover for loss of society under the "humanitarian" rule of *Gaudet.* 414 U. S., at 588. But once a vessel crosses the imaginary three-mile line, the seaman's dependents no longer have a remedy for an identical loss, occasioned by an identical breach of duty. Instead, they may recover only pecuniary losses, which are allowed them by the Death on the High Seas Act (DOHSA), 46 U. S. C. § 762.

The irony implicit in the Court's result is readily apparent. As in the pre-*Moragne* situation, the benefits available to a seaman's dependents will once again vary depending on whether the injury causing death occurs in state territorial waters or on the high seas. Now, however, more generous benefits will be available if the injury occurs in state waters. We have thus come full circle from *Moragne,* which was designed to eliminate reliance on an artificial three-mile line as the basis for disparate treatment of dependents of similarly situated seamen. There is undoubtedly a certain symmetry in the Court's return to the pre-*Moragne* anomalies, but it is a symmetry that is both patently unfair to a seaman's dependents and flatly inconsistent with the spirit of *Moragne* and *Gaudet.*

The dictates of fairness and the words of this Court would all be beside the point, of course, if Congress could be said to have made a determination to disallow any recovery except pecuniary loss with regard to deaths arising on the high seas. But Congress made no such determination when it passed DOHSA. Congress was writing in 1920 against the background of *The Harrisburg,* under which a remedy for death on the high seas depended entirely on the existence of a statute allowing recovery. This rule left many dependents without any remedy and was viewed as "a disgrace to civilized people." By enacting DOHSA, Congress sought to "bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea." S. Rep. No. 216, 66th Cong., 1st Sess., 4 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess., 4 (1920), quoted in *Moragne, supra,* at 397.

The Court today uses this ameliorative, remedial statute as the foundation of a decision denying a remedy. It purports to find, in the section of DOHSA that provides for "fair and just compensation for the pecuniary loss sustained," 46 U. S. C. § 762, a "considered judgment" by Congress that recovery must be limited to pecuniary loss, *ante,* at 625. Nothing in this

section, however, states that recovery must be so limited; certainly Congress was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover at least their pecuniary loss. As Representative Montague stated in the House debate, the Act was meant to provide a cause of action "in cases where there is now no remedy." 59 Cong. Rec. 4486 (1920). See generally S. Rep. No. 216, *supra,* at 2–5; H. R. Rep. No. 674, *supra,* at 2–4; 59 Cong. Rec. 4482–4486 (1920). See also *Moragne,* 398 U. S., at 393 (DOHSA was designed "to furnish [a] remedy denied by the courts").

Although recognizing that DOHSA was a response to *The Harrisburg, ante,* at 620, the majority opinion otherwise ignores the legislative history of the Act. The fundamental premise of the opinion—that Congress meant to "limi[t] survivors to recovery of their pecuniary losses," *ante,* at 623—is simply assumed. Today's decision thus stands in sharp contrast to *Moragne,* where Mr. Justice Harlan carefully surveyed the legislative history and then concluded that "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U. S., at 400.

Because there is no congressional directive to foreclose nonstatutory remedies, I believe that maritime law principles require us to uphold the remedy for loss of society at issue here. The general approach that mandates this result was stated over 100 years ago by Mr. Chief Justice Chase, sitting on circuit, in a passage that has since been quoted in both *Moragne* and *Gaudet:*

> "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *The Sea Gull,* 21 F.

Cas. 909, 910 (No. 12,578) (CC Md. 1865), quoted in 398 U. S., at 387; 414 U. S., at 583.

In the instant case we have no "established and inflexible rule"; we have at most an expression of the minimum recovery that must be available to the dependents of a seaman who dies on the high seas. When DOHSA is read against the background out of which it arose—rather than as if it had been written after *Moragne* and *Gaudet*—it becomes apparent that Congress did not mean to exclude the possibility of recovery beyond pecuniary loss.

The only remaining issue is whether allowing recovery for loss of society would be "appropriate to effectuate the policies of general maritime law." *Moragne, supra,* at 400. This issue was resolved in *Gaudet,* where we stated, without any situs qualifications, that recovery for loss of society is not merely "appropriate to effectuate" maritime law policies but is "compelled" by them. 414 U. S., at 588. I would follow *Gaudet* in this case and thereby avoid the creation of a new and unfair "anomaly" of the type that *Moragne* was intended to eliminate.

Accordingly, I dissent.

Syllabus

# TRANS ALASKA PIPELINE RATE CASES*

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

Argued March 28, 1978—Decided June 6, 1978

Anticipating completion of the Trans Alaska Pipeline System (TAPS) in mid-1977, seven of its eight owners filed tariffs for the transportation of oil over TAPS with the Interstate Commerce Commission, which at that time had jurisdiction over oil pipelines. Four protestants, respondents here, immediately asked the ICC to suspend the proposed rates, which were claimed to be prima facie unlawful for a number of reasons. Rejecting the carriers' argument that it had no authority under § 15 (7) of the Interstate Commerce Act (Act) (which provides that "[w]henever there shall be filed . . . any schedule stating a new individual or joint rate, . . . the Commission . . . may . . . suspend the operation of such schedule") to suspend TAPS's initial rates, the ICC concluded that the rates should be suspended. It then went on to hold that the TAPS carriers could submit interim tariffs, to be effective on one day's notice, which would be allowed to go into effect during the suspension period if the rates proposed in such tariffs were lower than levels summarily fixed by the ICC and if the TAPS carriers would agree to refund any amounts collected under either the interim or initially proposed tariffs which might subsequently (after full hearing) be held to be unlawful. The TAPS carriers petitioned for review of the ICC's order in the Court of Appeals, which affirmed all aspects of the order. *Held:*

1. Pursuant to § 15 (7), the ICC is authorized to suspend initial tariff schedules of an interstate carrier subject to Part I of the Act, as it did here. As against the contention that the word "new" as used in § 15 (7) was intended to refer only to increased or changed rates (*i. e.*, rates which replace other rates previously in effect), such word must be given its literal interpretation as applying to services which have never before been offered to the public, thus embracing the initial rates in question in these cases. Pp. 642–652.

2. The ICC has power ancillary to its suspension authority under

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*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.*

§ 15 (7) to establish, without an adjudicatory hearing, maximum interim rates which it would allow to go into effect during the suspension period. By so establishing such interim rates here, the ICC did not exceed its suspension power but, to the contrary, performed an intelligent and practical exercise of its suspension power in accord with Congress' goal in § 15 (7) to strike a fair balance between the needs of the public and the needs of regulated carriers. Pp. 651–654.

3. The ICC, as part of such ancillary power to establish maximum interim rates, has authority, which it properly exercised here, to condition its decision not to suspend tariffs on a requirement that the carriers refund any amounts collected under either interim or initially proposed rates that might later be determined to exceed lawful rates, notwithstanding the absence of express authority in the statute for such refunds. *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500. If the ICC's approximations of what would be lawful rates are to be used to meet the carriers' needs, such refund provisions are a necessary and "directly related," *id.*, at 514, means of discharging the ICC's mandate to protect the public pending a more complete determination of the reasonableness of the rates, and thus are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," *ibid.*, in that they allow the ICC, in exercising its suspension power, to pursue "a more measured course" and to "offe[r] an alternative tailored far more precisely to the particular circumstances" of these cases. *Ibid.* Pp. 654–657.

557 F. 2d 775, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

*Andrew J. Kilcarr* and *Richard J. Flynn* argued the cause for petitioners in all cases and for Union Alaska Pipeline Co. et al. (respondents under this Court's Rule 21 (4)). With them on the joint briefs were *William J. T. Brown, James R. Kinzer, William R. Connole, David M. Schwartz, Lee A. Monroe, Robert E. Jordan III, James H. Pipkin, Jr., Steven H. Brose,* and *Jack Landsdale, Jr.*

*Deputy Solicitor General Easterbrook* argued the cause for the federal respondents in all cases. With him on the brief were *Solicitor General McCree, Assistant Attorney General*

*Shenefield, Allan A. Ryan, Jr., Donald A. Kaplan, Mark L. Evans, Christine N. Kohl,* and *Philip R. Telleen. Avrum M. Gross,* Attorney General of Alaska, argued the cause for respondents State of Alaska et al. in all cases. With him on the brief were *Philip Elman, Robert M. Lichtman, Terry F. Lenzer,* and *Robert E. Nagle.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in these cases is whether the Interstate Commerce Commission is authorized by § 15 (7) of the Interstate Commerce Act, as added, 36 Stat. 552, and amended, 49 U. S. C. § 15 (7),[1] to suspend *initial* tariff schedules of an interstate carrier subject to Part I of the Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1–27 (1970 ed. and Supp. V). In addition, we are asked to decide whether, if the Commission is so authorized, it has additional authority summarily to fix maximum interim tariff rates which will be allowed to go into effect during the suspension period and to require carriers filing tariffs containing such rates, as a further condition of nonsuspension, to refund any amounts collected which are ultimately found to be unlawful. We hold that the Commission has statutory authority to suspend initial tariff schedules and that it has power ancillary to that authority to establish maximum interim rates and associated regulations—including refund provisions—as it has done in these cases.

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[1] "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge . . . , but not for a longer period than seven months beyond the time when it would otherwise go into effect . . . ."

## I

In 1968, massive reservoirs of oil were discovered at Prudhoe Bay in the Alaskan Arctic. Two years later plans crystallized to build a pipeline from Prudhoe Bay to the all-weather port of Valdez on Alaska's Pacific coast. After protracted environmental litigation was ended by special Act of Congress,[2] construction of the Trans Alaska Pipeline System (TAPS) began in 1974. In May and June 1977, seven of the eight owners of TAPS,[3] anticipating completion of TAPS in mid-1977, filed tariffs with the Interstate Commerce Commission [4] setting out the rules and rates governing transportation

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[2] Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U. S. C. § 1651 *et seq.* (1970 ed., Supp. V).

[3] Each of eight companies holds an undivided interest in TAPS and each has the "right and obligation to utilize its share of TAPS capacity as an independent common carrier." Joint Brief for Petitioners 5. The interests held by each owner are as follows:

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|---|---|
| Sohio Pipe Line Co. | 33.34% |
| ARCO Pipe Line Co. | 21.00 |
| Exxon Pipeline Co. | 20.00 |
| BP Pipelines, Inc. | 15.84 |
| Mobil Alaska Pipeline Co. | 5.00 |
| Phillips Alaska Pipeline Corp. | 1.66 |
| Union Alaska Pipeline Co. | 1.66 |
| Amerada Hess Pipeline Corp. | 1.50 |

*Trans Alaska Pipeline System,* 355 I. C. C. 80, 91–93 (1977) (*TAPS*). Phillips Alaska Pipeline Corp. filed its tariffs later than the other seven carriers and has filed a petition for review of the suspension of its tariffs in the Court of Appeals for the District of Columbia Circuit, where decision has been deferred pending decision by this Court in these cases. See Joint Brief for Petitioners 4 n. 2.

[4] Oil pipelines were until October 1, 1977, subject to the jurisdiction of the Interstate Commerce Commission. See 49 U. S. C. § 1 (1)(b). On that date, jurisdiction over the transportation of oil in interstate commerce by pipeline was transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission (FERC). Department of Energy Organization Act of 1977, 91 Stat. 565, 42 U. S. C. § 7101 *et seq.* (1976 ed., Supp. I); Exec. Order No. 12009, 42 Fed. Reg. 46267

of oil over TAPS. These rates were met immediately by formal protests [5] from the State of Alaska,[6] the Arctic Slope Regional Corporation,[7] the United States Department of Justice,[8] and the Commission's Bureau of Investigations and Enforcement.[9]

Acting pursuant to § 15 (7) of the Interstate Commerce Act, the Commission [10] found that the protests lodged against the

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(1977). Further proceedings on the TAPS tariffs are pending before FERC.

[5] See 49 CFR § 1100.42 (1976).

[6] The State of Alaska owns a one-eighth royalty interest in Prudhoe Bay oil, which is calculated to be equal to 12.5% of the "wellhead value" of that oil. The parties tell us (although recent reports of falling oil prices on the west coast tend to cast doubt on this) that the market price of oil is essentially fixed. Accordingly, wellhead value is approximately determined by subtracting transportation costs from the fixed market price. See 1 App. 554a. For this reason, the State claims to lose 23 cents in royalties for every dollar by which the TAPS rate exceeds a just and reasonable level. Brief for Respondent State of Alaska 7.

[7] The Corporation, one of 13 established pursuant to the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U. S. C. §§ 1601–1627 (1970 ed., Supp. V), represents the interests of the Inupiat Eskimos, who have a claim to be paid 2% of the wellhead value, see n. 6, *supra*, of Alaskan crude oil up to a total of $500 million as consideration for their surrender of aboriginal land claims in the Prudhoe Bay area. The rate at which the Corporation collects revenue is inversely proportional to the TAPS rate. See *ibid.* Accordingly, if the TAPS rate is too high, the Corporation, which has a great immediate need for oil royalties, is harmed.

[8] The Department of Justice argued that the proposed TAPS rates were unreasonably high and would accordingly "discourage exploration and development of new fields by reducing the wellhead value of crude [oil]." 1 App. 95a. Such discouragement was said to be "inconsistent with national energy policy." *Ibid.*

[9] The Bureau argued that the proposed rates were "prima facie unreasonable," *id.*, at 143a, and should be suspended pending a full investigation.

[10] Rather than referring the TAPS protest to its staff suspension board and its appellate division of three Commissioners, as is routinely done in suspension cases, see 49 CFR § 1100.200 (1976), the Commission itself heard oral argument on the protests and determined that the TAPS rates should be suspended.

TAPS tariffs gave it "reason to believe the proposed rates are not just and reasonable." *Trans Alaska Pipeline System,* 355 I. C. C. 80, 81 (1977) (*TAPS*). In support of this conclusion, it cited the protestants' arguments that the filed rates allowed excessive returns on capital [11] and that the cost data provided by the carriers were overstated.[12] Dismissing the TAPS carriers' argument that § 15 (7) gave the Commission no power to suspend initial rates, the Commission suspended the TAPS rates for the full seven months allowed by law, see 355 I. C. C., at 81–82, citing protestants' showing of "probable unlawfulness," *id.,* at 81, and the Commission's concern that "maintenance of excessively high rates could act as a deterrent or an obstacle to the use of the pipeline by nonaffiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the well-head price of the oil." *Id.,* at 82.

On the other hand, the Commission found that it would not be in the public interest if TAPS had to close for a seven-month period. *Id.,* at 83. Accordingly, "accept[ing] the basic data supplied by the carriers" as true, *ibid.,* the Commis-

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[11] According to carrier data, the aggregate debt-equity ratio in TAPS financing was approximately 85%–15%. 1 App. 23a–24a, 159a; *TAPS, supra,* at 91. In calculating their rates, the carriers deducted interest expense in the computation of net income and then added a return element to calculated net income sufficient to provide them a 7% return on *total* investment, *i. e.,* both debt and equity. 3 App. 177–178. The protestants characterized this as "double-dipping." Brief for Respondent State of Alaska 13. The carriers defended the practice as being consistent with Commission practice and a consent decree entered in *United States* v. *Atlantic Refining Co.,* C. A. No. 14060 (DC, Dec. 23, 1941). See, *e. g.,* 1 App. 349a–355a; 3 App. 178.

[12] TAPS was originally estimated to cost less than $1 billion. 1 App. 10a. However, the estimated cost on which tariffs were calculated by the TAPS carriers was over $9 billion. *Id.,* at 102a, 117a. Protestants argued that much of the $9 billion represented waste and mismanagement on the part of the TAPS owners and could not, therefore, be included in the TAPS rate base. *E. g., id.,* at 10a–11a.

sion applied what it stated to be its traditional rate-of-return calculation [13] to compute new rates that approximated what full investigation would likely reveal to be lawful rates [14] and it stated that it would not suspend interim tariffs which specified rates no higher than those estimated. See *id.*, at 83–86. However, since the estimated rates might still "exceed reasonable levels," the Commission stated that any interim tariffs must provide for refunds of any amounts later determined to be in excess of lawful rates. *Id.*, at 86.[15]

Four pipeline owners, petitioners here,[16] filed a petition for review of the Commission's suspension order in the Court of Appeals for the Fifth Circuit. That court determined: (1) that the Commission had the statutory authority to suspend

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[13] Usually, the Commission uses an 8% return on valuation in setting pipeline rates, but in recognition of the extreme risk of the TAPS venture, the Commission used 10% in setting the interim rates. See *TAPS*, 355 I. C. C., at 85.

[14] The rates initially filed and the maximum interim rates allowed by the ICC are as follows:

| Carrier | Proposed Rate | Interim Rate | Reduction |
|---|---|---|---|
| Amerada Hess | $6.44 | $4.85 | $1.59 |
| BP | 6.35 | 4.68 | 1.67 |
| Mobil Alaska | 6.31 | 4.84 | 1.47 |
| Exxon | 6.27 | 5.10 | 1.17 |
| Phillips Alaska | 6.22 | 4.83 | 1.39 |
| Sohio | 6.16 | 4.70 | 1.46 |
| Union Alaska | 6.09 | 4.89 | 1.20 |
| ARCO | 6.04 | 4.91 | 1.13 |

See *id.*, at 80, 87, 94.

[15] In addition, the Commission authorized the carriers to file new tariffs which could become effective on as little as one-day's notice, and it instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U. S. C. § 15 (1). *TAPS, supra,* at 87–88.

[16] Sohio Pipeline Co., Union Alaska Pipeline Co., and Amerada Hess Pipeline Corp. were intervenors in the proceedings below and are parties here. See this Court's Rule 21 (4).

an initial tariff as well as changes in tariffs; (2) that it had authority ancillary to the suspension power to set out, without an adjudicatory hearing, maximum interim rates which it would allow to go into effect during the suspension period; and (3) that it had authority to condition a decision not to suspend tariffs on a requirement that carriers whose tariffs were allowed to go into effect be prepared to make refunds of any amounts collected—whether under initially proposed or interim tariffs—which were later determined (after full hearing) to be unlawful. *Mobil Alaska Pipeline Co.* v. *United States,* 557 F. 2d 775 (1977).

Petitioners sought review in this Court and filed applications for a stay of the Commission's suspension order, all relief having been denied by the Fifth Circuit. On October 20, 1977, we granted the applications for a stay, 434 U. S. 913, and we issued a supplemental stay order on November 14, 1977. 434 U. S. 949. Thereafter we granted certiorari to consider the three issues decided by the Court of Appeals. 434 U. S. 964. We affirm.[17]

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[17] In the Court of Appeals, the United States argued that *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658 (1963), and *United States* v. *SCRAP,* 412 U. S. 669 (1973), divest courts of jurisdiction to review suspension orders of the Interstate Commerce Commission. In this Court, the United States has modified that position and now apparently concedes that courts have jurisdiction to review suspension orders to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority. We agree.

*Arrow* and *SCRAP* stand for two propositions: first, that federal courts have no power to enjoin rate changes before the Commission has finally determined the lawfulness of rates, see *Arrow, supra,* at 669; *SCRAP, supra,* at 691; and, second, that federal courts have no power to make "an independent appraisal of the reasonableness of rates," *Arrow, supra,* at 670–671; see *SCRAP, supra,* at 692. Although reversal of a suspension order on judicial review might have the effect of allowing a rate to go into effect, such a reversal would not have the effect of an injunction, which jeopardizes "the regulatory goal of uniformity" of rates, *Arrow, supra,* at 664; see *infra,* at 641, since the effect of the reviewing court's judgment

## II

By the Act of Sept. 18, 1940, ch. 722, Tit. I, § 1, 54 Stat. 899, note preceding 49 U. S. C. § 1, Congress declared the National Transportation Policy of the United States to be "to encourage the establishment and maintenance of reasonable charges for transportation services." Part I of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1–27 (1970 ed. and Supp. V), which applies to common carriers by rail and pipeline, is one vehicle by which the National Transportation Policy is carried into effect. Under the Act as passed in 1887, however, the role of the Commission in establishing "reasonable charges" was circumscribed. Although § 1 of the Act provided that "[a]ll charges made for any service rendered or to be rendered in the transportation of passengers or property . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," 24 Stat. 379, this Court early held that the Commission had no authority to set charges, but could only determine if charges set by the carriers were unreasonable or unjust in the context of granting reparations to injured shippers. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479 (1897); 1 I. Sharfman, The Interstate Commerce Commission 25–27 (1931) (hereinafter Sharfman).

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would be to void the suspension order as to all affected carriers in all regions of the country. Moreover, under the recently modified provisions for judicial review of ICC orders, only one reviewing court could have jurisdiction over a suspension order. See 28 U. S. C. §§ 2341 (3)(A), 2342 (5) (1970 ed., Supp. V), added by Pub. L. No. 93–584, §§ 3–4, 88 Stat. 1917; 28 U. S. C. § 2349 (a). And, although we reaffirm our previous holding that courts may not independently appraise the reasonableness of rates, no such appraisal is involved in inquiring whether the Commission has overstepped the bounds of its authority. Therefore, we conclude that Congress did not mean to cut off judicial review for such limited purposes. Cf. *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967); *Leedom* v. *Kyne*, 358 U. S. 184, 190 (1958).

In 1906, Congress passed the Hepburn Act, 34 Stat. 584, which, *inter alia,* augmented the Commission's authority to condemn existing rates as unjust or unreasonable by adding express authority to set maximum rates to be observed by carriers in the future. See 49 U. S. C. § 15. Under the Hepburn Act, however, the Commission could not issue an order affecting a rate until it had become effective. This feature of the Hepburn Act was immediately recognized by the Commission as a major defect. See Sharfman 51 n. 50. It meant that the only relief against unreasonable rates lay in the reparations remedy and this could not provide a satisfactory solution:

> "In many cases the damage suffered through loss of competitive advantage far exceeds the difference between the rate actually charged and that found to be reasonable by the Commission; and in most instances the burden of the unreasonable rate is borne by a prior producer or is shifted to the ultimate consumer, for whom no redress whatever is available as against the carrier." *Id.,* at 51.

See H. R. Rep. No. 923, 61st Cong., 2d Sess., 4 (1910), quoting President Taft's special message to Congress on the Interstate Commerce Act; [18] S. Rep. No. 355, 61st Cong., 2d Sess., 8 (1910); [19] *United States* v. *Chesapeake & Ohio R. Co.,* 426 U. S. 500, 513, and n. 10 (1976) (*Chessie*); Dixon, The Mann-Elkins Act, 24 Q. J. Econ. 593, 602–603 (1910)

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[18] " 'It may be doubted how effective [the reparations] remedy really is. Experience has shown that many, perhaps most, shippers do not resort to proceedings to recover the excessive rates which they may have been required to pay, for the simple reason that they have added the rates paid to the cost of the goods and thus enhanced the price thereof to their customers, and that the public has in effect paid the bill.' "

[19] "[I]n practice it is found that . . . restitution is but seldom sought or awarded; probably because the shipper generally recoups himself from the public for the amount of the loss through the augmented price of the commodity."

(hereinafter Dixon). The Commission's Annual Reports also tell us that, as early as 1907, private litigants were able to convince some federal courts to enjoin rate advances after their effective dates but before the Commission was able to complete an investigation as required by the Hepburn Act. See *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 663–664, and n. 6 (1963); Sharfman 50 n. 49. Thus, not only did the Hepburn Act fail to protect the public against unreasonable carrier charges, but the equity litigation spawned by the Act led to discrimination in rates—much like that prohibited by § 1 of the Act—in the situation in which shippers successful in court would be paying one charge while those who were unsuccessful, or who did not have the wherewithal to go to court or to post an injunction bond, were paying higher charges. See *Arrow, supra,* at 663–664; Sharfman 50 n. 49; Dixon 603.

To "provid[e] a 'means . . . for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships,'" *Chessie, supra,* at 513, quoting Sharfman 59, Congress passed the Mann-Elkins Act of 1910, 36 Stat. 539. Section 12 of that Act, 36 Stat. 552, amended § 15 of the Interstate Commerce Act to allow the Commission to suspend "any schedule stating a new individual or joint rate, fare, or charge" for a period not to exceed 10 months. The suspension power conferred was intended to be a "particularly potent tool," giving the Commission "'tremendous power.'" *Chessie, supra,* at 513, quoting 45 Cong. Rec. 3471 (1910) (statement of Sen. Elkins speaking on behalf of majority report).

Section 15 of the Act, as augmented by the Hepburn and Mann-Elkins Acts, thus works with §§ 1 and 6 of the Act, 49 U. S. C. §§ 1 and 6 (1970 ed. and Supp. V), to give the Com-

mission a complete ratemaking charter. Section 1, as we have indicated above, sets the standard that rates and charges must meet, and § 6—which prohibits a carrier covered by Part I from engaging in interstate transportation unless its rates, fares, and charges have been filed and published and which, in addition, allows changes in any rate, fare, or charge to be made only after notice to the Commission and public through advance filing of schedules showing the proposed changes, see 49 U. S. C. §§ 6 (1), 6 (3), and 6 (7)—insures both that the Commission will have sufficient notice to exercise its suspension power and that no carrier can operate on suspended or disapproved schedules.

III

With this background in mind, we turn to the question whether the Commission is authorized by § 15 (7) to suspend the initial rates of a common carrier subject to Part I of the Interstate Commerce Act.

Section 15 (7) states that "[w]henever there shall be filed . . . *any* schedule stating a *new* individual or joint rate, fare, or charge, . . . the Commission . . . may from time to time suspend the operation of such schedule . . . ." (Emphasis added.) It is hard to imagine rates any more "new" than those filed for TAPS, a service which has never before been offered. And, since § 15 (7) applies to *any* new rate, there is little room to argue that Congress meant the suspension power not to apply to these cases, although we recognize that the Court of Appeals found that § 15 (7) had no plain meaning. See 557 F. 2d, at 781.

Nonetheless, petitioners argue that "new" does not really mean "new," but refers only to increased or changed rates, *i. e.*, rates which replace other rates previously in effect. As we understand the argument, it draws on three sources. First, it is said that Congress in 1910 was directing its attention solely to the problem of increased railroad rates and, therefore, that the statute should be limited to this application. Second,

petitioners argue that the only rate schedules the Interstate Commerce Act requires to be filed prior to their effective date are schedules of *changed* rates. See 49 U. S. C. § 6 (3). Since in their view § 15 (7) is intended to work in tandem with § 6 (3), petitioners conclude that new schedules include only changed schedules. Finally, petitioners point to language added to § 15 (7) by § 418 of the Transportation Act of 1920, 41 Stat. 484–487, which they say authoritatively glosses the word "new," limiting it to the increased rate situation. We find these arguments unpersuasive.

A

This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . [b]ut it is otherwise 'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act . . . .' " *Commissioner* v. *Brown,* 380 U. S. 563, 571 (1965) (citations omitted). Under this test, a restriction on the "literal or usual meaning" of the word "new" is not warranted by the legislative history of the Mann-Elkins Act.

First, petitioners' claim that the Commission is without authority to suspend initial rates is not limited to situations in which proposed initial rates are in some sense reasonable; it is a claim that a carrier can impose any rate it chooses.[20] Nor have petitioners pointed to any mechanism which would tend to make initial rates reasonable, and Congress in 1910 concluded that the reparations provisions of the Commerce

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[20] See 3 App. 17–18:

"[ICC] Commissioner Hardin: If we do not have the power to suspend then would the carriers be in a position to file a rate, say, at $35 a barrel, and the Commission still could not suspend that?

"[Exxon counsel]: If you do not have that power, that would be right."

Act are an insufficient check. Moreover, in these cases, the reparations remedy is particularly ineffective since those who will ship oil over TAPS are almost exclusively parents or co-subsidiaries of TAPS owners.[21] Thus, to an indeterminate, but possibly large extent, excess transportation charges to shippers will be offset by excess profits to TAPS owners, creating a wash transaction from the standpoint of parent oil companies. Indeed, it is telling that no shipper of oil protested the TAPS rates. Instead, as one might predict from experience under the Hepburn Act, see *supra,* at 640–641, only the public perceives that it will be injured by the proposed TAPS rates and has objected to them. See nn. 6–8, *supra.* Therefore, in the absence of suspension authority, unreasonable initial rates—both generally and in these cases—like unreasonable increases in existing rates, will almost certainly be passed along to "a prior producer or . . . to the ultimate consumer." Sharfman 51.

Second, if the Commission has no authority to suspend initial rates, it follows that Congress cannot have meant to foreclose whatever equity power there is in the courts to enjoin

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[21] The United States, pointing to an agreement between Sohio and BP that Sohio will tender to BP oil to the extent of the latter's TAPS ownership, computes the relationship between equity interests and TAPS interests as follows:

| Carrier | TAPS Interest | Oil Interest |
|---|---|---|
| Sohio/BP | 49.18% | 53.155% |
| ARCO | 21.00 | 20.274 |
| Exxon | 20.00 | 20.274 |
| Mobil | 5.00 | 2.094 |
| Phillips | 1.66 | 2.044 |
| Amerada Hess | 1.50 | .538 |
| Union Oil | 1.66 | 0.000 |
| Ten Others | 0.00 | 1.619 |

Brief for Federal Respondents 7–8, n. 4. The oil equity interests computed by petitioners are different, but not substantially so. See Joint Brief for Petitioners 6 n. 6.

carrier rates. Thus, with respect to initial rates, courts might again reach "diverse conclusions," jeopardizing "the regulatory goal of uniformity," and "causing in turn 'discrimination and hardship to the general public.'" *Arrow,* 372 U. S., at 664, quoting ICC Annual Report 10 (1907).[22]

Accordingly, far from reaching an "'absurd resul[t]'" which would "'thwart the obvious purpose of the statute,'" *Brown, supra,* at 571, a literal reading of the word "new" in § 15 (7) is necessary to curb mischief flowing from unchecked initial rates, which is in every way identical to that flowing from unchecked changes in rates to which the Mann-Elkins Act is concededly addressed. Given the equivalence of the harms resulting from unchecked initial and changed rates, only unequivocal statements in the legislative history of the Act would support any limitation on the scope of the suspension power. Petitioners, however, have been able to offer only isolated remarks made in floor debates in favor of their position.[23] These show at most that the primary area

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[22] In the past, actions for injunctions were brought in diversity of citizenship cases under the common law of carriers or under federal-question jurisdiction on the theory that the Sherman Act was being violated by a rate increase or alternatively that there was an implied right of action under § 1 of the Interstate Commerce Act, 49 U. S C. § 1. See, *e. g., Northern Pac. R. Co.* v. *Pacific Coast Lumber Mfrs.,* 165 F. 1 (CA9 1908); *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. R. Co.,* 156 F. 160 (CC S. D. 1907). The provisions consolidating judicial review of ICC orders in a single court of appeals, see n. 17, *supra,* are therefore not apposite to actions for injunctive relief and it would still be possible for district courts to reach conflicting views about the propriety of injunctive relief, a conflict that would create the rate discriminations sought to be ended by the Mann-Elkins Act.

[23] Petitioners place particular emphasis on the following statement of Representative Mann:

"[W]hen the railroad company then files this schedule of rates proposing to increase the rates, we say it is a reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the

of congressional concern was the situation in which railroads increased their pre-existing rates. There is nothing to show that Congress intended to limit the suspension power to this situation, however, and, indeed, other isolated remarks show quite clearly that Representative Mann, at least, thought both initial and changed rates could be suspended.[24] Therefore, we conclude that the word "new" must be given its literal interpretation, which embraces the rates that are the subject of this litigation.[25]

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commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the shipper." 45 Cong. Rec. 4713 (1910).

Just before this, however, Mann stated:

"We have therefore provided in the bill that where the schedule of rates is filed with the commission proposing to *change* an existing rate, the commission shall have authority to suspend the taking effect of that rate; *and* we provide that when there shall be filed with the commission a schedule stating a *new* rate or classification or regulation or practice, the commission . . . may suspend the operation of the proposed rate, classification, regulation, or practice . . . ." *Id.*, at 4711 (emphasis added).

Thus, Mann quite clearly recognized that the suspension power extended to both changes in rates and schedules stating initial rates. Moreover, Mann, in defending the suspension power, felt the need to discuss the situation in which a carrier puts in a rate "upon a new article." *Id.*, at 4711–4712. If the suspension power was meant to apply only where there was an old rate in effect, this element of Mann's defense would have been superfluous.

Petitioners also rely on statements made in the Senate which appear to refer solely to the rate increase situation. See Joint Brief for Petitioners 22 n. 29. These remarks, however, refer to an amendment to the Mann-Elkins Act, ultimately defeated, 45 Cong. Rec. 6915 (1910), introduced by Senator Cummins which prevented any change in rate "which is an increase over the then existing rate," *id.*, at 6409, from becoming effective until the Commission approved it. Therefore, the remarks are not relevant to an interpretation of the Act as passed.

[24] See n. 23, *supra*.

[25] Petitioners also argue that, were the Commission given authority to suspend initial rates, carriers would be prohibited for an extended period

B

Nor do we think much can be made of the fact that Congress, in Part I of the Interstate Commerce Act, sometimes refers to "new" rates and sometimes to "changed" rates.

While it is true that § 6 (3) of the Act provides that "[n]o *change* shall be made in . . . rates . . . *which have been filed and published* by any common carrier . . . except after thirty days' notice to the Commission and to the public" (emphasis added), we do not not read this section to restrict § 15 (7), as petitioners do. Central to petitioners' argument is the premise that § 6 (3) provides the exclusive procedure through which tariffs can be filed with the Commission. But this is not so.

We can agree that § 6 (3) simply cannot describe the procedure to be followed for filing initial rates since that section, by its terms, applies only to changes in tariffs which have previously been filed with the Commission and initial tariffs by definition have not been so filed. However, the conclusion that § 6 (3) cannot govern the filing of initial tariffs only begins the analysis, for § 6 (1) of the Act—which states that "[e]very common carrier . . . shall file with the Commission . . . schedules showing *all* the rates, fares, and charges for transportation [over its routes,]" 49 U. S. C. § 6 (1) (emphasis added)—plainly requires initial rates as well as rates resulting from tariff changes to be filed with the Commission. Since initial tariffs cannot be filed under § 6 (3), the question therefore arises how initial tariffs are to be filed.

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of time from using their facilities. This, they further argue, would constitute a confiscation prohibited by the Due Process Clause. As we indicate, see n. 33, *infra,* petitioners' major premise is misguided because suspension of initial rates does not pretermit filing of a lower rate to go into effect in the suspension period. Therefore, although a carrier may not be allowed to operate under its preferred rate, it is by no means obvious that it will have to refrain from operations or operate under a confiscatory tariff during the suspension period.

The Interstate Commerce Act gives no answer to this question; § 6 is silent on the issue. However, the Commission provided an answer by regulation in 1906 in order to clarify carrier obligations under the then recently enacted Hepburn Act.[26] In that year, the Commission issued Tariff Circular No. 2–A, which provided:

> "NEW ROADS.—On new lines of road, including branches and extensions of existing roads, individual rates may be established in the first instance, and also joint rates to and from points on such new line, without notice, on posting a tariff of such rates and filing the same with the Commission."

The immediately preceding paragraph of the same Circular provided that "Changes in Rates" had to be filed on 30 days' notice, which suggests that the Commission was aware that the 30-day requirement of § 6 (3), and indeed that § 6 (3) itself, was inapplicable to initial rates for "new roads." The rule announced in Circular 2–A became Rule 44 of Tariff Circular 14–A in 1907 and Rule 57 of Tariff Circular 15–A in 1908, a numerical designation which has been retained to this day. See 49 CFR § 1300.57 (1977).[27]

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[26] Since the 1906 regulation is a "contemporaneous construction of [the Act] by the men charged with the responsibility of setting its [tariff] machinery in motion," *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315 (1933), its interpretation of how § 6 (1) should be implemented is presumptively correct. See, *e. g., ibid.; Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

[27] Tariff Circulars covering oil pipelines were apparently not promulgated until 1928. In that year Tariff Circular No. 20, which superseded all earlier Circulars, was promulgated and its version of Rule 57 provided that "[r]ates from, to, via, or at points reached via newly laid pipe lines . . . may be established or changed in like manner and upon like notice to that provided for newly constructed lines of railroad . . . ." Tariff Circular No. 20, Rule 57 (e). This provision is now codified as 49 CFR § 1300.57 (e) (1977) and is the provision under which TAPS rates were filed with the Commission. See Joint Brief for Petitioners 6.

Thus, in 1910 when the Mann-Elkins Act was passed, Commission practice was quite clear. Initial tariffs were filed under Rule 57 on 1 day's notice (later changed to 10 days' notice) and tariff changes were filed under the provisions of § 6 (3). Since both the Rule and the Act provided that tariffs should be filed with delayed effective dates, it was clearly possible for the Commission to suspend either initial or changed rates. Consequently, we find no basis for concluding either that § 6 (3) in fact provides the exclusive procedural avenue for filing tariffs or that Congress in 1910 would have thought that it did.

Similarly, although § 418 of the Transportation Act of 1920, 41 Stat. 484–487, added a sentence to § 15 (7)—"if the proceeding has not been concluded [within the suspension period], the proposed change . . . shall go into effect at the end of such period"—nothing in the legislative history of that Act suggests that "change" is to be read to restrict the scope of the suspension power. Moreover, the amending language of § 418 itself refers to both changed rates and rate increases, which would suggest that changed rates include more than rate increases.[28]

Finally, as we have indicated, the tariff provisions in Part I of the Act did not spring full grown into the statute books. Section 6 (3), part of the 1887 Act, was drafted at a time when the Commission had no ratemaking authority. Section 15 (7) traces to three Acts—the 1887 Act, the Hepburn Act, and the Mann-Elkins Act—and was then further amended by the Transportation Act of 1920. Since, therefore, the tariff provisions grew more like Topsy than Athena, it is inappropriate to insist that each phrase in those provisions fit meticulously

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[28] "[I]f the proceeding has not been concluded . . . , the proposed *change* . . . shall go into effect . . . , but, in case of a proposed *increased* rate or charge [the Commission may impose recordkeeping and refund requirements on the carrier]." 41 Stat. 487 (emphasis added).

with every other. Instead, the Act must be construed not only by its language but by its purposes if sense is to be made of the verbal accretions of many years. Under this proper standard of construction, there is little to commend the argument that the word "change" was meant to narrow "new." To the contrary, the opposite construction—that "new" was intended to clarify the meaning of "change"—is more justified given the purposes of the Hepburn and Mann-Elkins Acts. Indeed, when Congress did enact comprehensive tariff schemes in Parts II,[29] III,[30] and IV [31] of the Interstate Commerce Act, which cover (respectively) motor carriers, common carriers by water, and freight forwarders, it indicated unequivocally in the language of the suspension provisions that initial rates were "new" rates capable of being suspended and yet references to "changed" rates appear in those Parts in each place they appear in Part I.[32]

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[29] 49 U. S. C. §§ 301–327 (1970 ed. and Supp. V).

[30] §§ 901–923 (1970 ed. and Supp. V).

[31] §§ 1001–1022.

[32] The relevant provisions of § 15 (7) are reproduced *in haec verba* in 49 U. S. C. §§ 316 (g) ("Whenever there shall be filed with the Commission any schedule stating a new . . . rate, fare, [or] charge . . . , the Commission . . . may . . . suspend the operation of such schedule . . ."); 907 (g) ("Whenever there shall be filed with the Commission any schedule . . . stating a new rate, fare, [or] charge . . . , the Commission . . . may . . . suspend the operation of such schedule . . ."); and 1006 (e) ("Whenever there shall be filed with the Commission . . . any tariff stating a new rate, charge, classification, regulation, or practice, the Commission . . . may . . . suspend the operation of such tariff . . ."). As enacted, § 316 (g) provided that the suspension power "shall not apply to any *initial* schedule or schedules filed by any . . . carrier in bona fide operation when this section takes effect." Motor Carrier Act of 1935, § 216 (g), 49 Stat. 559, 560 (emphasis added). This provision was subsequently amended to state: "[T]his paragraph shall not apply to any *initial* schedule or schedules filed on or before July 31, 1938, by any . . . carrier in bona fide operation [on October 1, 1935]." Act of June 29, 1938, ch. 811, § 16, 52 Stat. 1240 (emphasis added). Substantially identical provisos—each

C

For the reasons stated above, we conclude that the Commission is authorized by § 15 (7) to suspend rates which are "new" in the sense that they apply to services which have never before been offered to the public.

IV

Our conclusion that the Commission can suspend TAPS's initial rates does not end our inquiry, for petitioners also argue that the Commission has here exceeded whatever power

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exempting *initial* rates from suspension until a date certain—can be found in §§ 907 (g) and 1006 (e). These provisos are significant here.

First, they demonstrate that Congress understood the words "any schedule stating a new rate" to include initial rates, that is, rates filed with the Commission for a service not previously under tariff. If this were not so, a grandfather proviso would have been entirely unnecessary. Second, because Congress grandfathered only rates filed within a specified time period, the inference is strong that initial rates filed subsequent to that period were (and are) subject to suspension. This inference is confirmed by the legislative history of § 316 (g).

As indicated, § 316 (g) as enacted did not contain a cutoff date in the grandfather proviso. In 1938, a cutoff date was provided by amendment. This change was explained by the House Committee Report as follows:

"Sectio[n 16] . . . propose[s] to amend sectio[n] [316 (g)] . . . to permit the Commission to suspend any initial schedule of a common carrier . . . filed after the date that the provisions of the bill shall have become effective. The purpose of the proposed amendment is to prevent future filings of initial tariffs and schedules by motor carriers who were in bona fide operation on June 1, or July 1, 1935, without the exercise by the Commission of its suspension power." H. R. Rep. No. 2714, 75th Cong., 3d Sess., 4 (1938).

While there is no grandfather clause in § 15 (7) itself which would confirm its application to initial rates, Congress was doubtless attempting to recreate the scheme of § 15 (7) in Parts II–IV of the Act and expressly stated this on two occasions. See H. R. Rep. No. 1217, 76th Cong., 1st Sess., 23–24 (1939); H. R. Rep. No. 2066, 77th Cong., 2d Sess., 22 (1942). Moreover, since § 15 (7) is in all respects *in pari materia* with

it has to suspend tariffs. Pointing to the Commission's calculation of rates which it would allow to go into effect during the suspension period, they state that the Commission has set rates without the hearing required by 49 U. S. C. § 15 (1).[33] We disagree.

The reason the Commission has been given power to suspend is to prevent irreparable harm to the public during the

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§§ 316 (g), 907 (g), and 1006 (e), the plain meaning of the latter sections should be given significant weight in construing the former. See *United States* v. *Freeman,* 3 How. 556, 564–565 (1845); *United States* v. *Stewart,* 311 U. S. 60, 64–65 (1940); *Erlenbaugh* v. *United States,* 409 U. S. 239, 243–244 (1972).

In addition, the fact that §§ 316 (g) and 1006 (e) plainly apply to initial rates defeats petitioners' argument that the word "change" in either § 6 (3) or § 15 (7) of the Act narrows the word "new." Counterparts to § 6 (3) are found in §§ 317 (c) and 1005 (d), each of which, like § 6 (3), states: "No *change* shall be made in any rate . . . except after thirty days' notice . . . ." (Emphasis added.) Since §§ 317 (c) and 1005 (d) are intended to work with §§ 316 (g) and 1006 (e), respectively, in the same way § 6 (3) works with § 15 (7), it is clear that the word "change" does not limit the scope of the suspension power. Similarly, each of §§ 316 (g), 907 (g), and 1006 (e) contains language identical to that added to § 15 (7) by the Transportation Act of 1920, see *supra,* at 649, which again shows that the word "change" cannot be given any restrictive meaning.

[33] Petitioners also argue that, for suspension to be lawful, the Commission had to make a "finding that it would be preferable to defer operation of the Trans Alaska Pipeline rather than to commence operation at the carriers' original rates." Joint Brief for Petitioners 36. We find no basis in the Interstate Commerce Act to support such an argument. Indeed, § 6 (3) of the Act, 49 U. S. C. § 6 (3), authorizes a carrier to submit new tariffs at any time. This authority does not lapse once one tariff for a proposed service is suspended. To the contrary, the Commission cannot refuse to file a tendered tariff simply because it has already suspended other tariffs for the same service. See *American Tel. & Tel. Co.* v. *FCC,* 487 F. 2d 865, 870–881 (CA2 1973). Petitioners, therefore, would require the Commission, in making suspension decisions, to blink at the reality that carriers whose initial rates are suspended will submit interim rates to avoid the almost certain losses that would accrue were the commencement of service postponed altogether.

time when it has under consideration the lawfulness of a proposed rate. See Part II, *supra.* The foundation for a suspension is the Commission's conclusion that a proposed rate is probably unreasonable or unjust. See, *e. g., TAPS,* 355 I. C. C., at 81–82. To make such a determination, the Commission is obviously required to form a tentative opinion about the location of the line between the just and the unjust, the reasonable and the unreasonable. Moreover, the Commission is required by § 15 (7) to set out its reasons in writing for suspending a tariff. The usual and sufficient reason will be that the Commission has found a proposed tariff to fall on the unjust or unreasonable side of the line it has drawn, and it is a reason of precisely this sort that the Commission has given here. See 355 I. C. C., at 81–83.

Petitioners do not apparently disagree that the Commission can suspend a tariff because it falls on the wrong side of the line of reasonableness, but they would prevent the Commission in suspending a tariff from stating, as it did here, where the tentative dividing line lies. Such a statement, they say, is ratemaking. But this is untenable: No principle of law requires the Commission to engage in a pointless charade in which carriers desiring to exercise their § 6 (3) rights are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect. The administrative process, after all, is not modeled on "The Price is Right." What the Commission did here, therefore, far from being condemnable, is an intelligent and practical exercise of its suspension power which is thoroughly in accord with Congress' goal, recognized in *Arrow,* 372 U. S., at 664–666; see *United States* v. *SCRAP,* 412 U. S. 669, 697 (1973), to strike a fair balance between the needs of the public and the needs of regulated carriers. Indeed, the Commission might well have been derelict in its duty had it insisted on charade once it had determined that there was a way TAPS could operate without harm to the

public. Cf. *Arrow, supra; SCRAP, supra;* 43 U. S. C. § 1651 (a) (1970 ed., Supp. V) (congressional policy favors "[t]he early development and delivery of oil . . . from Alaska's North Slope to domestic markets").

V

Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such period. They point to the absence of any express authority for such refund provisions and also to the fact that § 15 (7) does provide expressly for refunds in a limited category of circumstances, namely, where there is an "increased rate or charge for or in respect to the transportation of property," which has become effective at the end of a suspension period. This statutory pattern, they suggest, indicates that Congress considered and rejected any broader refund scheme, thereby curtailing any ancillary power to order refund provisions that the Commission might otherwise have.

In response, we note first that we have already recognized in *Chessie* that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in *Chessie* to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direc[t] relat[ionship]" between the power asserted and the Commission's "mandate to assess the reasonableness of . . . rates and to suspend them pending investigation if there is a question as to their legality." 426 U. S., at 514. Applying this test, we found in *Chessie* a direct relationship which justified the Commission in insisting that the proceeds of proposed general railroad rate increases be used to pay for deferred maintenance. If such a use was made of the proceeds,

the rates were reasonable; but they might not be reasonable if put to other purposes. *Ibid.* We also noted that "[d]elay through suspension would only have aggravated the already poor condition of some of the railroads." *Ibid.* Thus, we approved the deferred maintenance condition essentially because it was necessary to strike a proper balance between the interests of the carriers and the interests of the public.

The situation here is very similar. Even a cursory glance at the pleadings before the Commission shows that extended adjudicatory proceedings will be required to resolve the question of precisely what are fair rates. Accordingly, it is not apparent how the Commission could discharge its mandate under § 15 (7) summarily "to assess the reasonableness of [TAPS] rates," 426 U. S., at 514, while considering the interest of the TAPS carriers in beginning operations, unless it could make gross approximations of the sort it made in this proceeding, in which it essentially accepted carrier-supplied data as true and properly included in the TAPS rate base notwithstanding protests to the contrary. See *TAPS, supra,* at 83; *supra,* at 636, and n. 12. But if such approximations are to be used to meet the needs of carriers, it is plain that refund provisions are a necessary and "directly related," *Chessie,* 426 U. S., at 514, means of discharging the Commission's other mandate to protect the public pending a more complete determination of the reasonableness of the TAPS rates.

Thus, here as in *Chessie,* the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe[r] an alternative tailored far more precisely to the particular circumstances" of these cases. *Ibid.* Since, again as in *Chessie,* the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should

be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result.

We turn, therefore, to the language in § 15 (7) on which petitioners rely. This language was not part of the Mann-Elkins Act, but was added by the Transportation Act of 1920. See § 418 of the latter Act, 41 Stat. 484, 487. Section 418 rearranged the paragraphs of § 15 of the Interstate Commerce Act and made numerous modifications to the text of that section. Among other things, § 418 reduced the suspension period created by the Mann-Elkins Act from 10 months to 120 days. According to Commissioner Clark, this change was intended to alleviate complaints by the railroads that the 10-month period too long deprived them of needed revenue in the situation in which proposed rates were ultimately determined to be reasonable. See 1 Hearings on H. R. 4378 before the House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., 30–31 (1919). To protect shippers, the reduction in the suspension period was counterbalanced with a provision authorizing the Commission to require carriers to keep account of and refund amounts collected under tariffs which became effective after a 120-day suspension. See *ibid.* The provisions were summarized in the Report of the Conference Committee which described the provisions of the House bill which provided the text of § 418:

> "[The House bill provided that] as to freight rates the carrier should keep a record in all cases where the commission had not concluded such hearing, and, if the commission finally found the rates too high, the carrier was required to make refunds to the shippers affected." H. R. Conf. Rep. No. 650, 66th Cong., 2d Sess., 66 (1920).

This passage, which declares that Congress sought to protect the public in *"all cases"* in which a hearing had not been concluded by the termination of the suspension period, certainly cannot be read to indicate that Congress placed any

emphasis on the word "increased" or intended to limit the Commission's ancillary powers. Indeed, the House Report on the same bill, H. R. Rep. No. 456, 66th Cong., 1st Sess., 20–21 (1919), appears to refer to "increased" rates only to distinguish them from "decreased" rates, over which the 1920 Act for the first time gave the Commission some authority by conferring power to set minimum rates, see *id.*, at 19, and as to which there is no need to create a refund procedure to protect shippers. From this very sketchy history, therefore, it seems that Congress' purpose was to create a remedy less cumbersome than the reparations procedure to protect shippers whenever they could be harmed due to the shortened suspension period created by the 1920 Act. See *Arrow,* 372 U. S., at 665–666. Accordingly, we conclude that nothing in the Transportation Act precludes what the Commission has done here and, moreover, that the Commission's actions are completely consistent with what Congress intended when it drafted the 1920 Act.

VI

For the reasons stated above, the judgment below is in all respects

*Affirmed.*

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

# MONELL ET AL. *v.* DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL.

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

No. 75–1914. Argued November 2, 1977—Decided June 6, 1978

Petitioners, female employees of the Department of Social Services and the Board of Education of the city of New York, brought this class action against the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor under 42 U. S. C. § 1983, which provides that every "person" who, under color of any statute, ordinance, regulation, custom, or usage of any State subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party. In each case, the individual defendants were sued solely in their official capacities. The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The District Court found that petitioners' constitutional rights had been violated, but held that petitioners' claims for injunctive relief were mooted by a supervening change in the official maternity leave policy. That court further held that *Monroe* v. *Pape*, 365 U. S. 167, barred recovery of backpay from the Department, the Board, and the city. In addition, to avoid circumvention of the immunity conferred by *Monroe*, the District Court held that natural persons sued in their official capacities as officers of a local government also enjoy the immunity conferred on local governments by that decision. The Court of Appeals affirmed on a similar theory. *Held:*

1. In *Monroe* v. *Pape*, *supra*, after examining the legislative history of the Civil Rights Act of 1871, now codified as 42 U. S. C. § 1983, and particularly the rejection of the so-called Sherman amendment, the Court held that Congress in 1871 doubted its constitutional authority to impose civil liability on municipalities and therefore could not have intended to include municipal bodies within the class of "persons" subject to the Act. Re-examination of this legislative history compels the conclusion that Congress in 1871 would *not* have thought § 1983 constitutionally infirm if it applied to local governments. In addition, that history confirms that local governments were intended to be included

among the "persons" to which § 1983 applies. Accordingly, *Monroe* v. *Pape* is overruled insofar as it holds that local governments are wholly immune from suit under § 1983. Pp. 664–689.

2. Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. Pp. 690–691.

3. On the other hand, the language and legislative history of § 1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tortfeasor—in other words, a local government cannot be held liable under § 1983 on a *respondeat superior* theory. Pp. 691–695.

4. Considerations of *stare decisis* do not counsel against overruling *Monroe* v. *Pape* insofar as it is inconsistent with this opinion. Pp. 695–701.

(a) *Monroe* v. *Pape* departed from prior practice insofar as it completely immunized municipalities from suit under § 1983. Moreover, since the reasoning of *Monroe* does not allow a distinction to be drawn between municipalities and school boards, this Court's many cases holding school boards liable in § 1983 actions are inconsistent with *Monroe*, especially as the principle of that case was extended to suits for injunctive relief in *City of Kenosha* v. *Bruno*, 412 U. S. 507. Pp. 695–696.

(b) Similarly, extending absolute immunity to school boards would be inconsistent with several instances in which Congress has refused to immunize school boards from federal jurisdiction under § 1983. Pp. 696–699.

(c) In addition, municipalities cannot have arranged their affairs on an assumption that they can violate constitutional rights for an indefinite period; accordingly, municipalities have no reliance interest that would support an absolute immunity. Pp. 699–700.

(d) Finally, it appears beyond doubt from the legislative history of the Civil Rights Act of 1871 that *Monroe* misapprehended the meaning of the Act. Were § 1983 unconstitutional as to local governments, it would have been equally unconstitutional as to state or local officers,

yet the 1871 Congress clearly intended § 1983 to apply to such officers and all agreed that such officers could constitutionally be subjected to liability under § 1983. The Act also unquestionably was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, without a clear statement in the legislative history, which is not present, there is no justification for excluding municipalities from the "persons" covered by § 1983. Pp. 700–701.

5. Local governments sued under § 1983 cannot be entitled to an absolute immunity, lest today's decision "be drained of meaning," *Scheuer* v. *Rhodes*, 416 U. S. 232, 248. P. 701.

532 F. 2d 259, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined, and in Parts I, III, and V of which STEVENS, J., joined. POWELL, J., filed a concurring opinion, *post*, p. 704. STEVENS, J., filed a statement concurring in part, *post*, p. 714. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 714.

*Oscar Chase* argued the cause for petitioners. With him on the briefs were *Nancy Stearns, Jack Greenberg,* and *Eric Schnapper.*

*L. Kevin Sheridan* argued the cause for respondents. With him on the brief was *W. Bernard Richland.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and of the Board of Education of the city of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.[1] The gravamen of the complaint was that the

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**Michael H. Gottesman, Robert M. Weinberg, David Rubin, Albert E. Jenner, Jr., Robert A. Murphy,* and *William E. Caldwell* filed a brief for the National Education Assn. et al. as *amici curiae* urging reversal.

[1] The complaint was amended on September 14, 1972, to allege a claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e et seq. (1970 ed. and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to

Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.[2] Cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974). The suit sought injunctive relief and backpay for periods of unlawful forced leave. Named as defendants in the action were the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor. In each case, the individual defendants were sued solely in their official capacities.[3]

On cross-motions for summary judgment, the District Court for the Southern District of New York held moot petitioners' claims for injunctive and declaratory relief since the city of New York and the Board, after the filing of the complaint, had changed their policies relating to maternity leaves so that no pregnant employee would have to take leave unless she was medically unable to continue to perform her job. 394 F. Supp. 853, 855 (1975). No one now challenges this conclu-

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discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261–262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

[2] The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶ 28, App. 13–14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32–33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint ¶¶ 39, 42, 45, App. 18–19, 21. This allegation was denied. Answer ¶¶ 18, 22, App. 35, 37.

[3] Amended Complaint ¶ 24, App. 11–12.

sion. The court did conclude, however, that the acts complained of were unconstitutional under *LaFleur, supra.* 394 F. Supp., at 855. Nonetheless plaintiffs' prayers for backpay were denied because any such damages would come ultimately from the city of New York and, therefore, to hold otherwise would be to "circumven[t]" the immunity conferred on municipalities by *Monroe* v. *Pape,* 365 U. S. 167 (1961). See 394 F. Supp., at 855.

On appeal, petitioners renewed their arguments that the Board of Education [4] was not a "municipality" within the meaning of *Monroe* v. *Pape, supra,* and that, in any event, the District Court had erred in barring a damages award against the individual defendants. The Court of Appeals for the Second Circuit rejected both contentions. The court first held that the Board of Education was not a "person" under § 1983 because "it performs a vital governmental function . . . , and, significantly, while it has the right to determine how the funds appropriated to it shall be spent . . . , it has no final say in deciding what its appropriations shall be." 532 F. 2d 259, 263 (1976). The individual defendants, however, were "persons" under § 1983, even when sued solely in their official capacities. 532 F. 2d, at 264. Yet, because a damages award would "have to be paid by a city that was held not to be amenable to such an action in *Monroe* v. *Pape,*" a damages action against officials sued in their official capacities could not proceed. *Id.,* at 265.

We granted certiorari in this case, 429 U. S. 1071, to consider

> "Whether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U. S. C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" Pet. for Cert. 8.

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[4] Petitioners conceded that the Department of Social Services enjoys the same status as New York City for *Monroe* purposes. See 532 F. 2d, at 263.

Although, after plenary consideration, we have decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board [5]—and, indeed, in some of which § 1983 and its jurisdictional counterpart, 28 U. S. C. § 1343, provided the only basis for jurisdiction[6]—we indicated in *Mt. Healthy City Board of Education* v. *Doyle,* 429 U. S. 274, 279 (1977), last Term that the question presented here was open and would be decided "another day." That other day has come and we now overrule *Monroe* v. *Pape, supra,* insofar as it holds that local governments are wholly immune from suit under § 1983.[7]

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[5] *Milliken* v. *Bradley,* 433 U. S. 267 (1977); *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Vorchheimer* v. *School District of Philadelphia,* 430 U. S. 703 (1977); *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976); *Milliken* v. *Bradley,* 418 U. S. 717 (1974); *Bradley* v. *Richmond School Board,* 416 U. S. 696 (1974); *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974); *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189 (1973); *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *Northcross* v. *Memphis Board of Education,* 397 U. S. 232 (1970); *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 226 (1969); *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969); *Kramer* v. *Union Free School District,* 395 U. S. 621 (1969); *Tinker* v. *Des Moines Independent School District,* 393 U. S. 503 (1969); *Monroe* v. *Board of Comm'rs,* 391 U. S. 450 (1968); *Raney* v. *Board of Education,* 391 U. S. 443 (1968); *Green* v. *New Kent County School Board,* 391 U. S. 430 (1968); *Abington School District* v. *Schempp,* 374 U. S. 203 (1963); *Goss* v. *Board of Education,* 373 U. S. 683 (1963); *McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Orleans Parish School Board* v. *Bush,* 365 U. S. 569 (1961); *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

[6] *Cleveland Board of Education* v. *LaFleur, supra,* at 636; App. in *Keyes* v. *School District No. 1, Denver, Colo.,* O. T. 1972, No. 71–507, p. 4a; App. in *Swann* v. *Charlotte-Mecklenburg Board of Education,* O. T. 1970, No. 281, p. 465a; Pet. for Cert. in *Northcross* v. *Memphis Board of Education,* O. T. 1969, No. 1136, p. 3; *Tinker* v. *Des Moines Independent School District, supra,* at 504; *McNeese* v. *Board of Education, supra,* at 671.

[7] However, we do uphold *Monroe* v. *Pape* insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities

I

In *Monroe* v. *Pape,* we held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." 365 U. S., at 187. The sole basis for this conclusion was an inference drawn from Congress' rejection of the "Sherman amendment" to the bill which became the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The amendment would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons "riotously and tumultuously assembled." [8] Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (hereinafter Globe). Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because " 'the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law.' " 365 U. S., at 190 (emphasis added), quoting Globe 804 (Rep. Poland). This statement, we thought, showed that Congress doubted its "constitutional power . . . to impose *civil liability* on municipalities," 365 U. S., at 190 (emphasis added), and that such doubt would have extended to any type of civil liability.[9]

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liable under § 1983 for the constitutional torts of their employees. See Part II, *infra.*

[8] We expressly declined to consider "policy considerations" for or against municipal liability. See 365 U. S., at 191.

[9] Mr. Justice Douglas, the author of *Monroe,* has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities. See *City of Kenosha* v. *Bruno,* 412 U. S. 507, 517–520

A fresh analysis of the debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the "obligation" of which Representative Poland spoke with "civil liability."

A. An Overview

There are three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H. R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." H. R. 320 contained four sections. Section 1, now codified as 42 U. S. C. § 1983, was the subject of only limited debate and was passed without amendment.[10] Sections 2 through 4 dealt primarily with the "other purpose" of suppressing Ku Klux Klan violence in the Southern States.[11] The wisdom and constitutionality of these sections—not § 1, now § 1983—were the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H. R. 320 on April 7, 1871, and one week later the Senate also voted out a bill.[12] Again, debate on § 1 of the bill was limited and that section was passed as introduced.

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(1973). However, this view has never been shared by the Court, see *Monroe* v. *Pape*, 365 U. S., at 190; *Moor* v. *County of Alameda*, 411 U. S. 693, 708 (1973), and the debates do not support this position.

[10] Globe 522.

[11] Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily those thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App. 335–336 (1871) (hereinafter Globe App.).

[12] Globe 709.

Immediately prior to the vote on H. R. 320 in the Senate, Senator Sherman introduced his amendment.[13] This was *not* an amendment to § 1 of the bill, but was to be added as § 7 at the end of the bill. Under the Senate rules, no discussion of the amendment was allowed and, although attempts were made to amend the amendment, it was passed as introduced. In this form, the amendment did *not* place liability on municipal corporations, but made any inhabitant of a municipality liable for damage inflicted by persons "riotously and tumultuously assembled." [14]

The House refused to acquiesce in a number of amendments made by the Senate, including the Sherman amendment, and the respective versions of H. R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.

On April 18, 1871, the first conference committee completed its work on H. R. 320. The main features of the conference committee draft of the Sherman amendment were these: [15] First, a cause of action was given to persons injured by

> "any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . ."

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[13] See *id.*, at 663, quoted in Appendix to this opinion, *infra*, at 702–703.

[14] *Ibid.* An action for recovery of damages was to be in the federal courts and denominated as a suit against the county, city, or parish in which the damage had occurred. *Ibid.* Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant. *Ibid.*

[15] See Globe 749 and 755, quoted in Appendix to this opinion, *infra*, at 703–704.

Second, the bill provided that the action would be against the county, city, or parish in which the riot had occurred and that it could be maintained by either the person injured or his legal representative. Third, unlike the amendment as proposed, the conference substitute made the government defendant liable on the judgment if it was not satisfied against individual defendants who had committed the violence. If a municipality were liable, the judgment against it could be collected

> "by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment [would become] a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof."

In the ensuing debate on the first conference report, which was the first debate of any kind on the Sherman amendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property "responsible" for Ku Klux Klan damage.[16] Statutes drafted on a similar theory, he stated, had long been in force in England and were in force in 1871 in a number of States.[17]

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[16] "Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome." Globe 761.

Senator Sherman was apparently unconcerned that the conference committee substitute, unlike the original amendment, did not place liability for riot damage directly on the property of the well-to-do, but instead placed it on the local government. Presumably he assumed that taxes would be levied against the property of the inhabitants to make the locality whole.

[17] According to Senator Sherman, the law had originally been adopted in England immediately after the Norman Conquest and had most recently been promulgated as the law of 7 & 8 Geo. 4, ch. 31 (1827). See Globe

Nonetheless there were critical differences between the conference substitute and extant state and English statutes: The conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.[18]

The first conference substitute passed the Senate but was rejected by the House. House opponents, within whose ranks were some who had supported § 1, thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. And, because of this constitutional objection, opponents of the Sherman amendment were unwilling to impose damages liability for nonperformance of a duty which Congress could not require municipalities to perform. This position is reflected in Representative Poland's statement that is quoted in *Monroe*.[19]

Because the House rejected the first conference report a second conference was called and it duly issued its report. The second conference substitute for the Sherman amendment abandoned municipal liability and, instead, made "any per-

760. During the course of the debates, it appeared that Kentucky, Maryland, Massachusetts, and New York had similar laws. See *id.*, at 751 (Rep. Shellabarger); *id.*, at 762 (Sen. Stevenson); *id.*, at 771 (Sen. Thurman); *id.*, at 792 (Rep. Butler). Such a municipal liability was apparently common throughout New England. See *id.*, at 761 (Sen. Sherman).

[18] In the Senate, opponents, including a number of Senators who had voted for § 1 of the bill, criticized the Sherman amendment as an imperfect and impolitic rendering of the state statutes. Moreover, as drafted, the conference substitute could be construed to protect rights that were not protected by the Constitution. A complete critique was given by Senator Thurman. See Globe 770–772.

[19] See 365 U. S., at 190, quoted *supra*, at 664.

son or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same," who did not attempt to stop the same, liable to any person injured by the conspiracy.[20] The amendment in this form was adopted by both Houses of Congress and is now codified as 42 U. S. C. § 1986.

The meaning of the legislative history sketched above can most readily be developed by first considering the debate on the report of the first conference committee. This debate shows conclusively that the constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based, see *supra,* at 664—would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. Because § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be included within the "persons" to whom that section applies.

### B. Debate on the First Conference Report

The style of argument adopted by both proponents and opponents of the Sherman amendment in both Houses of Congress was largely legal, with frequent references to cases decided by this Court and the Supreme Courts of the several States. Proponents of the Sherman amendment did not, however, discuss in detail the argument in favor of its constitutionality. Nonetheless, it is possible to piece together such an argument from the debates on the first conference report and those on § 2 of the civil rights bill, which, because it allowed the Federal Government to prosecute crimes "in the States," had also raised questions of federal power. The account of Representative Shellabarger, the House sponsor of H. R. 320, is the most complete.

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[20] See Globe 804, quoted in Appendix to this opinion, *infra,* at 704.

Shellabarger began his discussion of H. R. 320 by stating that "there is a domain of constitutional law involved in the right consideration of this measure which is wholly unexplored." Globe App. 67. There were analogies, however. With respect to the meaning of § 1 of the Fourteenth Amendment, and particularly its Privileges or Immunities Clause, Shellabarger relied on the statement of Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (CC ED Pa. 1825), which defined the privileges protected by Art. IV:

> "'What these fundamental privileges are[,] it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government;'—
>
> "*Mark that*—
>
> "'*protection by the Government;* the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . .'" Globe App. 69 (emphasis added), quoting 4 Wash. C. C., at 380–381.

Building on his conclusion that citizens were owed protection—a conclusion not disputed by opponents of the Sherman amendment [21]—Shellabarger then considered Congress' role in providing that protection. Here again there were precedents:

> "[Congress has always] assumed to enforce, as against

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[21] See Globe 758 (Sen. Trumbull); *id.*, at 772 (Sen. Thurman); *id.*, at 791 (Rep. Willard). The Supreme Court of Indiana had so held in giving effect to the Civil Rights Act of 1866. See *Smith* v. *Moody*, 26 Ind. 299 (1866) (following *Coryell*), one of three State Supreme Court cases referred to in Globe App. 68 (Rep. Shellabarger). Moreover, § 2 of the 1871 Act as passed, unlike § 1, prosecuted persons who violated federal rights whether or not that violation was under color of official authority, apparently on the theory that Ku Klux Klan violence was infringing the right of protection defined by *Coryell*. Nonetheless, opponents argued that municipalities were not generally charged by the States with keeping

the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art. I, § 10,] relate to the divisions of the political powers of the State and General Governments. . . . These prohibitions upon political powers of the States are all of such nature that they can be, and even have been, . . . enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.

"These three are: first, that as to fugitives from justice; [22] second, that as to fugitives from service, (or slaves;) [23] third, that declaring that the 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' [24]

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the peace and hence did not have police forces, so that the duty to afford protection ought not devolve on the municipality, but on whatever agency of state government was charged by the State with keeping the peace. See *infra,* at 673, and n. 30. In addition, they argued that Congress could not constitutionally add to the duties of municipalities. See *infra,* at 673–678.

[22] U. S. Const., Art. IV, § 2, cl. 2:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

[23] *Id.,* cl. 3:

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

[24] *Id.,* cl. 1.

> "And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect . . . such persons." Globe App. 69–70.

Of legislation mentioned by Shellabarger, the closest analog of the Sherman amendment, ironically, was the statute implementing the fugitives from justice and fugitive slave provisions of Art. IV—the Act of Feb. 12, 1793, 1 Stat. 302—the constitutionality of which had been sustained in 1842, in *Prigg* v. *Pennsylvania,* 16 Pet. 539. There, Mr. Justice Story, writing for the Court, held that Art. IV gave slaveowners a federal right to the unhindered possession of their slaves in whatever State such slaves might be found. 16 Pet., at 612. Because state process for recovering runaway slaves might be inadequate or even hostile to the rights of the slaveowner, the right intended to be conferred could be negated if left to state implementation. *Id.,* at 614. Thus, since the Constitution guaranteed the right and this in turn required a remedy, Story held it to be a "natural inference" that Congress had the power itself to ensure an appropriate (in the Necessary and Proper Clause sense) remedy for the right. *Id.,* at 615.

Building on *Prigg,* Shellabarger argued that a remedy against municipalities and counties was an appropriate—and hence constitutional—method for ensuring the protection which the Fourteenth Amendment made every citizen's federal right.[25] This much was clear from the adoption of such statutes by the several States as devices for suppressing riot.[26] Thus, said Shellabarger, the only serious question remaining

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[25] See Globe 751. See also *id.,* at 760 (Sen. Sherman) ("If a State may . . . pass a law making a county . . . responsible for a riot in order to deter such crime, then we may pass the same remedies . . .").

[26] *Id.,* at 751; see n. 17, *supra.*

was "whether, since a county is an integer or part of a State, the United States can impose upon it, as such, *any obligations to keep the peace* in obedience to United States laws." [27] This he answered affirmatively, citing *Board of Comm'rs* v. *Aspinwall,* 24 How. 376 (1861), the first of many cases [28] upholding the power of federal courts to enforce the Contract Clause against municipalities.[29]

House opponents of the Sherman amendment—whose views are particularly important since only the House voted down the amendment—did not dispute Shellabarger's claim that the Fourteenth Amendment created a federal right to protection, see n. 21, *supra,* but they argued that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities. The most complete statement of this position is that of Representative Blair: [30]

"The proposition known as the Sherman amend-

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[27] Globe 751 (emphasis added). Compare this statement with Representative Poland's remark upon which our holding in *Monroe* was based. See *supra,* at 664.

[28] See, *e. g., Gelpcke* v. *Dubuque,* 1 Wall. 175 (1864); *Von Hoffman* v. *City of Quincy,* 4 Wall. 535 (1867); *Riggs* v. *Johnson County,* 6 Wall. 166 (1868); *Weber* v. *Lee County,* 6 Wall. 210 (1868); *Supervisors* v. *Rogers,* 7 Wall. 175 (1869); *Benbow* v. *Iowa City,* 7 Wall. 313 (1869); *Supervisors* v. *Durant,* 9 Wall. 415 (1870). See generally 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888, chs. 17–18 (1971).

[29] See Globe 751–752.

[30] Others taking a view similar to Representative Blair's included: Representative Willard, see *id.,* at 791; Representative Poland, see *id.,* at 794; Representative Burchard, see *id.,* at 795; Representative Farnsworth, see *id.,* at 799. Representative Willard also took a somewhat different position: He thought that the Constitution would not allow the Federal

ment . . . is entirely new. It is altogether without a precedent in this country. . . . That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. . . .

". . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to

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Government to dictate the manner in which a State fulfilled its obligation of protection. That is, he thought it a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc. He did not doubt, however, that the Federal Government could impose on the *States* the obligation imposed by the Sherman amendment, and presumably he would have enforced the amendment against a municipal corporation to which the peacekeeping obligation had been delegated. See *id.*, at 791.

Opponents of the Sherman amendment in the Senate agreed with Blair that Congress had no power to pass the Sherman amendment because it fell outside limits on national power implicit in the federal structure of the Constitution and recognized in, *e. g.*, *Collector* v. *Day*, 11 Wall. 113 (1871). However, the Senate opponents focused not on the amendment's attempt to obligate municipalities to keep the peace, but on the lien created by the amendment, which ran against *all* money and property of a defendant municipality, including property held for public purposes, such as jails or courthouses. Opponents argued that such a lien once entered would have the effect of making it impossible for the municipality to function, since no one would trade with it. See, *e. g.*, Globe 762 (Sen. Stevenson); *id.*, at 763 (Sen. Casserly). Moreover, everyone knew that sound policy prevented execution against public property since this, too, was needed if local government was to survive. See, *e. g.*, *ibid.* See also *Meriwether* v. *Garrett*, 102 U. S. 472, 501, 513 (1880) (recognizing principle that public property of a municipality was not subject to execution); 2 J. Dillon, The Law of Municipal Corporations §§ 445–446 (1873 ed.) (same).

Although the arguments of the Senate opponents appear to be a correct analysis of then-controlling constitutional and common-law principles, their arguments are not relevant to an analysis of the constitutionality of § 1 of the Civil Rights Act since any judgment under that section, as in any civil suit in the federal courts in 1871, would have been enforced pursuant to *state* laws under the Process Acts of 1792 and 1828. See Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of May 19, 1828, 4 Stat. 278.

create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. . . .

". . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .

"Now, only the other day, the Supreme Court . . . decided [in *Collector* v. *Day,* 11 Wall. 113 (1871)] that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a State officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the States in any respect. It was held also in the case of Prigg *vs.* Pennsylvania [16 Pet. 539 (1842)] that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty." Globe 795.

Any attempt to impute a unitary constitutional theory to opponents of the Sherman amendment is, of course, fraught

with difficulties, not the least of which is that most Members of Congress did not speak to the issue of the constitutionality of the amendment. Nonetheless, two considerations lead us to conclude that opponents of the Sherman amendment found it unconstitutional substantially because of the reasons stated by Representative Blair: First, Blair's analysis is precisely that of Poland, whose views were quoted as authoritative in *Monroe,* see *supra,* at 664, and that analysis was shared in large part by all House opponents who addressed the constitutionality of the Sherman amendment.[31] Second, Blair's exegesis of the reigning constitutional theory of his day, as we shall explain, was clearly supported by precedent—albeit precedent that has not survived, see *Ex parte Virginia,* 100 U. S. 339, 347–348 (1880); *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 486 (1939)—and no other constitutional formula was advanced by participants in the House debates.

*Collector* v. *Day,* cited by Blair, was the clearest and, at the time of the debates, the most recent pronouncement of a doctrine of coordinate sovereignty that, as Blair stated, placed limits on even the enumerated powers of the National Government in favor of protecting state prerogatives. There, the Court held that the United States could not tax the income of Day, a Massachusetts state judge, because the independence of the States within their legitimate spheres would be imperiled if the instrumentalities through which States executed their powers were "subject to the control of another and distinct government." 11 Wall., at 127. Although the Court in *Day* apparently rested this holding in part on the proposition that the taxing "power acknowledges no limits but the will of the legislative body imposing the tax," *id.,* at 125–126; cf. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), the Court had in other cases limited other national powers in order to avoid interference with the States.[32]

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[31] See n. 30, *supra.*

[32] In addition to the cases discussed in the text, see *Lane County* v. *Ore-*

In *Prigg* v. *Pennsylvania,* for example, Mr. Justice Story, in addition to confirming a broad national power to legislate under the Fugitive Slave Clause, see *supra,* at 672, held that Congress could not "insist that states . . . provide means to carry into effect the duties of the national government." 16 Pet., at 615–616.[33] And Mr. Justice McLean agreed that, "[a]s a general principle," it was true "that Congress had no power to impose duties on state officers, as provided in the [Act of Feb. 12, 1793]." Nonetheless he wondered whether Congress might not impose "positive" duties on state officers where a clause of the Constitution, like the Fugitive Slave Clause, seemed to require affirmative government assistance, rather than restraint of government, to secure federal rights. See *id.,* at 664–665.

Had Mr. Justice McLean been correct in his suggestion that, where the Constitution envisioned affirmative government assistance, the States or their officers or instrumentalities could be required to provide it, there would have been little doubt that Congress could have insisted that municipalities afford by "positive" action the protection [34] owed individuals under § 1 of the Fourteenth Amendment whether or not municipalities were obligated by state law to keep the peace. However, any such argument, largely foreclosed by *Prigg,* was made

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*gon,* 7 Wall. 71, 77, 81 (1869), in which the Court held that the federal Legal Tender Acts should not be construed to require the States to accept taxes tendered in United States notes since this might interfere with a legitimate state activity.

[33] Mr. Chief Justice Taney agreed:

"The state officers mentioned in the law [of 1793] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it." 16 Pet., at 630 (concurring in part).

[34] See *supra,* at 670, and n. 21.

impossible by the Court's holding in *Kentucky* v. *Dennison*, 24 How. 66 (1861). There, the Court was asked to require Dennison, the Governor of Ohio, to hand over Lago, a fugitive from justice wanted in Kentucky, as required by § 1 of the Act of Feb. 12, 1793,[35] which implemented Art. IV, § 2, cl. 2, of the Constitution. Mr. Chief Justice Taney, writing for a unanimous Court, refused to enforce that section of the Act:

> "[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How., at 107–108.

The rationale of *Dennison*—that the Nation could not impose duties on state officers since that might impede States in their legitimate activities—is obviously identical to that which animated the decision in *Collector* v. *Day*. See *supra*, at 676. And, as Blair indicated, municipalities as instrumentalities through which States executed their policies could be equally disabled from carrying out state policies if they were also obligated to carry out federally imposed duties. Although no one cited *Dennison* by name, the principle for which it

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[35] "*Be it enacted* . . . That whenever the executive authority of any state in the Union . . . shall demand any person as a fugitive from justice . . . and shall moreover produce the copy of an indictment found . . . charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state . . . from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured . . . and to cause the fugitive to be delivered to such agent [of the demanding State] when he shall appear . . . ." 1 Stat. 302.

stands was well known to Members of Congress,[36] many of whom discussed *Day* [37] as well as a series of State Supreme Court cases [38] in the mid-1860's which had invalidated a federal tax on the process of state courts on the ground that the tax threatened the independence of a vital state function.[39] Thus, there was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States." Globe 795.

If municipal liability under § 1 of the Civil Rights Act of 1871 created a similar Hobson's choice, we might conclude, as *Monroe* did, that Congress could not have intended municipalities to be among the "persons" to which that section applied. But this is not the case.

First, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment. Representative Poland, for example, reasoning from Contract Clause precedents, indicated that Congress could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities

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[36] "The Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer." Globe 799 (Rep. Farnsworth). See also *id.*, at 788–789 (Rep. Kerr).

[37] See, *e. g.*, *id.*, at 764 (Sen. Davis); *ibid.* (Sen. Casserly); *id.*, at 772 (Sen. Thurman) (reciting logic of *Day*); *id.*, at 777 (Sen. Frelinghuysen); *id.*, at 788–789 (Rep. Kerr) (reciting logic of *Day*); *id.*, at 793 (Rep. Poland); *id.*, at 799 (Rep. Farnsworth) (also reciting logic of *Day*).

[38] *Warren* v. *Paul,* 22 Ind. 276 (1864); *Jones* v. *Estate of Keep,* 19 Wis. 369 (1865); *Fifield* v. *Close,* 15 Mich. 505 (1867); *Union Bank* v. *Hill,* 43 Tenn. 325 (1866); *Smith* v. *Short,* 40 Ala. 385 (1867).

[39] See Globe 764 (Sen. Davis); *ibid.* (Sen. Casserly). See also T. Cooley, Constitutional Limitations *483–*484 (1871 ed.).

liable for using their authorized powers in violation of the Constitution—which is as far as § 1 of the Civil Rights Act went:

> "I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever." Globe 794.

Representative Burchard agreed:

> "[T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties . . . do not have any control of the police . . . ." *Id.*, at 795.

See also the views of Rep. Willard, discussed at n. 30, *supra*.

Second, the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. Under the theory of dual sovereignty set out in *Prigg*, this is quite understandable. So long as federal courts were vindicating the Federal Constitution, they were providing the "positive" government action

required to protect federal constitutional rights and no question was raised of enlisting the States in "positive" action. The limits of the principles announced in *Dennison* and *Day* are not so well defined in logic, but are clear as a matter of history. It must be remembered that the same Court which rendered *Day* also vigorously enforced the Contract Clause against municipalities—an enforcement effort which included various forms of "positive" relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found.[40] Thus, federal judicial enforcement of the Constitution's express limits on state power, since it was done so frequently, must, notwithstanding anything said in *Dennison* or *Day,* have been permissible, at least so long as the interpretation of the Constitution was left in the hands of the judiciary. Since § 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against munici-

[40] See cases cited in n. 28, *supra.* Since this Court granted unquestionably "positive" relief in Contract Clause cases, it appears that the distinction between the Sherman amendment and those cases was not that the former created a positive obligation whereas the latter imposed only a negative restraint. Instead, the distinction must have been that a violation of the Constitution was the predicate for "positive" relief in the Contract Clause cases, whereas the Sherman amendment imposed damages without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages. See *supra,* at 668. While no one stated this distinction expressly during the debates, the inference is strong that Congressmen in 1871 would have drawn this distinction since it explains why Representatives Poland, Burchard, and Willard, see *supra,* at 680, could oppose the amendment while at the same time saying that the Federal Government might impose damages on a local government that had defaulted in a state-imposed duty to keep the peace, and it also explains why everyone agreed that a state or municipal officer could constitutionally be held liable under § 1 for violations of the Constitution. See *infra,* at 682–683.

palities—there is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.

Finally, the very votes of those Members of Congress, who opposed the Sherman amendment but who had voted for § 1, confirm that the liability imposed by § 1 was something very different from that imposed by the amendment. Section 1 without question could be used to obtain a damages judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of law.[41] However, for *Prigg-Dennison-Day* purposes, as Blair and others recognized,[42] there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State: Both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power. *Dennison* and *Day*, after all, were not suits against municipalities but against *officers*, and Blair was quite conscious that he was extending these cases by applying them to municipal corporations.[43] Nonetheless, Senator Thurman, who gave the most exhaustive critique of § 1—*inter alia*, complaining that it would be applied to state officers, see Globe App. 217—and who opposed both § 1 and the Sherman amendment, the latter on *Prigg* grounds, agreed unequivocally that § 1 was constitu-

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[41] See, *e. g.*, Globe 334 (Rep. Hoar); *id.*, at 365 (Rep. Arthur); *id.*, at 367–368 (Rep. Sheldon); *id.*, at 385 (Rep. Lewis); Globe App. 217 (Sen. Thurman). In addition, officers were included among those who could be sued under the second conference substitute for the Sherman amendment. See Globe 805 (exchange between Rep. Willard and Rep. Shellabarger). There were no constitutional objections to the second report.

[42] See *id.*, at 795 (Rep. Blair); *id.*, at 788 (Rep. Kerr); *id.*, at 795 (Rep. Burchard); *id.*, at 799 (Rep. Farnsworth).

[43] "[W]e cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality . . . ." *Id.*, at 795.

tional.[44] Those who voted for § 1 must similarly have believed in its constitutionality despite *Prigg, Dennison,* and *Day.*

### C. Debate on § 1 of the Civil Rights Bill

From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under § 1—"any person"—covers more than natural persons. An examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal as well as natural persons.

Representative Shellabarger was the first to explain the function of § 1:

> "[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App. 68.

By extending a remedy to all people, including whites, § 1 went beyond the mischief to which the remaining sections of the 1871 Act were addressed. Representative Shellabarger also stated without reservation that the constitutionality of § 2 of the Civil Rights Act of 1866 controlled the constitutionality of § 1 of the 1871 Act, and that the former had been

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[44] See Globe App. 216–217, quoted in n. 45, *infra.* In 1880, moreover, when the question of the limits of the *Prigg* principle was squarely presented in *Ex parte Virginia,* 100 U. S. 339, this Court held that *Dennison* and *Day* and the principle of federalism for which they stand did not prohibit federal enforcement of § 5 of the Fourteenth Amendment through suits directed to state officers. See 100 U. S., at 345–348.

approved by "the supreme courts of at least three States of this Union" and by Mr. Justice Swayne, sitting on circuit, who had concluded: " 'We have no doubt of the constitutionality of every provision of this act.' " Globe App. 68. Representative Shellabarger then went on to describe how the courts would and should interpret § 1:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
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> " 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.'—1 *Story on Constitution,* sec. 429." Globe App., at 68.

The sentiments expressed in Representative Shellabarger's opening speech were echoed by Senator Edmunds, the manager of H. R. 320 in the Senate:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution." Globe 568.

> "[Section 1 is] so very simple and really reënact[s] the Constitution." *Id.*, at 569.

And he agreed that the bill "secure[d] the rights of white men as much as of colored men." *Id.*, at 696.

In both Houses, statements of the supporters of § 1 corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights.[45] Moreover, since municipalities through their official

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[45] Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution." Globe App. 81. He continued:

"The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.*, at 85.

Representative Perry, commenting on Congress' action in passing the civil rights bill also stated:

"Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." Globe 800.

See also *id.*, at 376 (Rep. Lowe); *id.*, at 428–429 (Rep. Beatty); *id.*, at 448 (Rep. Butler); *id.*, at 475–477 (Rep. Dawes); *id.*, at 578–579 (Sen. Trumbull); *id.*, at 609 (Sen. Pool); Globe App. 182 (Rep. Mercur).

Other supporters were quite clear that § 1 of the Act extended a remedy not only where a State had passed an unconstitutional statute, but also

acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1. Cf., *e. g., Ex parte Virginia,* 100 U. S. 339, 346–347 (1880); *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 286–287, 294–296 (1913). One need not rely on this inference alone, however, for the debates show that Members of Congress understood "persons" to include municipal corporations.

Representative Bingham, for example, in discussing § 1 of the bill, explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Barron* v. *Mayor of Baltimore,* 7 Pet. 243 (1833), especially in mind. "In [that] case the

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where officers of the State were deliberately indifferent to the rights of black citizens:

"But the chief complaint is . . . [that] by a systematic maladministration of [state law], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe [§ 5 of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.,* at 153 (Rep. Garfield). See also *Monroe* v. *Pape,* 365 U. S., at 171–187.

Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it swept very broadly. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said:

"This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which now does not belong to it—*a jurisdiction that may be constitutionally conferred upon it, I grant,* but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

. . . . . .

"*[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used.*" Globe App. 216–217 (emphasis added).

*city* had taken private property for public use, without compensation . . . , and there was no redress for the wrong . . . ." Globe App. 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings by cities, as had occurred in *Barron,* would be redressable under § 1 of the bill. See Globe App. 85. More generally, and as Bingham's remarks confirm, § 1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings.[46] Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.[47]

In addition, by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States* v. *Deveaux,* 5 Cranch 61, 86 (1809).[48] By 1844, however, the *Deveaux* doctrine was unhesitatingly abandoned:

"[A] corporation created by and doing business in a par-

[46] See 2 J. Story, Commentaries on the Constitution of the United States § 1956 (T. Cooley ed. 1873).

[47] Indeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. See *Sumner* v. *Philadelphia,* 23 F. Cas. 392 (No. 13,611) (CC ED Pa. 1873) (awarding damages of $2,273.36 and costs of $346.35 against the city of Philadelphia).

[48] Nonetheless, suits could be brought in federal court if the natural persons who were members of the corporation were of diverse citizenship from the other parties to the litigation. See 5 Cranch, at 91.

> ticular state, is to be deemed *to all intents and purposes as a person,* although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." *Louisville R. Co.* v. *Letson,* 2 How. 497, 558 (1844) (emphasis added), discussed in Globe 752.

And only two years before the debates on the Civil Rights Act, in *Cowles* v. *Mercer County,* 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts [49] and this fact was well known to Members of Congress.[50]

That the "usual" meaning of the word "person" would extend to municipal corporations is also evidenced by an Act of Congress which had been passed only months before the Civil Rights Act was passed. This Act provided that

> "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

Municipal corporations in 1871 were included within the phrase "bodies politic and corporate" [51] and, accordingly, the

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[49] See n. 28, *supra.*

[50] See, *e. g.,* Globe 777 (Sen. Sherman); *id.,* at 752 (Rep. Shellabarger) ("[C]ounties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States").

[51] See *Northwestern Fertilizing Co.* v. *Hyde Park,* 18 F. Cas. 393, 394 (No. 10,336) (CC ND Ill. 1873); 2 J. Kent, Commentaries on American Law *278–*279 (12th O. W. Holmes ed. 1873). See also *United States* v. *Maurice,* 2 Brock. 96, 109 (CC Va. 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a body politic and corporate"); Apps. D and E to Brief for Petitioners in *Monroe* v. *Pape,* O. T. 1960,

"plain meaning" of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act. Indeed, a Circuit Judge, writing in 1873 in what is apparently the first reported case under § 1, read the Dictionary Act in precisely this way in a case involving a corporate plaintiff and a municipal defendant.[52] See *Northwestern Fertilizing Co.* v. *Hyde Park*, 18 F. Cas. 393, 394 (No. 10,336) (CC ND Ill. 1873).[53]

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No. 39 (collecting state statutes which, in 1871, defined municipal corporations as bodies politic and corporate).

[52] The court also noted that there was no discernible reason why persons injured by municipal corporations should not be able to recover. See 18 F. Cas., at 394.

[53] In considering the effect of the Act of Feb. 25, 1871, in *Monroe*, however, Mr. Justice Douglas, apparently focusing on the word "may," stated: "[T]his definition [of person] is merely an allowable, not a mandatory, one." 365 U. S., at 191. A review of the legislative history of the Dictionary Act shows this conclusion to be incorrect.

There is no express reference in the legislative history to the definition of "person," but Senator Trumbull, the Act's sponsor, discussed the phrase "words importing the masculine gender *may* be applied to females," (emphasis added), which immediately precedes the definition of "person," and stated:

"The only object [of the Act] is to get rid of a great deal of verbosity in our statutes by providing that when the word 'he' is used it *shall* include females as well as males." Cong. Globe, 41st Cong., 3d Sess., 775 (1871) (emphasis added).

Thus, in Trumbull's view the word "may" meant "shall." Such a mandatory use of the extended meanings of the words defined by the Act is also required for it to perform its intended function—to be a guide to "rules of construction" of Acts of Congress. See *ibid.* (remarks of Sen. Trumbull). Were the defined words "allowable, [but] not mandatory" constructions, as *Monroe* suggests, there would be no "rules" at all. Instead, Congress must have intended the definitions of the Act to apply across-the-board except where the Act by its terms called for a deviation from this practice—"[where] the context shows that [defined] words were to be used in a more limited sense." Certainly this is how the *Northwestern Fertilizing* court viewed the matter. Since there is nothing in the "context" of § 1 of the Civil Rights Act calling for a restricted

## II

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.[54] Local governing bodies,[55] therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitu-

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interpretation of the word "person," the language of that section should prima facie be construed to include "bodies politic" among the entities that could be sued.

[54] There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken* v. *Bradley,* 433 U. S. 267, 291 (1977); see *Ex parte Virginia,* 100 U. S., at 347–348. For this reason, *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, *e. g., Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 456 (1976); *Lincoln County* v. *Luning,* 133 U. S. 529, 530 (1890). Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes.

[55] Since official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis—our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

tional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." [56]

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

We begin with the language of § 1983 as originally passed:

> "[*A*]*ny person who,* under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected,* any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such

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[56] See also Mr. Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369 (1940):

"It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." 17 Stat. 13 (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent.[57] See *Rizzo* v. *Goode,* 423 U. S. 362, 370–371 (1976).

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[57] Support for such a conclusion can be found in the legislative history. As we have indicated, there is virtually no discussion of § 1 of the Civil Rights Act. Again, however, Congress' treatment of the Sherman amendment gives a clue to whether it would have desired to impose *respondeat superior* liability.

The primary constitutional justification for the Sherman amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens as the Privileges or Immunities Clause of the Fourteenth Amendment required. See *supra,* at 670–673. And according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection. See Globe 761 (Sen. Sherman); *id.,* at 756 (Sen. Edmunds); *id.,* at 751–752 (Rep. Shellabarger). But other proponents of the amendment apparently viewed it as a form of vicarious liability for the unlawful acts of the citizens of the locality. See *id.,* at 792 (Rep. Butler). And whether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it. Indeed, the amendment held a municipality liable even if it had done everything in its

Equally important, creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship. See W. Prosser, Law of Torts § 69, p. 459 (4th ed. 1971). Nonetheless, two justifications tend to stand out. First is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. See, *e. g., ibid.;* 2 F. Harper & F. James, Law of Torts, § 26.3, pp. 1368–1369 (1956). Second is the argument that the cost of accidents should be

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power to curb the riot. See *supra,* at 668; Globe 761 (Sen. Stevenson); *id.,* at 771 (Sen. Thurman); *id.,* at 788 (Rep. Kerr); *id.,* at 791 (Rep. Willard). While the first conference substitute was rejected principally on constitutional grounds, see *id.,* at 804 (Rep. Poland), it is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux Klan violence, "neglect[ed] or refuse[d] so to do," see Appendix to this opinion, *infra,* at 704, and which was enacted as § 6 of the 1871 Act and is now codified as 42 U. S. C. § 1986—that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees. Nonetheless, when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong.

spread to the community as a whole on an insurance theory. See, *e. g., id.,* § 26.5; Prosser, *supra,* at 459.[58]

The first justification is of the same sort that was offered for statutes like the Sherman amendment: "The obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes, affirmatory law, and the reason of passing the statute is to secure a more perfect police regulation." Globe 777 (Sen. Frelinghuysen). This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable. The second justification was similarly put forward as a justification for the Sherman amendment: "we do not look upon [the Sherman amendment] as a punishment . . . . It is a mutual insurance." *Id.,* at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment.

We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see *supra,* at

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[58] A third justification, often cited but which on examination is apparently insufficient to justify the doctrine of *respondeat superior,* see, *e. g.,* 2 F. Harper & F. James, § 26.3, is that liability follows the right to control the actions of a tortfeasor. By our decision in *Rizzo* v. *Goode,* 423 U. S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See 423 U. S., at 370–371.

660–662, and n. 2, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.

III

Although we have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, see, *e. g., Edelman* v. *Jordan,* 415 U. S. 651, 671, and n. 14 (1974), we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes. See, *e. g., Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 47–49 (1977); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406 n. 1 (1932) (Brandeis, J., dissenting) (collecting cases). Nor is this a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States,* 328 U. S. 61, 70 (1946).

First, *Monroe* v. *Pape,* insofar as it completely immunizes municipalities from suit under § 1983, was a departure from prior practice. See, *e. g., Northwestern Fertilizing Co.* v. *Hyde Park,* 18 F. Cas. 393 (No. 10,336) (CC ND Ill. 1873); *City of Manchester* v. *Leiby,* 117 F. 2d 661 (CA1 1941); *Hannan* v. *City of Haverhill,* 120 F. 2d 87 (CA1 1941); *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943); *Holmes* v. *Atlanta,* 350 U. S. 879 (1955), in each of which municipalities were defendants in § 1983 suits.[59] Moreover, the constitutional de-

[59] Each case cited by *Monroe,* see 365 U. S., at 191 n. 50, as consistent with the position that local governments were not § 1983 "persons" reached its conclusion by assuming that state-law immunities overrode the § 1983 cause of action. This has never been the law.

fect that led to the rejection of the Sherman amendment would not have distinguished between municipalities and school boards, each of which is an instrumentality of state administration. See *supra,* at 673–682. For this reason, our cases—decided both before and after *Monroe,* see n. 5, *supra*—holding school boards liable in § 1983 actions are inconsistent with *Monroe,* especially as *Monroe*'s immunizing principle was extended to suits for injunctive relief in *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973).[60] And although in many of these cases jurisdiction was not questioned, we ought not "disregard the implications of an exercise of judicial authority assumed to be proper for [100] years." *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 307 (1962); see *Bank of the United States* v. *Deveaux,* 5 Cranch, at 88 (Marshall, C. J.) ("Those decisions are not cited as authority . . . but they have much weight, as they show that this point neither occurred to the bar or the bench"). Thus, while we have reaffirmed *Monroe* without further examination on three occasions,[61] it can scarcely be said that *Monroe* is so consistent with the warp and woof of civil rights law as to be beyond question.

Second, the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such an extension would itself be inconsistent with recent expressions of congressional intent. In the wake of our decisions, Congress not only has shown no hostility to federal-court decisions against school boards, but it has indeed rejected efforts to strip the federal courts of jurisdiction over school boards.[62] Moreover, recognizing that school boards are often

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[60] Although many suits against school boards also include private individuals as parties, the "principal defendant is usually the local board of education or school board." *Milliken* v. *Bradley,* 433 U. S., at 292–293 (POWELL, J., concurring in judgment).

[61] *Moor* v. *County of Alameda,* 411 U. S. 693 (1973); *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973); *Aldinger* v. *Howard,* 427 U. S. 1 (1976).

[62] During the heyday of the furor over busing, both the House and the

defendants in school desegregation suits, which have almost without exception been § 1983 suits, Congress has twice passed legislation authorizing grants to school boards to assist them in complying with federal-court decrees.[63] Finally, in

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Senate refused to adopt bills that would have removed from the federal courts jurisdiction

"to make any decision, enter any judgment, or issue any order requiring any *school board* to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any *school board* to transport any students from one public school to another public school or from one place to another place or from one school district to another school district in order to effect a change in the racial composition of the student body at any school or place or in any school district, or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any *school board* to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any *school board* from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract." S. 1737, 93d Cong., 1st Sess., § 1207 (1973) (emphasis added).

Other bills designed either completely to remove the federal courts from the school desegregation controversy, S. 287, 93d Cong., 1st Sess. (1973), or to limit the ability of federal courts to subject school boards to remedial orders in desegregation cases, S. 619, 93d Cong., 1st Sess. (1973); S. 179, 93d Cong., 1st Sess., § 2 (a) (1973); H. R. 13534, 92d Cong., 2d Sess., § 1 (1972), have similarly failed.

[63] In 1972, spurred by a finding "that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access," 86 Stat. 354, 20 U. S. C. § 1601 (a) (1976 ed.), Congress passed the Emergency School Aid Act. Section 706 (a)(1)(A)(i) of that Act, 20 U. S. C. § 1605 (a)(1)(A)(i) (1976 ed.), authorizes the Assistant Secretary

"to make a grant to, or a contract with, *a local educational agency [w]hich is implementing a plan . . . which has been undertaken pursuant to a final*

regard to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988 (1976 ed.), which allows prevailing parties (in the discretion of the court) in § 1983 suits

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*order issued by a court of the United States* . . . which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools." (Emphasis added.)

A "local educational agency" is defined by 20 U. S. C. § 1619 (8) (1976 ed.) as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or a federally recognized Indian reservation, or such combination of school districts, or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, or a combination of local educational agencies . . . ." Congress thus clearly recognized that school boards were often parties to federal school desegregation suits. In § 718 of the Act, 86 Stat. 369, 20 U. S. C. § 1617 (1976 ed.), Congress gave its explicit approval to the institution of federal desegregation suits against school boards—presumably under § 1983. Section 718 provides:

"Upon the entry of a final order *by a court of the United States against a local educational agency* . . . for discrimination on the basis of race, color, or national origin in violation of . . . the fourteenth amendment to the Constitution of the United States . . . the court . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added.)

Two years later in the Equal Educational Opportunities Act of 1974, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required *local educational agencies* to expend large amounts of funds, thereby depleting their financial resources . . . ." 20 U. S. C. § 1702 (a)(3) (1976 ed.). (Emphasis added.) Congress did not respond by declaring that school boards were not subject to suit under § 1983 or any other federal statute, "but simply [legislated] revised evidentiary standards and remedial priorities to be employed by the courts in deciding such cases." Brief for National Education Assn. et al. as *Amici Curiae* 15–16. Indeed, Congress expressly reiterated that a cause of action, cognizable in the federal courts, exists for discrimination in the public school context. 20 U. S. C. §§ 1703,

to obtain attorney's fees from the losing parties, the Senate stated:

> "[D]efendants in these cases are often State or local *bodies* or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, *in his official capacity,* from funds of his agency or under his control, or *from the State or local government (whether or not the agency or government is a named party).*" S. Rep. No. 94–1011, p. 5 (1976) (emphasis added; footnotes omitted).

Far from showing that Congress has relied on *Monroe,* therefore, events since 1961 show that Congress has refused to extend the benefits of *Monroe* to school boards and has attempted to allow awards of attorney's fees against local governments even though *Monroe, City of Kenosha* v. *Bruno,* and *Aldinger* v. *Howard,* 427 U. S. 1 (1976), have made the joinder of such governments impossible.[64]

Third, municipalities can assert no reliance claim which can

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1706, 1708, 1710, 1718 (1976 ed.). The Act assumes that school boards will usually be the defendants in such suits. For example, § 211 of the Act, 88 Stat. 516, as set forth in 20 U. S. C. § 1710 (1976 ed.), provides:

"The Attorney General shall not institute a civil action under section 1706 of this title [which allows for suit by both private parties and the Attorney General to redress discrimination in public education] before he—

"(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part 2 [the prohibitions against discrimination in public education]." Section 219 of the Act, 20 U. S. C. § 1718 (1976 ed.), provides for the termination of court-ordered busing "if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof."

[64] Whether Congress' attempt is in fact effective is the subject of *Hutto* v. *Finney,* O. T. 1977, No. 76–1660, cert. granted, 434 U. S. 901, and therefore we express no view on it here.

support an absolute immunity. As Mr. Justice Frankfurter said in *Monroe,* "[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." 365 U. S., at 221–222 (dissenting in part). Indeed, municipalities simply cannot "arrange their affairs" on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing in *Monroe* encourages municipalities to violate constitutional rights or even suggests that such violations are anything other than completely wrong.

Finally, even under the most stringent test for the propriety of overruling a statutory decision proposed by Mr. Justice Harlan in *Monroe* [65]—"that it appear beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the [section]," 365 U. S., at 192 (concurring opinion)—the overruling of *Monroe* insofar as it holds that local governments are not "persons" who may be defendants in § 1983 suits is clearly proper. It is simply beyond doubt that, under the 1871 Congress' view of the law, were § 1983 liability unconstitutional as to local governments, it would have been equally unconstitutional as to state officers. Yet everyone—proponents and opponents alike—knew § 1983 would be applied to state officers and nonetheless stated that § 1983 was constitutional. See *supra,* at 680–682. And, moreover, there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected

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[65] We note, however, that Mr. Justice Harlan's test has not been expressly adopted by this Court. Moreover, that test is based on two factors: *stare decisis* and "indications of congressional acceptance of this Court's earlier interpretation [of the statute in question]." 365 U. S., at 192. As we have explained, the second consideration is not present in this case.

rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the "persons" covered by § 1.

For the reasons stated above, therefore, we hold that *stare decisis* does not bar our overruling of *Monroe* insofar as it is inconsistent with Parts I and II of this opinion.[66]

## IV

Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 "be drained of meaning," *Scheuer* v. *Rhodes,* 416 U. S. 232, 248 (1974). Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 397–398 (1971).

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[66] No useful purpose would be served by an attempt at this late date to determine whether *Monroe* was correct on its facts. Similarly, since this case clearly involves official policy and does not involve *respondeat superior,* we do not assay a view on how our cases which have relied on that aspect of *Monroe* that is overruled today—*Moor* v. *County of Alameda,* 411 U. S. 693 (1973); *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973); and *Aldinger* v. *Howard,* 427 U. S. 1 (1976)—should have been decided on a correct view of § 1983. Nothing we say today affects the conclusion reached in *Moor,* see 411 U. S., at 703–704, that 42 U. S. C. § 1988 cannot be used to create a federal cause of action where § 1983 does not otherwise provide one, or the conclusion reached in *City of Kenosha,* see 412 U. S., at 513, that "nothing . . . suggest[s] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them."

V

For the reasons stated above, the judgment of the Court of Appeals is

*Reversed.*

## APPENDIX TO OPINION OF THE COURT

As proposed, the Sherman amendment was as follows:

"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest,

from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction." Globe 663.

The complete text of the first conference substitute for the Sherman amendment is:

"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced

against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment." *Id.*, at 749, 755.

The relevant text of the second conference substitute for the Sherman amendment is as follows:

"[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 so to do,* and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives." *Id.*, at 804 (emphasis added).

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and express these additional views.

Few cases in the history of the Court have been cited more frequently than *Monroe* v. *Pape,* 365 U. S. 167 (1961), decided less than two decades ago. Focusing new light on 42 U. S. C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of

the 1871 measure. But *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court's opinion today. Yet the gravity of overruling a part of so important a decision prompts me to write.

I

In addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law,[1] the *Monroe* Court treated the 42d Congress' rejection of the Sherman amendment as conclusive evidence of an intention to immunize local governments from all liability under the statute for constitutional injury. That reading, in light of today's thorough canvass of the legislative history, clearly "misapprehended the meaning of the controlling provision," *Monroe, supra,* at 192 (Harlan, J., concurring). In this case, involving formal, written policies of the Department of Social Services and the Board of Education of the city of New York that are alleged to conflict

[1] The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a private home. Although at least one of the allegations in the complaint could have been construed to charge a custom or usage of the Police Department of the city of Chicago that did not violate state law, see 365 U. S., at 258–259 (Frankfurter, J., dissenting in part), and there is a hint of such a theory in Brief for Petitioners, O. T. 1960, No. 39, pp. 41–42, that feature of the case was not highlighted in this Court. The dispute that divided the Court was over whether a complaint alleging police misconduct in violation of state law, for which state judicial remedies were available, stated a § 1983 claim in light of the statutory requirement that the conduct working injury be "under color of" state law. Compare 365 U. S., at 172–183 (opinion of the Court), and *id.*, at 193–202 (Harlan, J., concurring), with *id.*, at 202–259 (Frankfurter, J., dissenting in part).

with the command of the Due Process Clause, cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), the Court decides "not to reject [wisdom] merely because it comes late," *Henslee* v. *Union Planters Bank,* 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

As the Court demonstrates, the Sherman amendment presented an extreme example of "riot act" legislation that sought to impose vicarious liability on government subdivisions for the consequences of private lawlessness. As such, it implicated concerns that are of marginal pertinence to the operative principle of § 1 of the 1871 legislation—now § 1983—that "any person" acting "under color of" state law may be held liable for affirmative conduct that "subjects, or causes to be subjected, any person . . . to the deprivation of any" federal constitutional or statutory right. Of the many reasons for the defeat of the Sherman proposal, none supports *Monroe*'s observation that the 42d Congress was fundamentally "antagonistic," 365 U. S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. *Ante,* at 673–674, n. 30. The opposition in the House of Representatives focused largely on the Sherman amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante,* at 673–675, 679–682.[2]

[2] If in the view of House opponents, such as Representatives Poland, Burchard, and Willard, see *ante,* at 679–680, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the

The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.[3]

As elaborated in Part II of today's opinion, the rejection of the Sherman amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity but as a limitation of the statutory ambit to actual wrongdoers, *i. e.*, a rejection of *respondeat superior* or any other principle of vicarious liability. Cf. Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L. J. 1483, 1531–1535 (1977). Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity, see *Wood* v. *Strickland,* 420 U. S. 308 (1975); *Procunier* v. *Navarette,* 434 U. S. 555 (1978). Today the Court recognizes

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affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is premised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter—the sort of liability that would have been imposed by the Sherman amendment—but on the consequences of activities actually undertaken within the scope of the powers conferred by state law.

[3] The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition, "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431. It also accords with the interpretation given the same word when it was used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *Lafayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389 (1978) (plurality opinion); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 396 (1906); cf. *Pfizer Inc.* v. *Government of India,* 434 U. S. 308 (1978).

that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

II

This Court traditionally has been hesitant to overrule prior constructions of statutes or interpretations of common-law rules. "*Stare decisis* is usually the wise policy," *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting), but this cautionary principle must give way to countervailing considerations in appropriate circumstances.[4] I concur in the Court's view that this is not a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70 (1946).

Nor is this the usual case in which the Court is asked to overrule a precedent. Here considerations of *stare decisis* cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. On the other hand, many decisions of this Court have been premised on the amenability of school boards and similar entities to § 1983 suits.

In *Monroe* and its progeny, we have answered a question that was never actually briefed or argued in this Court—whether a municipality is liable in damages for injuries that are the direct result of its official policies. "The theory of the complaint [in *Monroe* was] that under the circumstances [t]here alleged the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*." Brief for Petition-

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[4] See, *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U. S. 132 (1976); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973); *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971); *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407, n. 1 (1932) (Brandeis, J., dissenting).

ers, O. T. 1960, No. 39, p. 21.[5] Respondents answered that adoption of petitioners' position would expose "Chicago and every other municipality in the United States . . . to Civil Rights Act liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of." Brief for Respondents, O. T. 1960, No. 39, p. 26. Thus the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case.[6]

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[5] The District Court in *Monroe* ruled in the municipality's favor, stating: "[S]ince the liability of the City of Chicago is based on the doctrine of *respondeat superior,* and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself." Record, O. T. 1960, No. 39, p. 30. The Court of Appeals affirmed for the same reason. 272 F. 2d 365–366 (CA7 1959).

Petitioners in this Court also offered an alternative argument that the city of Chicago was a "person" for purposes of § 1983, Brief for Petitioners, O. T. 1960, No. 39, p. 25, but the underlying theory of municipal liability remained one of *respondeat superior.*

[6] The doctrine of *stare decisis* advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of MR. JUSTICE REHNQUIST, *post,* at 718; cf. O. Holmes, The Common Law 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persis[t] from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. *Marbury*

Similarly, in *Moor* v. *County of Alameda,* 411 U. S. 693 (1973), petitioners asserted that "the County was vicariously liable for the acts of its deputies and sheriff," *id.,* at 696, under 42 U. S. C. § 1988. In rejecting this vicarious-liability claim, 411 U. S., at 710, and n. 27, we reaffirmed *Monroe*'s reading of the statute, but there was no challenge in that case to "the holding in *Monroe* concerning the status under § 1983 of public entities such as the County," 411 U. S., at 700; Brief for Petitioners, O. T. 1972, No. 72–10, p. 9.

Only in *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and the direct cause of the claimed constitutional injury. In *Kenosha,* however, we raised the issue of the city's amenability to suit under § 1983 on our own initiative.[7]

This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases

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v. *Madison,* 1 Cranch 137 (1803), cited by the dissent, *post,* at 718, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in *Marbury.* And on numerous subsequent occasions, the Court has been required to apply the full breadth of the *Marbury* holding. In *Monroe,* on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in *Monroe* cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's re-examination of the legislative history of the 1871 measure.

[7] In *Aldinger* v. *Howard,* 427 U. S. 1, 16 (1976), we reaffirmed *Monroe,* but petitioner did not contest the proposition that counties were excluded from the reach of § 1983 under *Monroe,* and the question before us concerned the scope of pendent-party jurisdiction with respect to a state-law claim. Similarly, the parties in *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274 (1977), did not seek a re-examination of our ruling in *Monroe.*

in which the Court has assumed *sub silentio* that some local government entities could be sued under § 1983. If now, after full consideration of the question, we continued to adhere to *Monroe,* grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. See *ante,* at 663 n. 5. Since "the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards," *ante,* at 696, the conflict is squarely presented. Although there was an independent basis of jurisdiction in many of the school board cases because of the inclusion of individual public officials as nominal parties, the opinions of this Court make explicit reference to the school board party, particularly in discussions of the relief to be awarded, see, *e. g., Green* v. *County School Board,* 391 U. S. 430, 437–439, 441–442 (1968); *Milliken* v. *Bradley,* 433 U. S. 267, 292–293 (1977) (POWELL, J., concurring in judgment). And, as the Court points out, *ante,* at 696–697, and nn. 62, 63, Congress has focused specifically on this Court's school board decisions in several statutes. Thus the exercise of § 1983 jurisdiction over school boards, while perhaps not premised on considered holdings, has been long-standing. Indeed, it predated *Monroe.*

Even if one attempts to explain away the school board decisions as involving suits which "may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young,* 209 U. S. 123 (1908)," *post,* at 716–717, n. 2, some difficulty remains in rationalizing the relevant body of precedents. At least two of the school board cases involved claims for monetary relief. *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159, 1161 (ED Va. 1971), rev'd, 474 F. 2d 395 (CA4 1973), rev'd and remanded, 414 U. S. 632 (1974); *Tinker* v. *Des Moines Independent School Dist.,* 393 U. S. 503, 504 (1969). See also *Vlandis* v. *Kline,* 412 U. S. 441, 445 (1973). Although the point was not squarely presented in this Court, these claims

for damages could not have been maintained in official-capacity suits if the government entity were not itself suable. Cf. *Edelman* v. *Jordan,* 415 U. S. 651 (1974).[8] Moreover, the rationale of *Kenosha* would have to be disturbed to avoid closing all avenues under § 1983 to injunctive relief against constitutional violations by local government. The Court of Appeals in this case suggested that we import, by analogy, the Eleventh Amendment fiction of *Ex parte Young* into § 1983, 532 F. 2d 259, 264–266 (CA2 1976). That approach, however, would create tension with *Kenosha* because it would require "a bifurcated application" of "the generic word 'person' in § 1983" to public officials "depending on the nature of the relief sought against them." 412 U. S., at 513. A public official sued in his official capacity for carrying out official policy would be a "person" for purposes of injunctive relief, but a non-"person" in an action for damages. The Court's holding avoids this difficulty. See *ante,* at 690 n. 55.

Finally, if we continued to adhere to a rule of absolute municipal immunity under § 1983, we could not long avoid the question whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983 . . . ." *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278 (1977). One aspect of that inquiry would be whether there are any "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 396 (1971), such as an "explicit congressional declaration

[8] To the extent that the complaints in those cases asserted claims against the individual defendants in their personal capacity, as well as official capacity, the court would have had authority to award the relief requested. There is no suggestion in the opinions, however, that the practices at issue were anything other than official, duly authorized policies.

that persons injured by a [municipality] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress," *id.*, at 397. In light of the Court's persuasive re-examination in today's decision of the 1871 debates, I would have difficulty inferring from § 1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.[9]

III

Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under § 1983." *Ante,* at 694. This case, however, involves formal, written policies of a municipal department and school board; it is the clear case. The Court also reserves decision on the availability of a qualified municipal immunity. *Ante,* at 701. Initial resolution of the question whether the protection available at common law for municipal corporations, see *post,* at 720–721, or other principles support a

[9] MR. JUSTICE REHNQUIST's dissent makes a strong argument that "[s]ince *Monroe,* municipalities *have* had the right to expect that they would not be held liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights." *Post,* at 717. But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees. In any event, the possibility of a qualified immunity, as to which the Court reserves decision, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.

qualified municipal immunity in the context of the § 1983 damages action, is left to the lower federal courts.

MR. JUSTICE STEVENS, concurring in part.

Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court's decision, I join only Parts I, III, and V.

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

Seventeen years ago, in *Monroe* v. *Pape,* 365 U. S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U. S. C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger* v. *Howard,* 427 U. S. 1 (1976); *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973); *Moor* v. *County of Alameda,* 411 U. S. 693 (1973). See also *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 277–279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon* v. *McCrary,* 427 U. S. 160, 186 (1976) (POWELL, J., concurring), I am compelled to dissent.

I

As this Court has repeatedly recognized, *id.,* at 175 n. 12; *Edelman* v. *Jordan,* 415 U. S. 651, 671 n. 14 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at

liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–407 (1932) (dissenting opinion) (footnotes omitted).

Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents. The best exposition of the proper burden of persuasion was delivered by Mr. Justice Harlan in *Monroe* itself:

> "From my point of view, the policy of *stare decisis,* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear *beyond doubt* from the legislative history of the 1871 statute that [*United States* v.] *Classic,* [313 U. S. 299 (1941)] and *Screws* [v. *United States,* 325 U. S. 91 (1945)] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." 365 U. S., at 192 (concurring opinion) (footnote omitted; emphasis added).

The Court does not demonstrate that any exception to this general rule is properly applicable here. The Court's first assertion, that *Monroe* "was a departure from prior practice," *ante,* at 695, is patently erroneous. Neither in *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943), nor in *Holmes* v. *Atlanta,*

350 U. S. 879 (1955), nor in any of the school board cases cited by the Court, *ante,* at 663 n. 5, was the question now before us raised by any of the litigants or addressed by this Court. As recently as four Terms ago, we said in *Hagans* v. *Lavine,* 415 U. S. 528, 535 n. 5 (1974):

> "Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."

The source of this doctrine that jurisdictional issues decided *sub silentio* are not binding in other cases seems to be Mr. Chief Justice Marshall's remark in *United States* v. *More,* 3 Cranch 159, 172 (1805).[1] While the Chief Justice also said that such decisions may "have much weight, as they show that this point neither occurred to the bar or the bench," *Bank of the United States* v. *Deveaux,* 5 Cranch 61, 88 (1809), unconsidered assumptions of jurisdiction simply cannot outweigh four consistent decisions of this Court, explicitly considering and rejecting that jurisdiction.

Nor is there any indication that any later Congress has ever approved suit against any municipal corporation under § 1983. Of all its recent enactments, only the Civil Rights Attorney's Fees Awards Act of 1976, § 2, 90 Stat. 2641, 42 U. S. C. § 1988 (1976 ed.), explicitly deals with the Civil Rights Act of 1871.[2] The 1976 Act provides that attorney's fees may be awarded

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[1] As we pointed out in *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278–279 (1977), the existence of a claim for relief under § 1983 is "jurisdictional" for purposes of invoking 28 U. S. C. § 1343, even though the existence of a meritorious constitutional claim is not similarly required in order to invoke jurisdiction under 28 U. S. C. § 1331. See *Bell* v. *Hood,* 327 U. S. 678, 682 (1946).

[2] The other statutes cited by the Court, *ante,* at 697–699, n. 63, make no mention of § 1983, but refer generally to suits against "a local educational agency." As noted by the Court of Appeals, 532 F. 2d 259, 264–266, such suits may be maintained against board members in their official capacities

to the prevailing party "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title." There is plainly no language in the 1976 Act which would enlarge the parties suable under those substantive sections; it simply provides that parties who are already suable may be made liable for attorney's fees. As the Court admits, *ante,* at 699, the language in the Senate Report stating that liability may be imposed "whether or not the agency or government is a named party," S. Rep. No. 94–1011, p. 5 (1976), suggests that Congress did not view its purpose as being in any way inconsistent with the well-known holding of *Monroe.*

The Court's assertion that municipalities have no right to act "on an assumption that they can violate constitutional rights indefinitely," *ante,* at 700, is simply beside the point. Since *Monroe,* municipalities *have* had the right to expect that they would not be held liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights. No doubt innumerable municipal insurance policies and indemnity ordinances have been founded on this assumption, which is wholly justifiable under established principles of *stare decisis.* To obliterate those legitimate expectations without more compelling justifications than those advanced by the Court is a significant departure from our prior practice.

I cannot agree with MR. JUSTICE POWELL's view that "[w]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Ante,* at 709 n. 6. Private parties must be able to rely upon explicitly stated holdings of this Court without being

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for injunctive relief under either § 1983 or *Ex parte Young,* 209 U. S. 123 (1908). Congress did not stop to consider the technically proper avenue of relief, but merely responded to the fact that relief was being granted. The practical result of choosing the avenue suggested by petitioners would be the subjection of school corporations to liability in damages. Nothing in recent congressional history even remotely supports such a result.

obliged to peruse the briefs of the litigants to predict the likelihood that this Court might change its mind. To cast such doubt upon each of our cases, from *Marbury* v. *Madison,* 1 Cranch 137 (1803), forward, in which the explicit ground of decision "was never actually briefed or argued," *ante,* at 708 (POWELL, J., concurring), would introduce intolerable uncertainty into the law. Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants—which, unlike the arguments in *Monroe,* is reproduced in the Reports of this Court where anyone can see it—devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State Madison, who evidently made no appearance. 1 Cranch, at 153–154. More recent landmark decisions of this Court would appear to be likewise vulnerable under my Brother POWELL's analysis. In *Mapp* v. *Ohio,* 367 U. S. 643 (1961), none of the parties requested the Court to overrule *Wolf* v. *Colorado,* 338 U. S. 25 (1949); it did so only at the request of an *amicus curiae.* 367 U. S., at 646 n. 3. That *Marbury, Mapp,* and countless other decisions retain their vitality despite their obvious flaws is a necessary byproduct of the adversary system, in which both judges and the general public rely upon litigants to present "all the relevant considerations." *Ante,* at 709 n. 6 (POWELL, J., concurring). While it undoubtedly has more latitude in the field of constitutional interpretation, this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing.[3]

Thus, our only task is to discern the intent of the 42d Congress. That intent was first expounded in *Monroe,* and it

[3] I find it somewhat ironic that, in abandoning the supposedly ill-considered holding of *Monroe,* my Brother POWELL relies heavily upon cases involving school boards, although he admits that "the exercise of § 1983 jurisdiction . . . [was] perhaps not premised on considered holdings." *Ante,* at 711.

has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe*. 124 Cong. Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of *stare decisis* require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." *Monroe,* 365 U. S., at 192 (Harlan, J., concurring). The Court must show not only that Congress, in rejecting the Sherman amendment, concluded that municipal liability was not unconstitutional, but also that, in enacting § 1, it intended to impose that liability. I am satisfied that no such showing has been made.

II

Any analysis of the meaning of the word "person" in § 1983, which was originally enacted as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, must begin, not with the Sherman amendment, but with the Dictionary Act. The latter Act, which supplied rules of construction for all legislation, provided:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

The Act expressly provided that corporations need not be included within the scope of the word "person" where the context suggests a more limited reach. Not a word in the legislative history of the Act gives any indication of the contexts

in which Congress felt it appropriate to include a corporation as a person. Indeed, the chief cause of concern was that the Act's provision that "words importing the masculine gender may be applied to females," might lead to an inadvertent extension of the suffrage to women. Cong. Globe, 41st Cong., 3d Sess., 777 (1871) (remarks of Sen. Sawyer).

There are other factors, however, which suggest that the Congress which enacted § 1983 may well have intended the word "person" "to be used in a more limited sense," as *Monroe* concluded. It is true that this Court had held that both commercial corporations, *Louisville R. Co.* v. *Letson,* 2 How. 497, 558 (1844), and municipal corporations, *Cowles* v. *Mercer County,* 7 Wall. 118, 121 (1869), were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III. Congress, however, also knew that this label did not apply in all contexts, since this Court, in *Paul* v. *Virginia,* 8 Wall. 168 (1869), had held commercial corporations not to be "citizens" within the meaning of the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2. Thus, the Congress surely knew that, for constitutional purposes, corporations generally enjoyed a different status in different contexts. Indeed, it may be presumed that Congress intended that a corporation should enjoy the same status under the Ku Klux Klan Act as it did under the Fourteenth Amendment, since it had been assured that § 1 "was so very simple and really reënact[ed] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871) (remarks of Sen. Edmunds). At the time § 1983 was enacted the only federal case to consider the status of corporations under the Fourteenth Amendment had concluded, with impeccable logic, that a corporation was neither a "citizen" nor a "person." *Insurance Co.* v. *New Orleans,* 13 F. Cas. 67 (No. 7,052) (CC La. 1870).

Furthermore, the state courts did not speak with a single voice with regard to the tort liability of municipal corporations. Although many Members of Congress represented

States which had retained absolute municipal tort immunity, see, *e. g., Irvine* v. *Town of Greenwood,* 89 S. C. 511, 72 S. E. 228 (1911) (collecting earlier cases), other States had adopted the currently predominant distinction imposing liability for proprietary acts, see generally 2 F. Harper & F. James, Law of Torts § 29.6 (1956), as early as 1842, *Bailey* v. *Mayor of City of New York,* 3 Hill 531 (N. Y. 1842). Nevertheless, no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons.

The general remarks from the floor on the liberal purposes of § 1 offer no explicit guidance as to the parties against whom the remedy could be enforced. As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to § 1 of the Act. Indeed, Bingham stated at the outset, "I do not propose now to discuss the provisions of the bill in detail," Cong. Globe, 42d Cong., 1st Sess., App. 82 (1871), and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment. While Bingham clearly stated that Congress could "provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor," *id.,* at 85, he never suggested that such a power was exercised in § 1.[4]

[4] It has not been generally thought, before today, that § 1983 provided an avenue of relief from unconstitutional takings. Those federal courts which have granted compensation against state and local governments have resorted to an implied right of action under the Fifth and Fourteenth Amendments. *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency,* 561 F. 2d 1327 (CA9 1977), aff'g 389 F. Supp. 486 (ND Cal. 1975); *Foster* v. *Detroit,* 405 F. 2d 138, 140 (CA6 1968). Since the Court today abandons the holding of *Monroe* chiefly on the strength of Bingham's arguments, it is indeed anomalous that § 1983 will provide relief only when a local government, not the State itself, seizes private property. See *ante,* at 690 n. 54; *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 452 (1976); *Edelman* v. *Jordan,* 415 U. S. 651, 674–677 (1974).

Finally, while Bingham has often been advanced as the chief expositor of the Fourteenth Amendment, *Duncan* v. *Louisiana,* 391 U. S. 145, 165 (1968) (Black, J., concurring); *Adamson* v. *California,* 332 U. S. 46, 73–74 (1947) (Black, J., dissenting), there is nothing to indicate that his colleagues placed any greater credence in his theories than has this Court. See *Duncan, supra,* at 174–176 (Harlan, J., dissenting); *Adamson, supra,* at 64 (Frankfurter, J., concurring).

Thus, it ought not lightly to be presumed, as the Court does today, *ante,* at 690 n. 53, that § 1983 "should prima facie be construed to include 'bodies politic' among the entities that could be sued." Neither the Dictionary Act, the ambivalent state of judicial decisions, nor the floor debate on § 1 of the Act gives any indication that any Member of Congress had any inkling that § 1 could be used to impose liability on municipalities. Although Senator Thurman, as the Court emphasizes, *ante,* at 686 n. 45, expressed his belief that the terms of § 1 "are as comprehensive as can be used," Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871), an examination of his lengthy remarks demonstrates that it never occurred to him that § 1 did impose or could have imposed any liability upon municipal corporations. In an extended parade of horribles, this "old Roman," who was one of the Act's most implacable opponents, suggested that state legislatures, Members of Congress, and state judges might be held liable under the Act. *Ibid.* If, at that point in the debate, he had any idea that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised an additional outraged objection. Only once was that possibility placed squarely before the Congress—in its consideration of the Sherman amendment—and the Congress squarely rejected it.

The Court is probably correct that the rejection of the Sherman amendment does not lead ineluctably to the conclusion that Congress intended municipalities to be immune from liability under all circumstances. Nevertheless, it cannot be

denied that the debate on that amendment, the only explicit consideration of municipal tort liability, sheds considerable light on the Congress' understanding of the status of municipal corporations in that context. Opponents of the amendment were well aware that municipalities had been subjected to the jurisdiction of the federal courts in the context of suits to enforce their contracts, Cong. Globe, 42d Cong., 1st Sess., 789 (1871) (remarks of Rep. Kerr), but they expressed their skepticism that such jurisdiction should be exercised in cases sounding in tort:

> "Suppose a judgment obtained under this section, and no property can be found to levy upon except the court-house, can we levy on the court-house and sell it? So this section provides, and that too in an action of tort, in an action *ex delicto,* where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort or imposed any liability upon it. It is in my opinion simply absurd." *Id.,* at 799 (remarks of Rep. Farnsworth).

Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of "person," and thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe,* and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected.

Any inference which might be drawn from the Dictionary Act or from general expressions of benevolence in the debate on § 1 that the word "person" was intended to include municipal corporations falls far short of showing "beyond doubt" that this Court in *Monroe* "misapprehended the meaning of the controlling provision." Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to *stare decisis;* they merely begin it. I would adhere to the holding of *Monroe* as to the liability of a municipal corporation under § 1983.

## III

The decision in *Monroe* v. *Pape* was the fountainhead of the torrent of civil rights litigation of the last 17 years. Using § 1983 as a vehicle, the courts have articulated new and previously unforeseeable interpretations of the Fourteenth Amendment. At the same time, the doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence. None of the Members of this Court can foresee the practical consequences of today's removal of that protection. Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision.

I would affirm the judgment of the Court of Appeals.

Syllabus

# QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* MANDLEY ET AL.

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

No. 76–1159. Argued November 30, 1977—Decided June 6, 1978*

This litigation originated as a challenge to the validity of Illinois' Emergency Assistance to Needy Families with Children (EA) program under Title IV–A of the Social Security Act (SSA). The Court of Appeals, reversing the District Court, first held that the program was invalid because it limited eligibility for such assistance more narrowly than § 406 (e) (1) of the SSA, which makes federal matching funds available under a state EA program for emergency aid to intact families with children if threatened with destitution, regardless of the cause of the need. In a later appeal involving the validity of a proposed alternative to the EA program, the Court of Appeals held that § 403 (a) (5) of the SSA, which authorizes federal funding of a state EA program, is the exclusive source of federal funds for a state program of emergency assistance and that therefore a new "special needs" program that Illinois proposed to operate under its Title IV–A Aid to Families with Dependent Children (AFDC) program, funded under § 403 (a) (1) of the SSA, in place of its withdrawn EA program, must, as a *de facto* EA program, extend aid to all persons eligible under § 406 (e) (1). *Held:*

1. There is nothing in the policies or history of the EA statute to indicate that Illinois' proposed "special needs" program should not be judged solely under the requirements for an AFDC program funded under § 403 (a) (1) without regard to the EA requirements of §§ 406 (e) and 403 (a) (5). Pp. 735–736.

2. The proposed "special needs" program is permissible as part of an AFDC program alone. A plan to meet certain emergency needs of AFDC recipients—specifically actual or threatened loss of shelter due to damage or eviction—is not necessarily improper as an AFDC "special needs" program simply because it addresses a nonrecurring need that could alternatively be provided for under an EA program. Pp. 737–739.

3. Neither § 402 (a) (10) of the SSA, which makes *AFDC*, not EA, eligibility criteria mandatory, nor § 406 (e), which defines the *permis-*

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*Together with No. 76–1416, *Califano, Secretary of Health, Education, and Welfare* v. *Mandley et al.*, also on certiorari to the same court.

*sible* scope of an EA program for purpose of federal funding, imposes mandatory eligibility standards on States that elect to participate in the EA program, and therefore Illinois is not precluded from receiving matching federal funds for either an EA or a "special needs" program simply because it limits eligibility for aid under that program more narrowly than § 406 (e). Pp. 739–747.

545 F. 2d 1062, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the consideration or decision of the cases.

*George W. Lindberg,* First Assistant Attorney General of Illinois, argued the cause for petitioners in No. 76–1159. With him on the briefs were *William J. Scott,* Attorney General, and *Paul J. Bargiel* and *Paul V. Esposito,* Assistant Attorneys General. *Deputy Solicitor General Jones* argued the cause for petitioner in No. 76–1416. With him on the brief were *Solicitor General McCree, Assistant Attorney General Babcock, Marion L. Jetton, William Kanter,* and *Harry R. Silver.*

*Michael F. Lefkow* argued the cause for respondents in both cases. With him on the brief was *Stephen G. Seliger.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases require examination of the interplay between state option and federal mandate within the system of cooperative federalism created by the public assistance programs of Title IV–A of the Social Security Act, 42 U. S. C. § 601 *et seq.* The ultimate question to be decided is whether a

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†*William F. Hyland,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Richard M. Hluchan,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal.

*Theodore C. Diller* and *Deborah C. Franczek* filed a brief for the United Way of Metropolitan Chicago et al. as *amici curiae* urging affirmance.

*Francis X. Bellotti,* Attorney General, and *S. Stephen Rosenfeld* and *Garrick F. Cole,* Assistant Attorneys General, filed a brief for the Commonwealth of Massachusetts as *amicus curiae.*

State may ever receive federal matching funds for a program of emergency assistance to needy families, either under the general program of Aid to Families with Dependent Children (AFDC) [1] or under the specific provisions for Emergency Assistance to Needy Families with Children (EA),[2] if it limits

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[1] The AFDC program is established and defined in several related provisions of Title IV–A of the Social Security Act. Section 406 (b) of the Act, as set forth in 42 U. S. C. § 606 (b), provides in pertinent part: "The term 'aid to families with dependent children' means money payments with respect to, or . . . medical care in behalf of or any type of remedial care recognized under State law in behalf of a dependent child . . . ." The term "dependent child" is defined in § 406 (a), 42 U. S. C. § 606 (a), as

"a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with [specified relatives] in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school . . . [or] course of vocational or technical training . . . ."

[2] Section 406 (e) of the Act, as set forth in 42 U. S. C. § 606 (e), provides in pertinent part:

"(1) The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is . . . living with any of the relatives specified in subsection (a) (1) . . . but only where such child is without available resources, the payments, care, or services involved as necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution . . . did not arise because such child or relative refused without good cause to accept employment or training for employment—

"(A) money payments, payments in kind, or such other payments as the State agency may specify . . . or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

"(B) such services as may be specified by the Secretary;

"but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

"(2) Emergency assistance as authorized under paragraph (1) may be

eligibility for such aid more narrowly than the federal EA statute.

## I

Title IV–A of the Social Security Act establishes several different public aid programs under the general rubric of "Grants to States for Aid and Services to Needy Families with Children." In order to receive federal funds under any of the Title IV–A programs a State must adopt a "state plan for aid and services to needy families with children" that is approved by the United States Department of Health, Education, and Welfare (HEW) as meeting the requirements set forth in § 402 of the Act.

AFDC is the core of the Title IV–A system. As the Court observed in one of its earliest forays into Title IV, AFDC is a categorical aid program, and "the category singled out for welfare assistance . . . is the 'dependent child,' who is defined in § 406 of the Act . . . as an age-qualified 'needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with' any one of several listed relatives." *King* v. *Smith*, 392 U. S. 309, 313. A State's expenditures for AFDC, under an approved § 402 state plan, are reimbursed by the Federal Government according to the formula set forth in § 403 (a)(1).

The federal EA program was added to Title IV as part of the omnibus Social Security Amendments of 1967. Pub. L. 90–248, § 206, 81 Stat. 893. It was described in the Senate Finance Committee report as "a new program optional with the States [to] authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies." S. Rep. No. 744, 90th Cong., 1st Sess., 4 (1967).

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provided . . . to migrant workers with families in the State or in such part or parts thereof as the State shall designate."

To participate in the program a State must include a provision for EA in its § 402 state plan, and funding at a flat rate of 50% of program expenses is authorized by § 403 (a)(5).

Unlike AFDC, eligibility for EA is not limited to "dependent children." Instead, the term "emergency assistance to needy families with children" is broadly defined in § 406 (e) to include money payments and other kinds of aid provided on a temporary basis "to avoid destitution . . . or to provide living arrangements" for a "needy child under the age of 21 who is . . . without available resources." 42 U. S. C. § 606 (e)(1). Thus under the EA statute, federal matching funds are available for emergency aid to intact families with children if threatened with destitution, regardless of the cause of their need.

The State of Illinois, however, elected to adopt an EA program of much narrower scope. It provided only for (1) aid to AFDC families who were without shelter as a result of either damage to their homes or court-ordered eviction for reasons other than nonpayment of rent; and (2) aid to applicants determined to be presumptively eligible for AFDC who were in immediate need of clothing or household furnishings.

In 1973 the respondents instituted a class action against state and federal officials on behalf of all "AFDC recipients, applicants for AFDC, and other families with needy children" in Illinois seeking a declaratory judgment that the Illinois EA program violated federal law by defining eligibility more narrowly than § 406 (e)(1), and an injunction restraining the defendants from administering the allegedly unlawful program.[3] The United States District Court for the Northern

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[3] The complaint also alleged that the Illinois program violated the Equal Protection Clause of the Fourteenth Amendment and the Illinois Public Aid Code.

While none of the defendants questioned the District Court's subject-matter jurisdiction, the Court of Appeals properly considered the question *sua sponte*. It held that the District Court had jurisdiction of claims

District of Illinois held in an unreported opinion that the State's program was not inconsistent with federal law. The Court of Appeals for the Seventh Circuit reversed this judgment, ruling that "Illinois may no longer conduct an emergency assistance program under [§ 406 (e)] in which some of the families with needy children described in [§ 406 (e)] are given aid and some are not." *Mandley* v. *Trainor,* 523 F. 2d 415, 423 (*Mandley I*).

After the Court of Appeals' mandate was returned to the District Court, the plaintiffs submitted a proposed final order requiring the State to conform its EA program to the provisions of § 406 (e) and further requiring the federal defendants to promulgate regulations consistent with the Court of Appeals' interpretation of the statute. The state and federal defendants not only opposed the substantive terms of the proposed order, but also filed motions to dismiss the complaint altogether on the ground that the case had been rendered moot by the State's decision to withdraw entirely from the EA program. In support of its motion the State filed an affidavit from the Chief Fiscal Officer of its Department of Public Aid stating that "the Department would immediately cease all activities and requests for federal reimbursement pursuant to the 'Emergency Assistance' program of § 406 (e) of the Social Security Act" and that "no additional § 406 (e)

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against the state defendants under 28 U. S. C. § 1343 and 42 U. S. C. § 1983 since the plaintiffs' constitutional claims were not insubstantial. *Mandley* v. *Trainor,* 523 F. 2d 415, 419 n. 2 (*Mandley I*).

It found the question of jurisdiction over the federal defendants more troublesome, *ibid.* We express no view as to the Court of Appeals' theory of jurisdiction in light of the intervening amendment of 28 U. S. C. § 1331, which, by eliminating the requirement of $10,000 in controversy in any action "against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U. S. C. § 1331 (a) (1976 ed.), clearly confers jurisdiction over the federal defendants in these cases. *Andrus* v. *Charlestone Stone Products Co., ante,* at 607–608, n. 6.

federal funds [would] be drawn for the balance . . . of the current fiscal year."

In opposing the motions to dismiss, the plaintiffs argued that even though the State would no longer request federal reimbursement for emergency aid under §§ 406 (e) and 403 (a)(5), it intended nonetheless to operate virtually the identical program as an AFDC "special needs" program and to seek federal reimbursement under § 403 (a)(1). They contended that such a course of conduct would be equally unlawful. The District Court took the position that the validity of any proposed program under the AFDC provisions presented a new question that had not been raised in the original lawsuit, and that the plaintiffs' challenge to the § 406 (e) program had indeed been rendered moot by the State's decision to withdraw altogether from the EA program. When the plaintiffs declined to amend their complaint to allege that the new program would also be in violation of § 403 (a)(1), the District Court entered an order dismissing the cause "for lack of case or controversy."

The Court of Appeals again reversed. *Mandley* v. *Trainor,* 545 F. 2d 1062 (*Mandley II*). Noting that the defendants "admit[ted] that they [were] conducting the same program under the label 'special assistance' that they formerly conducted under the label of emergency assistance," *Id.,* at 1068, the Court of Appeals held that the change in funding arrangements did not raise issues beyond the scope of the plaintiffs' pleadings, and did not render the case moot. As the appellate court viewed the situation, the plaintiffs were still claiming, as they always had, that any federally funded program for emergency assistance must conform with the eligibility standards of § 406 (e)(1), and that the defendants were still violating the federal law by using federal funds to operate an emergency assistance program that defined eligibility more narrowly than § 406 (e)(1). On the merits the Court of Appeals agreed with the plaintiffs that § 403 (a)(5)

is the exclusive source of federal funds for a program of emergency assistance, and therefore held that Illinois' proposed new program, as a *de facto* EA program, must extend aid to all persons eligible under § 406 (e)(1).

Because of the lengthy and, in its view, wrongful delay in the implementation of its *Mandley I* mandate, the Court of Appeals then considered *sua sponte* the defendants' objections to the terms of the final order that had been proposed by the plaintiffs after the first remand, and directed the District Court on remand to enter the proposed order with minor modifications. As to the state defendants this order would provide:

> "Defendants . . . are enjoined, so long as Illinois receives federal funding under Title IV–A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406 (e) and 403 (a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406 (e), and are further enjoined from denying emergency assistance . . . to any member of the plaintiff class with a needy child [who is eligible under the definition in § 406 (e)]." [4]

In addition the Secretary of HEW was to be

> "enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than

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[4] As stated in the order, any child:

"(i) who is under the age of 21,

"(ii) who is living with any of the relatives specified in § 406 (a)(1) of the Act in a place of residence maintained by such relative as a home,

"(iii) where such child is without available resources,

"(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

"(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment."

§ 406 (e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406 (e) and 403 (a)(5)." [5]

The broad injunction ordered by the Court of Appeals raises two distinct statutory questions: whether a program of emergency aid to AFDC families may qualify for federal funding under a provision other than § 403 (a)(5), and more particularly as an AFDC "special needs" program under § 403 (a)(1); [6] and whether a State that adopts an EA program under §§ 403 (a)(5) and 406 (e) must define eligibility no more narrowly than § 406 (e).[7] We granted certiorari, 431

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[5] The order would further require HEW to "file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 CFR § 233.10 (a)(1)(ii)(A)."

The plaintiffs' originally proposed order would have specifically required that the regulations "include, inter alia, definitions of such terms as 'necessary to avoid destitution' and 'lack of available resources' which are compatible with providing emergency assistance when a needy child is approaching destitution." While the Court of Appeals thought "it would be salutary to include such definitions in the new regulation," it declined to "order HEW specifically to include any items in its new regulation." 545 F. 2d, at 1073.

[6] The petitioners have not raised in this Court the claim that the validity of the proposed AFDC special-needs program was beyond the scope of the pleadings in this case.

[7] We agree with the Court of Appeals that the cases were not rendered moot by Illinois' decision to withdraw from the § 406 (e) program. For even if the proposed arrangement is entirely legal under §§ 402 and 403 (a)(1), the State's decision to withdraw voluntarily from the § 406 (e) program in no way mooted the Court of Appeals' prior determination that that program was being operated in violation of federal law. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629.

By granting the defendants' motions to dismiss, as it was bound to do if the case was indeed moot, the District Court rendered the entire proceeding a nullity. There was no longer any judgment binding on the defendants to prevent them from returning to the old program. And, while the defendants' good-faith representation that they had no inten-

U. S. 953, to consider these important questions affecting the nationwide administration of a major federal welfare program.

## II

As the Court of Appeals readily conceded, its holding in *Mandley I* that federal eligibility standards are mandatory upon States that adopt the optional EA program in no way obligates a State to continue that program. The federal definition of eligibility in § 406 (e), like the other provisions of Title IV of the Social Security Act, simply governs the dispensation of federal funds. See *Townsend* v. *Swank,* 404 U. S. 282, 292 (BURGER, C. J., concurring in result). And while Congress may attach strings to its offer of federal funding, it does not require the States to accept any federal funds at all.

The Court of Appeals also acknowledged that § 406 (e)

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tion of doing so might properly have led the District Court to deny injunctive relief, see *Hecht Co.* v. *Bowles,* 321 U. S. 321, it could not operate to deprive the successful plaintiffs, and indeed the public, of a final and binding determination of the legality of the old practice. *United States* v. *W. T. Grant Co., supra,* at 632.

Since the Court of Appeals correctly concluded that the District Court had erred in dismissing the case as moot, the controversy was still alive as to the legality of both the old EA program and the proposed AFDC special-needs program. We note that, in a status report to the Illinois Advisory Committee on Public Aid, the State's Director of the Department of Public Aid stated that he intended to request that "HEW clarify its [§ 406 (e)] Emergency Assistance Program [since] there are aspects of a [§ 406 (e)] program that we feel superior to a special need program and we would prefer, if so allowed, to maintain the [§ 406 (e)] Emergency Assistance Program of the present scope." (This status report was filed in the District Court as Exhibit 1 to Plaintiffs' Answer to Defendants' Motions to Dismiss.) Thus while the Court of Appeals had already passed on the legality of the Illinois EA program in *Mandley I,* there was no *jurisdictional* bar to its directing entry of a judgment on remand from *Mandley II* resolving the entire dispute by enjoining the operation of both programs.

does not by its own terms attach any eligibility "strings" to a program funded under the AFDC provisions. If Illinois' plan to meet the emergency needs of AFDC recipients by means of AFDC "special needs payments" was proper under § 403 (a)(1), the broader EA eligibility definition would have no application. The Court of Appeals believed, however, that the requirements of § 406 (e) would be "totally eviscerated" if States could evade them simply by resorting to the AFDC provisions. This effect, in its view, compels the conclusion that § 403 (a)(5) is the exclusive source of federal funds for emergency needs, and therefore that emergency payments of the kind contemplated by the Illinois plan [8] cannot be reimbursed under § 403 (a)(1) as AFDC "special needs."

A

Even assuming the Court of Appeals' premise that § 406 (e) does impose mandatory standards of eligibility for EA, its conclusion simply does not follow. If a State adopts a program that is, for whatever reason, *not* a proper EA program, it is no "evasion" of the requirements of § 406 (e) to seek alternative funding. It is merely an election not to operate an EA program, but to do something quite different instead. Since the statute clearly offers the States an option whether or not to adopt an EA program, it is in no sense "eviscerated" when a State chooses to forgo the offer.

The legislative history does not indicate a contrary intent. The Court of Appeals found highly significant the description

[8] The record does not contain an actual proposal for the contemplated special-needs program, since Illinois had not at the time of the Court of Appeals' decision drafted or submitted such a plan to HEW for approval. The court assumed, and the parties agreed, that the program would parallel the old EA program: *i. e.*, it would cover emergencies in AFDC families arising out of the actual or threatened loss of shelter due to damage or eviction and the immediate needs of presumptively eligible AFDC applicants.

of EA as an altogether "new" program that would provide federal matching for emergency assistance "[f]or the first time," 113 Cong. Rec. 36319 (1967) (remarks of Sen. Curtis). But, as we have already observed, a critical distinction between EA and AFDC is that eligibility for the former does not depend on the absence of a parent from the home. Thus the enactment of EA extended aid to an entirely new class of families that had not previously been eligible for any form of federal assistance.[9] In this context, the fact that EA was described as a "new" program hardly implies an understanding that the emergency needs of persons who *were* eligible for AFDC could not be met under the existing program.[10] Indeed the contrary understanding is revealed in the observation that emergency assistance to AFDC applicants was "*frequently* . . . unavailable under State programs today." S. Rep. No. 744, 90th Cong., 1st Sess., 165 (1967). (Emphasis supplied.)

There is nothing, therefore, in the policies or history of the EA statute to indicate that Illinois' proposed AFDC special-needs program should not be judged solely under the requirements for an AFDC program funded under § 403 (a)(1), without regard to the EA requirements of §§ 406 (e) and 403 (a)(5). Accordingly, we must consider whether the special-needs program proposed by Illinois is permissible as part of an AFDC program alone.

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[9] "For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before. For a period of 30 days, *emergency assistance can be paid in cases where they cannot meet other qualifications.*" 113 Cong. Rec. 36319 (1967) (remarks of Sen. Curtis). (Emphasis supplied.) See also S. Rep. No. 744, 90th Cong., 1st Sess., 166 (1967).

[10] Even if their import were clearer, as an expression of Congress' understanding as to the scope of the pre-existing AFDC statute, such *post hoc* observations by a single member of Congress carry little if any weight. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 714.

B

Illinois' proposed program would recognize specified emergency needs as "special needs items" within its AFDC "standard of need." The standard of need is a dollar figure set by each State reflecting the amount deemed necessary to provide for essential needs, such as food, clothing, and shelter.[11] See *Rosado* v. *Wyman,* 397 U. S. 397, 408. It is the "yardstick" for measuring finanical eligibility for assistance, but the level of benefits actually paid is not necessarily a function of the standard of need. *Ibid.* At least as early as 1966 federal regulations recognized that States could properly include special-needs items in their standards of need for AFDC.[12] These "are usually defined as those needs that are recognized by the State as essential for some persons but not for all, and that must therefore be determined on an individual basis." U. S. Dept. of HEW, Social and Rehabilitation Service, Assistance Payments Administration, Characteristics of State Plans for Aid to Families with Dependent Children xiii (1974) (AFDC Survey). Whenever the special need is found to exist, it is budgeted in the total standard of need. *Ibid.*

Frequently the special need is a regular or recurring expense, such as medication or a medically indicated diet, but this is not always the case. On the contrary, the 1974 AFDC Survey, *supra,* reveals that HEW has approved state plans that cover a wide variety of needs under the rubric of "special circumstance items," including one-time emergency needs like

[11] The States have a "great deal of discretion" in setting the standard of need, and "some States include in their 'standard of need' items that others do not take into account." *Rosado* v. *Wyman,* 397 U. S. 397, 408.

[12] U. S. Dept. of HEW, Handbook of Public Assistance Administration, Part IV, § 3131 (3) (1966). Current regulations provide that "[i]f the State agency includes special need items in its standard [the state plan must] (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them." 45 CFR § 233.20 (a)(2)(v) (1977).

replacing major appliances,[13] home repair,[14] and catastrophic loss.[15] Similarly, the loss of shelter because of damage or eviction is a particular, nonrecurring event that befalls some, but not all, AFDC recipients, which may be reflected in an adjustment in the standard of need whenever that event occurs.

By approving state plans that cover nonrecurring emergencies as special needs HEW has expressed its view that such items are properly included in the AFDC standard of need for reimbursement under § 403 (a)(1). The interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference. *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 421. Moreover, this view is entirely consistent with the well-established principle that the States have "undisputed power to set the level of benefits and the standard of need" for their AFDC programs. *King* v. *Smith,* 392 U. S., at 334; *Dandridge* v. *Williams,* 397 U. S. 471, 478; *Rosado* v. *Wyman, supra,* at 408; *Jefferson* v. *Hackney,* 406 U. S. 535, 541. See n. 11, *supra.*

Since Illinois has not in fact submitted a proposed special-needs program for approval, see n. 8, *supra,* there is no way of knowing whether such a plan would comply in all other respects with the requirements for an AFDC program. But it is clear that a plan to meet certain emergency needs of AFDC recipients—specifically actual or threatened loss of shelter due to damage or eviction—is not necessarily improper as an AFDC special-needs program simply because it addresses a

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[13] Illinois and Minnesota. AFDC Survey 59, 100.

[14] Arizona, Connecticut, Guam, Iowa, Kansas, Minnesota, New Hampshire, and South Dakota. *Id.,* at 11, 27, 46, 69, 73, 100, 125, 179.

[15] California's plan provided for "replacement of clothing and certain household items because of sudden or unusual circumstances beyond [the] control of [the] family." *Id.,* at 19. Connecticut, North Dakota, and Rhode Island covered needs arising out of "catastrophic" events as special-circumstance items. *Id.,* at 27, 147, 171.

nonrecurring need that could alternatively be provided for under an EA program.

III

Although the Court of Appeals' opinion in *Mandley II* focused on the proposed special-needs program, the injunction it ordered to be entered on remand would prohibit not only the operation of such a program under AFDC, but *any* program of emergency assistance that defines eligibility more narrowly than § 406 (e). In substance, therefore, the injunction would enforce *Mandley I*'s holding that § 406 (e) imposes mandatory eligibility standards on States participating in the EA program. Since there is still a live controversy over this issue, see n. 7, *supra,* it is to that question that we now turn.

Section 406 (e) defines EA in terms of four distinct considerations. First, unlike AFDC, it specifies a time limitation: EA may be provided only for a period not to exceed 30 days in any 12-month period. Second, it describes the persons on whose behalf aid may be furnished: needy children under the age of 21 who are living with specified relatives. Third, it defines the circumstances under which aid may be provided: where the child is without resources, and aid is necessary to "avoid destitution . . . or to provide living arrangements" for the child. Finally, it describes the method by which aid may be provided: not only cash payments and medical or remedial care, as under AFDC, but also payments in kind and "such services as may be specified by the Secretary." In summary, under EA any family with children that is for any reason threatened with destitution is eligible for emergency aid at least once in a 12-month period, and that aid may be provided by almost any means.

In declaring that Illinois is prohibited from narrowing these broad standards in any way,[16] the Court of Appeals relied on

[16] The original plan actually invalidated in *Mandley I* narrowed EA eligibility by limiting it to persons also eligible (or presumptively eligible) for AFDC, and by recognizing as circumstances of emergency need only

a long line of this Court's cases mapping out the mandatory reach of the AFDC eligibility provisions. As to AFDC, the law is indeed clear. Each State is entirely free to set its own monetary standard of need and level of benefits. *King* v. *Smith, supra,* at 334; *Dandridge* v. *Williams, supra,* at 478; *Rosado* v. *Wyman,* 397 U. S., at 408; *Jefferson* v. *Hackney, supra,* at 541.[17] But the States are not free to narrow the federal standards that define the categories of people eligible for aid. Beginning with *King* v. *Smith, supra,* this Court has consistently held that States participating in the AFDC program must make assistance available to *all* persons who meet the criteria of § 406 (a) of the Act. *Carleson* v. *Remillard,* 406 U. S. 598; *Townsend* v. *Swank,* 404 U. S. 282. See also *Lewis* v. *Martin,* 397 U. S. 552. The statutory foundation for this conclusion is § 402 (a)(10), which requires that a State's "plan for aid and services to needy families with children" must provide that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U. S. C. § 602 (a)(10).

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an AFDC recipient's loss of shelter due to damage or eviction, and an AFDC applicant's immediate need for household effects. Other States, however, have imposed different kinds of restrictions on EA eligibility. Some, for example, *exclude* AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant, reasoning that the State should not pay double benefits when recipients have failed to budget their resources properly. See generally Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Cornell L. Rev. 879, 888–892 (1975).

The injunction ordered by the Court of Appeals in *Mandley II* apparently reaches all such limitations. It requires Illinois, so long as it receives any funds under Title IV–A and operates an emergency aid program, to provide assistance to all persons who fit the federal description of eligible individuals, and it prohibits HEW from "approving state plans for emergency assistance which limit eligibility more narrowly than § 406 (e)."

[17] By controlling these two elements, which determine actual payments under the program, every State retains the ability to control its total AFDC expenditures. Cf. *Jefferson* v. *Hackney,* 406 U. S., at 539–541.

The question to be decided is whether these interpretive principles are to be applied to the EA program as well.

A

The short answer is that, since § 402 (a)(10) on its face applies only to "aid to families with dependent children" and not to the separately designated program of "emergency aid to needy families with children," it cannot be the basis for making the § 406 (e) eligibility requirements mandatory on the States.

The Court of Appeals recognized that § 402 (a)(10) was limited by its language to AFDC, but nevertheless concluded that Congress intended to treat EA "in the same way" because it is "part of the same statutory scheme," and rooted in the "same Congressional concern with [the] deprivation of children that brought forth the AFDC program . . . ." *Mandley I*, 523 F. 2d, at 422. But Congress' choice of precise language in this complex statute cannot be glossed over with such generalities.

The § 402 "state plan for aid and services to needy families with children" is the central, organizing element of the Title IV–A program. A State's plan establishes both its funding relationship with the Federal Government and the substantive terms of all Title IV–A programs in which it has elected to participate. Thus, the plan reflects not only the basic AFDC program of cash assistance defined in § 406 (b), but also Title XX social services, see § 402 (a)(15) and 42 U. S. C. § 1397 *et seq.* (1970 ed., Supp. V), and, if the State chooses to adopt them, the optional programs of EA, defined in § 406 (e), and AFDC–Unemployed Fathers (AFDC–UF), established by § 407.

Section 402 (a) lists some 20 specific requirements for which a state plan "must provide." Some clearly apply to the plan as a whole. These generally concern program administration. *E. g.*, § 402 (a)(1) ("provide that it shall be in effect in all

political subdivisions of the State"); § 402 (a)(5) ("provide . . . such methods of administration . . . as are found by the Secretary to be necessary [and] proper . . ."); § 402 (a)(9) ("provide safeguards which restrict the use or disclosure of information concerning applicants or recipients . . ."). Others, like § 402 (a)(10), refer specifically to "aid to families with dependent children." *E. g.*, § 402 (a)(7) ("provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children"); § 402 (a)(11) ("provide for prompt notice . . . to the State child support collection agency . . . of the furnishing of aid to families with dependent children with respect to a child who has been deserted or abandoned . . .").

The term "aid to families with dependent children" is given a very specific meaning in § 406 (b)—and "emergency assistance to needy families with children" as defined in § 406 (e) means, as we have observed, something quite different. It is true that both the EA and AFDC programs must be reflected in a State's § 402 plan, and both will be governed by those parts of § 402 that apply to the plan as a whole. But there is no basis for assuming that, when § 402 refers specifically to AFDC, those references are either meaningless or inadvertent. On the contrary, there is every reason to suppose that the exclusion of EA from specific substantive requirements of § 402, in particular § 402 (a)(10)'s imposition of mandatory eligibility standards, was deliberate, since the absence of mandatory eligibility standards is wholly consistent with the nature and purpose of the EA program.

B

The EA program was adopted by means of an amendment to § 406 defining the new term "emergency assistance to needy families with children." Pub. L. 90–248, § 206 (b), 81 Stat. 893. But nowhere in the EA statute is there a

precise definition of eligibility comparable to the terms that have been held mandatory in AFDC. As to the latter, the term "aid to families with dependent children" is defined in § 406 (b) as "money payments . . . in behalf of [a] dependent child . . . ." The term "dependent child" is separately defined in § 406 (a) as a needy child who has been deprived of parental support, is living with specified relatives, and is either under the age of 18 or under the age of 21 and regularly attending school. It is this very specific definition of "dependent child" in § 406 (a) that has been held to be mandatory upon the States in *King* v. *Smith,* 392 U. S. 309 ("deprived of parental support"), *Carleson* v. *Remillard,* 406 U. S. 598 ("continued absence from the home"), and *Townsend* v. *Swank,* 404 U. S. 282 ("regularly attending a school").

On the other hand, the term "emergency assistance to needy families with children" is defined in § 406 (e) as payments and services furnished "in the case of a needy child" who meets certain requirements and is facing destitution. The structure of this statutory provision thus parallels § 406 (b)—*i. e.,* while it describes eligible persons, it is in terms a definition of the *program* for which federal funding is available. But in the EA program there is no separate provision, parallel to § 406 (a), that defines the terms used to describe eligible persons.[18] There is no statutory language, therefore, that can reasonably be understood as imposing uniform standards of eligibility on every state EA program.[19]

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[18] By contrast, the other optional Title IV–A program, AFDC–UF, is defined by reference to the key statutory term "dependent child." § 407 (a), 42 U. S. C. § 607 (a). This indicates that when Congress intended that a separate program should be treated "in the same way" as AFDC, it was able to express that intent clearly by actually incorporating the identical terms.

[19] The Court of Appeals thought that "the problem of setting workable definitions for the somewhat amorphous eligibility criteria in [§ 406 (e) could] be addressed by HEW rule-making," *Mandley I,* 523 F. 2d, at 422–423, and indeed required such rulemaking in its *Mandley II* order. See

The conclusion that Congress in fact intended to treat EA and AFDC quite differently is fully consistent with its purposes in enacting the EA program. Unlike the basic AFDC program and the optional AFDC–UF extension, EA is not a comprehensive system of income maintenance, but rather a program designed to allow quick, ad hoc responses to immediate needs. Indeed one of the primary purposes of making EA available to persons not receiving or eligible for AFDC was to "encourag[e] the States to move quickly in family crises, supplying the family promptly with appropriate services," in the hope that this "would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967) (remarks of Cong. Mills). This purpose reflects not only an awareness of the distinct difference between AFDC and EA, but also an understanding that EA would not be surrounded with all of the trappings that § 402 requires of the ongoing AFDC cash-payments program. In short, EA was designed "to assure needed care for children, to focus maximum effort on self-support by families, and to provide *more flexible and appropriate tools to accomplish these objectives.*" S. Rep. No. 744, 90th Cong., 1st Sess., 165 (1967). (Emphasis supplied.)

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n. 5, *supra*. The statute does not, however, require the Secretary to promulgate implementing regulations to clarify the scope of § 406 (e). Compare § 406 (e) with § 407 (a) (AFDC–UF). Cf. *Batterton* v. *Francis*, 432 U. S. 416. And the regulations in fact adopted by the Secretary interpret the statute as leaving the States with broad discretion as to EA eligibility requirements. 45 CFR § 233.120 (1977). The Secretary's contemporaneous interpretation of the statute is entitled to considerable deference. *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 421. In the absence of an express delegation of authority to the Secretary, there is simply no basis for assuming that Congress intended that he, rather than the States, must make definite—and mandatory—the generalized standards of eligibility it wrote into the EA statute. Cf. n. 21, *infra*.

As a matter of historical fact, Congress has always left the States broad discretion in shaping the programs that, like EA, authorize assistance to persons not eligible for AFDC in the hope of preventing lasting welfare dependency. Under the former § 406 (d) family services program [20] the States had "considerable latitude in providing services to nonwelfare recipients on the grounds that they [were] 'former or potential' recipients." S. Rep. No. 93–1356, p. 9 (1974). And the declared purpose of the new Title XX social services program enacted in 1975, 42 U. S. C. § 1397 *et seq.* (1970 ed., Supp. V), was to "encourag[e] each State, *as far as practicable under the conditions in that State,* to furnish services directed at the goal of . . . achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency. . . ." 42 U. S. C. § 1397 (1970 ed., Supp. V). (Emphasis supplied.) The legislative history of that statutory program reflects Congress' awareness that the very magnitude of its purpose would require that "the States . . . have the ultimate decision-making authority in fashioning their own social service programs within the limits of funding established by Congress." S. Rep. No. 93–1356, *supra,* at 6.[21]

By the same token, the very breadth of the potential reach of EA—to virtually any family with needy children of a

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[20] Section 406 (d) of the Act, as set forth in 42 U. S.C. § 606 (d), defined "family services" as "services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence." Section 406 (d) has been repealed and replaced by the new Title XX Social Services program. Pub. L. 93–647, §§ 2, 3 (a)(5), 88 Stat. 2337, 2348. See 42 U. S. C. § 1397 *et seq.* (1970 ed., Supp. V).

[21] This conclusion was based on the "lengthy history of legislative and regulatory action in the social service area [which] made it clear . . . that the Department of Health, Education, and Welfare can neither mandate meaningful programs nor impose effective controls upon the States." S. Rep. No. 93–1356, at 6.

certain age that faces a risk of destitution—argues against the inference that Congress intended to require participating States to extend aid to *all* who were potentially eligible under § 406 (e). A literal application of all of the § 406 (e) standards, as required by the Court of Appeals' proposed order, would create an entirely open-ended program, not susceptible of meaningful fiscal or programmatic control by the States.

The Court of Appeals believed that under its interpretation of the Act Illinois would retain "substantial control" of its program through its ability to limit the amount of assistance actually paid:

> "It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams,* 397 U. S. 471, . . . but it will not be able to declare ineligible those who come within the federal definition of eligibility in [§ 406 (e)]. . . . This need not result in additional expense to the state but with existing appropriations should at least result in helping a broader number of persons, although more moderately than at present." *Mandley I,* 523 F. 2d, at 422–423.

But this application of the distinction drawn in the AFDC cases between eligibility criteria and financial need standards, see *supra,* at 740, fundamentally misconceives the purpose of the EA program. A family that is facing destitution because its home has burned down is not helped at all by a "moderate" grant insufficient to see it through the crisis. As the Illinois Director of the Department of Public Aid stated in his report to the Legislative Advisory Committee on Public Aid, the decision in *Mandley I* created an untenable tension between fiscal and programmatic integrity in the EA system:

> "But even if the Department could so limit [expenditures as suggested by the Court of Appeals] the results would be to divide a limited amount of Emergency Assistance

> money among a very expanded group of individuals, thus reducing the amount of assistance paid in each individual case to a meaninglessly small amount. The agency is thus faced with the prospect, if it continues the program, of potentially unlimited financial expenses, if it meets actual need in Emergency Assistance payments, or the payment of meaninglessly small amounts (and the possibility of legal challenge and subsequent mandatory order of additional financial payments)."

The intent of Congress in enacting EA thus would not be furthered by a statutory interpretation that requires a State to meet less than what it believes is the actual emergency need of an eligible family in order to retain financial control of its program. On the other hand, that intent will be effectuated by the natural reading we give to the relevant statutory provisions. Neither § 402 (a)(10), which makes *AFDC* eligibility criteria mandatory, nor § 406 (e), which defines the *permissible* scope of an EA program for purposes of federal funding, imposes mandatory eligibility standards on States that elect to participate in the EA program.

For the foregoing reasons the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.[22]

*It is so ordered.*

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

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[22] The Court of Appeals did not reach the respondents' constitutional and state-law claims, see n. 3, *supra*. They remain open for consideration on remand.

# AGOSTO *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

No. 76-1410. Argued February 28, 1978—Decided June 6, 1978

The Immigration and Naturalization Service brought proceedings to deport petitioner as an alien who had unlawfully entered the United States. At a series of hearings before an Immigration Judge, the INS presented documentary evidence that petitioner was born in Italy in 1927 of unknown parents, was placed in a foundling home there, and ultimately was adopted by an Italian couple. Petitioner and several other witnesses testified that he was born in Ohio of an Italian mother and sent to Italy at an early age to reside with the above couple. Rejecting petitioner's evidence, the Immigration Judge issued a deportation order, and the Board of Immigration Appeals affirmed. Petitioner then petitioned the Court of Appeals for review of the Board's decision, claiming that he was entitled to a *de novo* hearing in District Court pursuant to § 106 (a) (5) (B) of the Immigration and Nationality Act, which provides that whenever a petitioner seeking review of a deportation order claims to be a United States citizen and makes a showing that his claim is not frivolous, the court of appeals, if it finds that "a genuine issue of material fact as to the petitioner's nationality is presented," must transfer the proceedings to the district court for a hearing *de novo* of the nationality claim. The Court of Appeals refused to transfer the case to the District Court for a *de novo* hearing and affirmed the deportation order, apparently holding that in order to obtain a *de novo* hearing petitioner was required by *Kessler* v. *Strecker,* 307 U. S. 22, to present "substantial evidence" in support of his citizenship claim and that he had failed to do so. *Held:*

1. The Court of Appeals' decision, to the extent that it holds *de novo* review to be required only where the petitioner presents substantial evidence in support of his claim to citizenship, is contrary to the plain language and clear meaning of § 106 (a) (5) (B), and there is nothing in the legislative history to indicate that Congress intended to require *de novo* judicial determination of citizenship claims only when such determinations would be compelled by the *Kessler* "substantial evidence" standard. Pp. 752–757.

(a) Although § 106 (a) (5) (B) was intended to satisfy any constitutional requirements relating to *de novo* judicial determination of citizenship claims, the statute clearly does not restrict *de novo* review to cases in which the "substantial evidence" test is met. Rather than incorporating the language of *Kessler* in the statute, Congress chose to require hearings where there is "a genuine issue of material fact," thus incorporating the same standard as governs summary judgment motions under Fed. Rule Civ. Proc. 56. Pp. 753–755.

(b) Since summary judgment principles control, it follows that a court of appeals cannot refuse to allow a *de novo* review of a citizenship claim if the supporting evidence would suffice to entitle a litigant to trial were such evidence presented in opposition to a motion for summary judgment. Pp. 756–757.

2. Applying the appropriate standard to the record in this case, it is apparent that the Court of Appeals erred when it failed to transfer the case to the District Court for a *de novo* hearing. While the INS's documentary evidence would suffice, if uncontradicted, to establish petitioner's birth in Italy, such evidence would be refuted by petitioner's witnesses' testimony if that testimony were accepted by the trier of fact. Hence there is a genuine issue of material fact for the District Court on the question of petitioner's citizenship. Pp. 757–761.

549 F. 2d 806, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 761.

*Robert S. Bixby* argued the cause and filed briefs for petitioner.

*Marion L. Jetton* argued the cause for respondent. With her on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti, Deputy Solicitor General Easterbrook,* and *John H. Burnes, Jr.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question for decision is whether petitioner has made a sufficient showing in support of his claim to United States citizenship to entitle him to a *de novo* judicial determination

of that claim under § 106 (a)(5)(B) of the Immigration and Nationality Act, 8 U. S. C. § 1105a (a)(5)(B) (1976 ed.).

## I

In 1967, the Immigration and Naturalization Service began deportation proceedings against petitioner, Joseph Agosto, by issuance of a show-cause order charging that he was deportable as an alien who had unlawfully entered the United States. App. 4–6. Petitioner opposed deportation, claiming that he was born in this country and therefore is a citizen of the United States not subject to deportation. Over the course of several years, a series of hearings were held before an Immigration Judge,[1] at which the Service presented documentary evidence in an effort to show that petitioner was born in Italy in 1927 of unknown parents, placed in a foundling home there, and ultimately adopted by an Italian couple. Petitioner presented testimony from himself and several other witnesses to show that he was born in Ohio of an Italian mother and sent to Italy at an early age to reside with the aforementioned couple.

In April 1973, the Immigration Judge issued the deportation

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[1] After petitioner's first set of hearings, an Immigration Judge issued a deportation order, App. 18, which petitioner then appealed to the Board of Immigration Appeals. The Board remanded to permit the Immigration Judge to consider petitioner's claim that he was entitled to relief from deportation pursuant to § 241 (f), 8 U. S. C. § 1251 (f) (1976 ed.), as the husband of a United States citizen, but did not consider petitioner's other challenges to the finding that he was deportable. App. 19–20. At the hearing on remand, the Service lodged an additional charge against petitioner alleging that he was deportable because he had been convicted of crimes of moral turpitude. The Immigration Judge adhered to his finding that petitioner was deportable and not entitled to relief under § 241 (f). Record 677–691. On petitioner's second appeal, the Board again remanded for a further determination of petitioner's eligibility for § 241 (f) relief and to permit petitioner to produce certain witnesses in support of his claim to United States citizenship. Record 628–633. The deportation order challenged here was issued after petitioner's third set of hearings, App. 23–59, and the Board affirmed the order. Pet. for Cert. iv–xiii.

order challenged here, rejecting the evidence tendered by petitioner and his witnesses that he was born in the United States. App. 23–59. The Board of Immigration Appeals affirmed. It noted that, "[i]f believed, the testimony of [petitioner's witnesses] clearly refutes the Service's otherwise strong documentary demonstration of [petitioner's] alienage" and that "[i]t is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii. The Board nevertheless accepted the Immigration Judge's credibility determinations and found that the "Service's case as to alienage is clear, convincing and unequivocal." *Id.*, at xi.

Agosto petitioned for review of the Board's decision in the United States Court of Appeals for the Ninth Circuit pursuant to § 106 of the Act, and claimed that, pursuant to § 106 (a)(5), he was entitled to a *de novo* hearing in District Court to determine whether he was a United States citizen. Section 106 (a)(5) provides that, whenever a petitioner "claims to be a national of the United States and makes a showing that his claim is not frivolous," the court of appeals is to transfer the proceedings to the district court for a hearing on that claim if "a genuine issue of material fact as to the petitioner's nationality is presented." When no genuine issue of material fact is presented, the court of appeals has authority to "pass upon the issues presented." [2]

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[2] Section 106 (a)(5), as set forth in 8 U. S. C. § 1105a (a)(5) (1976 ed.), provides:

"[W]henever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in

The Court of Appeals, with one judge dissenting, refused to transfer the case to the District Court for a *de novo* hearing on petitioner's citizenship claim, and affirmed the deportation order. Pet. for Cert. i; affirmance order, 549 F. 2d 806. It held that "[t]he evidence presented to the immigration judge does not disclose a colorable claim to United States nationality." Pet. for Cert. ii. Further, the Court of Appeals apparently concluded that in order to obtain a *de novo* hearing petitioner was required to present "substantial evidence" in support of his citizenship claim and that he had failed to do so. *Ibid.* The dissenting judge, while acknowledging that as a factfinder she would not have credited petitioner's testimony, stated that "I do not believe our legally assigned role includes a decision on credibility, and, on that basis, I am unable to say that petitioner's evidence, if believed, would not present a colorable claim to American citizenship." *Ibid.*

We granted certiorari, 434 U. S. 901 (1977), to consider the proper construction of § 106 (a)(5)(B), and we now reverse.

## II

In 1961, Congress enacted § 106 of the Immigration and Nationality Act, 8 U. S. C. § 1105a (1976 ed.), in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens from the United States." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22 (1961).[3] This statutory provision eliminated district court

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the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503 (a) of this title or otherwise . . . ."

[3] Prior to 1961, there was no specific statutory authorization for judicial review of deportation orders. For many years, habeas corpus had been the exclusive judicial remedy for challenging such orders, see *Heikkila* v. *Barber,* 345 U. S. 229, 235 (1953), but in 1955, we held that aliens could also obtain review of deportation orders in actions for declaratory and injunctive relief in district court under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702 (1976 ed.), *Shaughnessy* v. *Pedreiro,* 349 U. S. 48.

review of deportation orders under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702 (1976 ed.), and replaced it with direct review in the courts of appeals based on the administrative record. Congress carved out one class of cases, however, where *de novo* review in district court would be available: cases in which the person subject to deportation claims to be a United States citizen.

In carving out this class of cases, Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings. See H. R. Rep. No. 1086, *supra,* at 29; H. R. Rep. No. 565, 87th Cong., 1st Sess., 15 (1961). In *Ng Fung Ho* v. *White,* 259 U. S. 276, 284 (1922), the Court observed:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. . . . To deport one who . . . claims to be a citizen, obviously deprives him of liberty, . . . [and] may result also in loss of both property and life; or of all that makes life worth living."

We therefore held that a resident of this country has a right to *de novo* judicial determination of a claim to United States citizenship which is supported "by evidence sufficient, if believed, to entitle [him] to a finding of citizenship." *Id.,* at 282. See also *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 152–153 (1923). In *Kessler* v. *Strecker,* 307 U. S. 22, 34–35 (1939), we reaffirmed that holding and indicated in dictum that judicial determination of citizenship claims is required where "substantial evidence" is presented to support the citizenship claim.

In the instant case, the court below stated that petitioner failed to satisfy the standard of *Kessler* v. *Strecker, supra;* the court thus implicitly held that the standard of "substantial evidence" had been incorporated into § 106 (a)(5)(B). Pet. for Cert. ii. We disagree. Although Congress intended § 106

(a)(5) to satisfy any constitutional requirements relating to *de novo* judicial determination of citizenship claims, *supra,* the statute clearly does not restrict *de novo* review to cases in which the "substantial evidence" test is met. Rather than incorporating the specific language of *Kessler* into the statute, as it easily could have done, Congress chose instead to require hearings where there is "a genuine issue of material fact"—a standard that is different from but as familiar as the substantial-evidence standard.[4]

This statutory language is virtually identical to that embodied in Fed. Rule Civ. Proc. 56, which governs summary judgment motions. Under Rule 56, district court litigants opposing summary judgment have a right to a trial whenever there exists a "genuine issue as to any material fact." We may reasonably assume that, in using the language from Rule 56 as the standard for granting *de novo* district court hearings on citizenship claims, Congress intended the language to be interpreted similarly to that in Rule 56. " '[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' " *Lorillard* v. *Pons,* 434 U. S. 575, 583 (1978), quoting *Standard Oil* v. *United States,* 221 U. S. 1, 59 (1911). The Court of Appeals decision in this case, to the extent that it holds *de novo* review to be required only where the petitioner presents substantial evidence in support of his

[4] In addition to showing the existence of a "genuine issue of material fact" as to his nationality, a petitioner must demonstrate that his citizenship claim is not "frivolous" to obtain a *de novo* hearing. § 106 (a)(5). The "frivolousness" standard apparently refers to the merits of the legal theory underlying the citizenship claim. A "frivolous" claim would be analogous to one that could not survive a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. Rule Civ. Proc. 12 (b)(6). No one has suggested that the legal theory underlying petitioner's claim to American citizenship—that he was born in this country—is frivolous.

claim to citizenship,[5] is thus contrary to the plain language and clear meaning of the statute.[6]

Nor does anything in the legislative history indicate that Congress intended to require *de novo* judicial determination of citizenship claims only when such determinations would be compelled by the *Kessler* "substantial evidence" standard. Although there are references in the legislative history suggesting that a claim to citizenship must itself be "substantial," these statements are not amenable to the interpretation that substantial evidence is required in support of the claim before a judicial hearing would be provided. See, *e. g.*, H. R. Rep. No. 1086, *supra,* at 29; H. R. Rep. No. 565, *supra,* at 5. While Congress in enacting § 106 sought to "expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts," *Foti* v. *INS,* 375 U. S. 217, 226 (1963), this concern hardly justifies the assumption that Congress intended to impose a steep hurdle to judicial determination of citizenship claims. None of the abuses of judicial

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[5] In addition to holding that petitioner had not satisfied the standard of *Kessler* v. *Strecker,* the Court of Appeals held that petitioner had not made a "colorable" claim to United States citizenship. The dissenting judge stated that she was unable to say that petitioner's claim was not "colorable." The term "colorable" appears nowhere in the statute, and neither opinion hints at its derivation. We cannot tell whether, by use of the word "colorable," the Court of Appeals was applying the proper standard as set forth in § 106 (a) (5); if it was applying that standard, we believe it did so erroneously. See Part III, *infra.*

[6] None of the other Courts of Appeals to apply the standard have held that "substantial evidence" is necessary to trigger *de novo* review under § 106 (a) (5) (B). Instead, they have all indicated, although with some variation in language, that the appropriate standard is whether there is a genuine issue of material fact as to petitioner's alienage. See *Olvera* v. *Immigration & Naturalization Service,* 504 F. 2d 1372, 1375 (CA5 1974); *Rassano* v. *Immigration & Naturalization Service,* 377 F. 2d 971, 972 (CA7 1966); *Maroon* v. *Immigration & Naturalization Service,* 364 F. 2d 982, 989 (CA8 1966); *Pignatello* v. *Attorney General of the United States,* 350 F. 2d 719, 723 (CA2 1965).

review catalogued by Congress in the Committee Reports related to citizenship claims. See H. R. Rep. No. 565, *supra*, at 7–13. Rather, Congress was primarily concerned with the filing of repetitive petitions for review and with frivolous claims of impropriety in the deportation proceedings.[7] See, *e. g.*, H. R. Rep. No. 1086, *supra*, at 23, 33; 107 Cong. Rec. 19650 (1961) (remarks of Sen. Eastland); 105 Cong. Rec. 12724 (1959) (remarks of Rep. Walter).

Since summary judgment principles are controlling here, it follows that a court of appeals cannot refuse to allow a *de novo* review of a citizenship claim if the evidence presented in support of the claim would be sufficient to entitle a litigant to trial were such evidence presented in opposition to a motion for summary judgment. More specifically, just as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 467–468 (1962); 6 J. Moore, Federal Practice ¶ 56.02 [10], p. 56–45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence, see *Pignatello* v. *Attorney General of the United*

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[7] Section 106 was designed to minimize dilatory and repetitious litigation of deportation orders in several key respects. First, § 106 (c) precludes consideration of petitions for review or for habeas corpus where the validity of the deportation order "has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order." 8 U. S. C. § 1105a (c) (1976 ed.). Second, § 106 (a)(1) mandates that all petitions for review must be filed within six months of the date of the final deportation order. 8 U. S. C. § 1105a (a)(1) (1976 ed.). Finally, the statutory review proceeding replaces review in the district court under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702 (1976 ed.), with review directly in the courts of appeals. 8 U. S. C. § 1105a (a) (1976 ed.). See *supra*, at 752–753.

*States,* 350 F. 2d 719, 723 (CA2 1965). Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a *de novo* hearing, since "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Poller* v. *Columbia Broadcasting System, Inc., supra,* at 473.

III

Applying the appropriate standard to the record in this case, it is apparent that the Court of Appeals erred when it failed to transfer the case to the District Court for a *de novo* hearing. The Service's proof that petitioner is not a United States citizen would certainly be sufficient, if uncontradicted, to establish his birth in Agrigento, Italy, in July 1927. However, the evidence adduced by petitioner to support his claim of American citizenship creates "genuine issue[s] of material fact" that can only be resolved in a *de novo* hearing in the District Court.

Petitioner acknowledges that the Service's documentary proof pertains to him. This proof includes an entry from the city of Agrigento registry of births for 1927 relating that a 75-year-old handywoman appeared before the registrar and declared that "at 4:00 a. m. on the 17th day of [July] in a house situated in Via Oblati, of a woman who does not want to be named, a male child was born, which she presents to me and to whom she gives the first name of Vincenzo and the surname of Di Paola." Record 667. The city registry also indicates that the child was sent to a foundling home. In addition, the foundling home's registry indicates that a Vincenzo Di Paola was born on July 16, 1927, and was consigned to Crocifissa Porello, petitioner's adoptive mother and wife of Pietro Pianetti, petitioner's adoptive father, on August 26, 1927. The last piece of documentary evidence is a translation from the foundling home record showing that Vincenzo Di Paola was baptized on July 18, 1927.

Petitioner claims, however, that the records regarding Vincenzo Di Paola were made at the request of his maternal grandfather to hide the true facts of his illegitimate birth in the United States. Petitioner's evidence in support of his claim to United States citizenship consisted of his own testimony and that of his adoptive parents, Crocifissa and Pietro Pianetti, and his alleged half brother, Carmen Ripolino.

According to the testimony of the Pianettis, petitioner was the illegitimate son of Crocifissa Pianetti's sister, Angela Porello, who left her Italian husband and two daughters in 1921 to move to the United States with her cousin Giacomo Ripolino. Through correspondence with Angela, the Pianettis learned in about 1925 that petitioner had been born, that his father was Salvatore Agosto, and that Angela had at least two other children, including Carmen Ripolino. According to the Pianettis, petitioner was sent to live with them and with Angela's parents because Angela could not care for petitioner in Ohio. The Pianettis testified that petitioner was never in the foundling home, but that the documents presented by the Service concerning petitioner's birth in Italy were created by Angela's father to hide the fact that petitioner was his illegitimate grandson.[8]

Carmen Ripolino corroborated the testimony of the Pianettis in important respects. He testified that his mother was Angela Porello, and that she told him when he was a child that he had two half sisters in Italy and a half brother whom she had sent there to live with her mother. Although Carmen Ripolino admitted having no independent knowledge that petitioner was the brother who had been sent to Italy, his testimony corroborated that of the Pianettis that Angela Porello gave birth to a son in this country whom she sent to Italy to live with relatives.

Petitioner's testimony was only partially consistent with

[8] Petitioner and the Pianettis testified that the name Vincenzo Di Paola was probably chosen because July 17 was the feast day for Saint Vincent.

that of his witnesses. Because he possessed a birth certificate belonging to one Joseph Agosto, born in Cleveland in 1921, which had allegedly been sent to petitioner in Italy by another American relative between 1948 and 1950, petitioner maintained for a time that he was that Joseph Agosto, the son of Salvatore Agosto and his wife Carmela Todaro.[9] The birth certificate had not actually been issued, however, until sometime after petitioner claimed to have received it. At the same time petitioner also testified that he had been told that his mother's name was Angela Porello and that he lived with his grandfather and the Pianettis after coming to Italy as a small boy. Petitioner acknowledged that he had been known by different names at different times.

There is no doubt that petitioner has not told one story consistently throughout his deportation hearings and has attempted to establish his citizenship by relying on any possible shred of evidence. Nor is there any doubt that petitioner has told different stories about his past to different courts.[10] But it is noteworthy that, starting in his first deportation hearing, petitioner has acknowledged that he is not certain of his true parental origins, and that he had been told that his mother was Angela Porello. And, given the obvious confusion and uncertainty surrounding the circumstances of petitioner's birth (under either the Service's theory or that of petitioner),

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[9] Salvatore Agosto was sometimes referred to in the deportation proceedings as Arcangelo Agosto. Petitioner claimed they were different names for the same man who used one name with his wife, Carmela Todaro, and one name with Angela Porello.

[10] Petitioner maintained, in connection with a suit to declare his third wife his lawful wife, that he had been only 17 at the time of an earlier marriage in 1944, though in the deportation proceedings he claimed to have been born no later than 1925. In an effort to obtain leniency at his sentencing for falsification of papers in connection with a Federal Housing Administration loan, petitioner permitted his attorney to represent to the court that petitioner had no prior convictions, even though he did at that time have a criminal record in Italy.

it is hardly surprising that petitioner cannot say with any degree of certainty who his true parents might have been.

We need not decide whether petitioner's testimony, standing alone, is so inherently incredible in light of its internal inconsistencies as to justify denial of *de novo* judicial review of the citizenship claim. In this case, the citizenship claim is supported by the testimony of three witnesses whose story, while highly unusual, certainly cannot be rejected as a matter of law. Their disputed testimony concerning petitioner's birth in this country and subsequent upbringing in Italy is in most respects no more unusual than their unchallenged testimony concerning other aspects of this family's relations.[11] To accept the present claim to United States citizenship, the District Court would need only to believe that petitioner was born to Angela Porello in Ohio in the mid-1920's; that he was sent by her to live with the Pianettis in Italy; and that Angela's father had the birth records in his native town falsified to prevent public knowledge of the birth of an illegitimate child to his daughter while still permitting him and other members of his family to raise the child.[12] These events, while out of

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[11] For example, Carmen Ripolino testified that he did not know who his father was, and that he had two birth certificates, one showing his father as Giacomo Ripolino (the man who brought Angela Porello to this country) and a second showing his father to be one Charles Litizia. In addition, the Pianettis testified to the varied relationships Mrs. Pianetti's sister, Angela Porello, maintained with different men and to her departure from Italy with one of those men, leaving behind a husband and two daughters. Although the Service may not have challenged this other testimony because it was immaterial to the issue of petitioner's citizenship, its lack of materiality and its unflattering character also suggest that the witnesses would have had no reason to testify to those events if they had not occurred.

[12] Since only the registrar signed the entry in the registry of births regarding the birth of Vincenzo Di Paola and the witnesses who were present were unable to write and only had the document read to them, it is certainly not entirely implausible that Angela's father was able to have that record and the notation at the foundling home falsified.

the ordinary, are not so extraordinary as to compel disbelief in their occurrence. Even the Board of Immigration Appeals, which rejected petitioner's claim of citizenship, stated that "[i]t is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii.

Since the documentary evidence submitted by the Service would be refuted by the testimony of petitioner's witnesses if that testimony were accepted by the trier of fact, *ibid.*, there is plainly a genuine issue of material fact for the District Court on the question of petitioner's citizenship. Although as the trier of fact the District Court might reject the testimony of these witnesses because of their interest in the outcome, that determination has been committed by Congress to the district courts by § 106 (a)(5)(B) of the Act and not to the courts of appeals. The decision of the Court of Appeals must therefore be reversed and the case remanded for proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court today has construed a statute in a way that rewards falsehood and frustrates justice. The statute is § 106 (a) of the Immigration and Naturalization Act, 8 U. S. C. § 1105a (a) (1976 ed.), adopted in 1961 as part of a general revision of the statutory provisions governing judicial review of deportation orders. The general revision was designed to prevent repetitious litigation of frivolous claims, and "dilatory tactics" used to forestall deportation, by eliminating in most instances any review by district courts of deportation decisions. *Foti* v. *INS*, 375 U. S. 217, 224–225 (1963).[1]

[1] "[B]y eliminating review in the district courts, the bill [was intended to] obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." 104 Cong.

The general rule under § 106 (a) leaves deportation matters largely to administrative proceedings, subject to review by a court of appeals to ensure that the administrative decision is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105 (a)(4) (1976 ed.). Section 106 (a)(5), quoted *ante,* at 751–752, n. 2, provides a narrow exception to the general rule when the deportation proceeding involves a person claiming to be a national of the United States. In such a proceeding, § 106 (a)(5) requires a reviewing court of appeals to refer the case to a district court for a *de novo* trial when the claimant clears two hurdles: first he must show that his claim to United States citizenship is not "frivolous," and then that its resolution turns on "a genuine issue of material fact." As indicated in the Court's opinion, the statute is hardly a model of artful draftsmanship. Even so, it is unnecessary to construe it, as the Court does, to require a trial *de novo* in federal district court in response to any asserted claim to citizenship turning on questions of "credibility," however farfetched.

There can be no case less deserving of further factual review than this one. Petitioner is an ex-convict, convicted of several crimes involving moral turpitude. He has told five different stories with respect to his nationality, inventing new fabrications to meet the Service's evidence or whenever they served other purposes. See *ante,* at 759 n. 10. No one has believed his stories. Yet he has proved himself a master at exploiting the safeguards designed to vindicate bona fide—not specious—claims of citizenship. The Court's holding totally frustrates the intent of Congress in enacting § 106 (a), in response to the "growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation

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Rec. 17173 (1958) (remarks of Rep. Walter), quoted in *Foti* v. *INS,* 375 U. S., at 225 n. 11.

from this country." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22–23 (1961). Rather than putting an end to this abuse of our generous procedures, the Court now concludes that petitioner is entitled to a *de novo* trial of a claim to citizenship so transparently false that none of the numerous judges who have passed on it believes it.

I

The Immigration Service claims that petitioner is an Italian by birth named Vincenzo Di Paola Pianetti, and that he is deportable because his most recent entry into the United States was fraudulent and because he has been convicted of crimes involving moral turpitude. The Service claims that petitioner last entered the United States in 1966, purporting to be a citizen of the United States and relying on the passport of Joseph Agosto. Petitioner claims he was born in Cleveland, Ohio, assigning various dates of birth from 1921 to 1927, and was named Joseph Agosto; that he was sent to Italy when he was 2 or 3 years old; that he lived there with his natural mother's sister and her husband, who later "affiliated" him and gave him their name; and that he returned to the United States in 1951 or 1952. The issue ultimately is one of identity. If petitioner is "Agosto" rather than "Pianetti," he is an American citizen. During the course of the instant proceedings, commenced in 1967, not a single administrative or judicial official has believed that petitioner is not the Italian-born Pianetti.

The proceedings in this case have been protracted. On September 5, 1967, the Service issued a show-cause order, and notice of hearing, seeking petitioner's deportation. A full hearing was held before an Immigration Judge. The Service introduced documentary evidence demonstrating that petitioner was born, taken to a foundling home, and baptized in Agrigento, Italy, in 1927, and later was entrusted to the Pianettis. See *ante,* at 757. The Service also demonstrated

that petitioner was married to an Italian woman in 1944 and had two daughters in Italy. At this first hearing, petitioner conceded that the documentary evidence pertained to him, but claimed that he really had been born in Cleveland, Ohio, in 1921, and was named Joseph Agosto. Petitioner produced a marriage certificate showing that he was married in Alaska in 1953, and that he claimed at the time to be 32 years old and not previously married. Petitioner testified that he was sent to Italy when he was 4 or 5, and that his belief that he was born in Cleveland was based entirely on the birth certificate which an uncle sent him from the United States. The Service countered with documentary evidence that the birth certificate pertained to a Joseph Agosto who had been born in Cleveland in 1921 and died in Italy in 1951, and an affidavit from Joseph Agosto's sister that petitioner falsely was using the identity of her deceased brother.

The Immigration Judge sustained the charge of the Service and entered a deportation order. He concluded that petitioner "presented no credible evidence to show that he is not the person [Pianetti] whom the Government claims him to be." App. 14. On appeal, the Board of Immigration Appeals remanded the proceedings, "without reviewing the case on the merits," for the Immigration Judge to consider petitioner's contention that he was nondeportable under § 241 (f) of the Act, 8 U. S. C. § 1251 (f) (1976 ed.), because of his marriage to an American citizen, Mary Marie Agosto.[2]

Following a second hearing, the Immigration Judge again found petitioner not a citizen, deportable (not only because he had entered the United States without inspection but also

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[2] On June 3, 1968, in connection with a friendly suit to have Mary Marie Agosto declared his legal wife, petitioner executed an affidavit which contradicted the story told at the first deportation hearing. The affidavit stated that petitioner was born in 1927, and therefore was only 17 when he married his Italian wife in 1944. This would have rendered his first marriage invalid and would have validated his American marriage.

because he had been convicted of several crimes involving moral turpitude), and not entitled to relief under § 241 (f). Again petitioner appealed to the Board of Immigration Appeals. On this appeal petitioner conceded that a Joseph Agosto died in Italy in 1951, but maintained that there were "two Joseph Agostos," both born in Cleveland of the same father but different mothers. Petitioner explained the fact of only one birth certificate by saying that his mother had been the father's mistress and that the birth of the legitimate Joseph Agosto had not been recorded. The Board again declined to reach the merits of petitioner's claim to citizenship and remanded for consideration of "forgiveness" relief under § 241 (f).

It was not until the third hearing in 1971 that petitioner produced three witnesses, the couple who adopted him in Italy and his supposed half-brother from Ohio, who testified in support of petitioner's claim to citizenship. Petitioner abandoned his other stories of birth in 1921 or 1927, and maintained that he was born in Cleveland in 1924, the son of the father of the Joseph Agosto who was born in 1921. On April 11, 1973, the Immigration Judge filed an exhaustive opinion concluding that all of petitioner's various and contradictory stories were fabrications. App. 23–59. The opinion characterized petitioner as having had, since "he was sixteen years of age, . . . a record of deceit, double-dealing and subterfuge." *Id.*, at 32. The Board of Immigration Appeals affirmed. In the context of affirming the denial of discretionary relief from deportation, it observed that petitioner "knowingly gave false testimony before the immigration judge; his claim to citizenship has been knowingly false since its inception." Pet. for Cert. xii.

Having finally exhausted his administrative remedies, petitioner appealed to the United States Court of Appeals for the Ninth Circuit. That court issued its memorandum decision on January 24, 1977, and sustained the deportation decision, say-

ing: "The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality; nor does it meet the standard set forth in *Kessler* v. *Strecker*, 307 U. S. 22, 35 (1939)." *Id.*, at ii.

We granted certiorari on October 17, 1977. 434 U. S. 901. Today the Court hands down a decision entitling petitioner to continue his 11-year saga, commencing with a trial *de novo* in a district court.

II

The first flaw in the Court's reasoning is that it reads out of the statute the threshold requirement that the claim to United States nationality not be "frivolous." The Court muses in a footnote, without support, that "[t]he 'frivolousness' standard apparently refers to the merits of the legal theory underlying the citizenship claim," *ante*, at 754 n. 4, and therefore has been satisfied in this case because petitioner's theory of citizenship—that he was born in this country—is not frivolous.

Neither the language of the statute nor its legislative history sheds any helpful light on the intended meaning of the term "frivolous" for purposes of this statute.[3] The term may well refer in some instances to the underlying legal theory of a claim. But to say that this is the exclusive meaning is virtually to read the term out of the statute. If all that is required for a claim to be considered nonfrivolous is that the alleged alien maintain that he was born in this country, patently frivolous claims will pass the first threshold of the statute.[4] If Congress thought that every claim to birth

[3] The origin of the term in this context seems to have been *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), where the Court articulated the constitutional requirement of a judicial hearing when the petitioner "claims citizenship and makes a showing that his claim is not frivolous . . . ." *Id.*, at 284. The threshold requirement that the claim not be frivolous was absent from one of the earlier drafts of § 106 (a)(5). See H. R. Rep. No. 2478, 85th Cong., 2d Sess., 1 (1958).

[4] Petitioner himself does not argue that a "frivolous" claim to citizenship can only be one whose underlying legal theory is frivolous. Petitioner's

in this country, however tenuous, merited judicial *trial* rather than judicial *review,* one would assume it would have so provided rather than create a dual system of *de novo* fact-finding by both administrative and judicial proceedings. In addition, the legal theory underlying *any* claim to citizenship almost always will be that the purported citizen was born or naturalized in the United States. According to the Court's theory, therefore, the underlying legal theory of a claim to citizenship rarely will be deemed "frivolous."

We normally construe statutes to give meaning to each of their components. I read Congress' intent to have been that the courts of appeals must examine the administrative record to determine whether a claim to citizenship is frivolous for any reason.[5] And it would be difficult to find a more frivolous claim to citizenship than this one.[6]

## III

Assuming, *arguendo,* that petitioner's claim is not frivolous, the Court of Appeals was required to transfer the case to a

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counsel conceded before us that if there were uncontested documentary evidence of birth in Italy and only the alien's sworn statement that he was born in the United States, "that would be a frivolous claim because [the hypothetical case] is really a bare assertion of citizenship without any evidentiary support at all." Tr. of Oral Arg. 10.

[5] The courts of appeals are accustomed to determining whether *in forma pauperis* appeals from denials of habeas corpus petitions are "frivolous," and therefore warrant dismissal, under 28 U. S. C. § 1915 (d). Whether such an appeal is considered "frivolous" may depend on either the legal theory or the facts of the case.

[6] In *Maroon* v. *Immigration & Naturalization Service,* 364 F. 2d 982 (CA8 1966), the alleged alien—somewhat like petitioner here—changed his story between the deportation proceedings and judicial review, in the face of solid contrary documentation offered by the Service. The Court of Appeals concluded: "In this situation, petitioner's present claim to be a national of the United States, wholly unsupported by any substantial evidence whatever, and utterly inconsistent with the documents admittedly executed by him, would appear to be *frivolous.*" *Id.,* at 989 (emphasis supplied).

district court for a *de novo* hearing only if it concluded that a "genuine issue of material fact" existed. The Court today, applying the standard governing summary judgment in the federal courts, concludes that a genuine issue of material fact exists here because "the citizenship claim is supported by the testimony of three witnesses whose story, while highly unusual, certainly cannot be rejected as a matter of law." *Ante,* at 760. The fallacy in this holding is twofold. First, it applies an erroneous standard. The Court assumes that Congress meant to import the summary judgment standard into an entirely different statutory scheme, simply because the same words appear in both contexts. While this is a superficially appealing approach, it abdicates our responsibility to construe the statute in light of its origin and purpose. The second flaw in the Court's holding lies in its incorrect application of the summary judgment standard itself.

A

Section 106 (a)(5) apparently was enacted in order to satisfy the constitutional requirement, first enunciated in *Ng Fung Ho* v. *White,* 259 U. S. 276 (1922), that a resident who claims to be a United States citizen and supports the claim with the requisite quantum of proof is entitled to a judicial determination of his claim to citizenship. *Id.,* at 282–285; see H. R. Rep. No. 1086, 87th Cong., 1st Sess., 29 (1961). The Court held that two of the petitioners in *Ng Fung Ho* were entitled to a *de novo* judicial determination of their citizenship claim because they "supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship." [7] 259 U. S., at 282.

[7] In *Ng Fung Ho,* two of the petitioners' claims of citizenship apparently were not contradicted by independent evidence presented by the Government. Rather, the petitioners had entered the United States lawfully, as the foreign-born sons of a naturalized United States citizen and therefore as citizens themselves, and had been issued "certificates of identity." Later, when immigration officials came to suspect perjury in the earlier

The standard of proof required by *Ng Fung Ho* for a judicial hearing was restated in two later cases, both decided before the enactment of § 106 (a)(5). In *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149 (1923)—which, like *Ng Fung Ho,* was written by Mr. Justice Brandeis—no claim to citizenship had been made. The Court observed, however, that "[i]f, in the deportation proceedings, Bilokumsky had claimed that he was a citizen *and had supported the claim by substantial evidence,* he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal." 263 U. S., at 152 (citing *Ng Fung Ho, supra*) (emphasis supplied). In *Kessler* v. *Strecker,* 307 U. S. 22, 34–35 (1939), the Court again observed, citing *Bilokumsky,* that an alien is entitled to a trial *de novo* on a claim of citizenship if supported by "substantial evidence." It is clear, therefore, that the constitutional requirement of a *de novo* judicial hearing is triggered only if the person claiming citizenship provides some substantial evidentiary support for his claim.

The Court's conclusion that Congress intended to set a lower standard in § 106 (a)(5) is not supported by the legislative history. The Court acknowledges but disregards the fact that the House Reports antedating enactment of § 106 (a)(5) contain repeated references to "substantial" and "genuine" claims to citizenship. See *ante,* at 755; see also H. R. Rep. No. 1086, *supra,* at 28; H. R. Rep. No. 565, 87th Cong.,

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proceedings, they sought to deport the petitioners. The petitioners argued in this Court that the immigration authorities had not presented any "real substantial evidence to support them in attempting . . . to set aside the former finding of American citizenship. . . ." Brief for Petitioners in *Ng Fung Ho* v. *White,* O. T. 1921, No. 176, p. 33. Thus the determination of citizenship in *Ng Fung Ho* depended entirely on whether the evidence of the petitioners was believed by the factfinder or disbelieved because of the Service's attempt to discredit it. Perhaps this explains the Court's use of the "sufficient, if believed" language.

1st Sess., 13, 15 (1961). In each of these Reports the reference to "a substantial claim of U. S. nationality" immediately precedes the observation that the statute was meant to satisfy the constitutional requirement articulated in *Ng Fung Ho*.

In the face of this unequivocal evidence of legislative intent, the Court errs in concluding that Congress meant to depart from the evidentiary standard stated in *Ng Fung Ho*, as interpreted in *Bilokumsky* and *Kessler*. The Court then compounds its error by holding that § 106 (a)(5) places a court of appeals, in reviewing a decision of the Board of Immigration Appeals, in the position of a district court ruling upon a motion for summary judgment at the outset of a trial. Fed. Rule Civ. Proc. 56 (c). Although there is congruity in the "genuine issue of material fact" language, found in both § 106 (a)(5) and Rule 56 (c), there is a controlling difference in the settings in which this language is used.

In the usual civil trial, the summary judgment motion is entertained before any hearing has taken place. If sustained, it forecloses all opportunity for the opposing party to present his case before the finder of fact. Subject to appeal, a decision in favor of the movant in effect deprives his opponent of a trial on the facts. The situation to which § 106 (a)(5) applies simply is not comparable. That section is part of an elaborate administrative procedure in which a claimant may present fully his evidence to an Immigration Judge and then have it reviewed by the Board of Immigration Appeals. There is no summary judgment procedure under the Act and, consequently, no danger that a claimant will be denied a full evidentiary hearing. In this respect, the standard contained in § 106 (a)(5) is more like the standard governing directed verdicts, Fed. Rule Civ. Proc. 50, than summary judgments.[8]

[8] When a party moves for a directed verdict, he does so after the evidence is in. This is comparable to the situation confronting a court of appeals in a case like this. The formulation of the standard governing summary judgments and directed verdicts is the same with respect to

Although the Court of Appeals in this case itself did not observe the witnesses who testified on petitioner's behalf, it was not required to ignore completely the unequivocal opinion of the Immigration Judge that petitioner's witnesses had been "coached as to their testimony," Pet. for Cert. viii; see App. 41, and that their stories were fabrications. Even if the Court of Appeals was not in as good a position to judge these matters as a judge ruling on a motion for directed verdict, neither was it as constricted as a judge ruling on a motion for summary judgment. As both motions are governed by the "genuine issue of material fact" standard, there is no reason to adopt the more restrictive but less appropriate analogy.[9]

This case illustrates forcefully the inappropriateness of the summary judgment analogy. Petitioner has had three evidentiary hearings before an Immigration Judge, three appellate reviews by the Board of Immigration Appeals, and one review

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the "genuine issue" rule: "Both motions . . . call upon the court to make basically the same determination—that there is no geninue issue of fact and that the moving party is entitled to prevail as a matter of law." 10 C. Wright & A. Miller, Federal Practice & Procedure § 2713, p. 407 (1973). Yet a major difference between summary judgment and directed verdict is that credibility determinations may enter into the latter but not the former. Unlike a summary judgment motion, "a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury." *Id.*, at 406.

[9] In addition, the Court substitutes its "genuine issue" standard for that used even by some of the Courts of Appeals in cases cited by the Court with approval. For example, in *Rassano* v. *Immigration & Naturalization Service*, 377 F. 2d 971 (CA7 1967), the petitioner and three supporting witnesses testified that the petitoner's father said he had been naturalized and that both father and son were citizens. They were unable to produce the naturalization papers or to testify that they had seen them. The court held that the evidence was insufficient to raise a genuine issue of material fact, in part because of the untrustworthiness of the testimony. While the *Rassano* court used the standard of "genuine issue of material fact," in conformity with the statutory language, it surely did not use the summary judgment standard endorsed by the Court today.

each by the Court of Appeals for the Ninth Circuit and the United States Supreme Court. One normally would expect that at the end of this elaborate sequence of hearings and reviews, the case would be concluded. Instead, the Court launches petitioner's litigation anew, bowing to a form of words rather than the substance of justice. All that has occurred—the entire sequence of *eight* proceedings—is merely prologue. Petitioner's case now starts afresh in a district court in the same way that any civil litigation would commence. He is free to change his testimony—again—and to round up new witnesses who will swear to it. If he loses once more, he will have an appeal as of right to the Court of Appeals; from there, he may file another petition for certiorari. This additional round of proceedings probably will take several years. Meanwhile, petitioner will continue to enjoy the privileges of American citizenship that he has consistently abused.

B

Even if one assumes with the Court that the summary judgment analogy is appropriate, today's decision still is untenable. Under Rule 56 (c) itself, there must be a degree of substantiality to the evidence proffered in opposition to a summary judgment motion if the motion is to be defeated. See *Firemen's Mutual Ins. Co.* v. *Aponaug Mfg. Co.*, 149 F. 2d 359, 362 (CA5 1945); *Whitaker* v. *Coleman*, 115 F. 2d 305, 306 (CA5 1940); 10 C. Wright & A. Miller, Federal Practice & Procedure § 2725, p. 512 (1973); 6 J. Moore, Federal Practice ¶ 56.15 [4], p. 56–521 (2d ed. 1976). See also *Maroon* v. *Immigration & Naturalization Service*, 364 F. 2d 982, 989 (CA8 1966). A court never is required to accept evidence that is inherently incredible or " 'too incredible to be accepted by reasonable minds.' " [10] 6 Moore, *supra*, at 56–621.

[10] And while the facts must be viewed in the light most favorable to the party opposing summary judgment, this means no more than that

I believe petitioner's evidence reasonably cannot be viewed in any other light.[11]

In concluding that there is a "genuine issue of material fact" presented on this record, under the standard applicable to a summary judgment motion, the Court relies primarily on the testimony of petitioner's adoptive parents and supposed half brother, presented for the first time at petitioner's *third* hearing before the Immigration Judge. In effect, the Court applies the summary judgment standard as if the *only* testimony on the record were that adduced at the third hearing. But if the summary judgment standard is to be applied, it is necessary to view the evidence submitted by petitioner in its totality—as if petitioner, in contesting a summary judgment motion, had submitted three sets of depositions containing precisely the same evidence presented by him at the three administrative hearings. A district court then would be confronted with three significantly different stories, each sworn to by petitioner, one belatedly corroborated by his coached kinsmen, and all of them contradicted by authenticated documentary evidence. I doubt that any district court would find petitioner's evidence sufficient, viewed in its totality, to defeat a motion for summary judgment.

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"the party opposing a summary judgment motion is to be given the benefit of all *reasonable* doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial." 10 Wright & Miller, *supra*, at 510 (emphasis supplied).

[11] The Board of Immigration Appeals did say: "It is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii. But the rest of the Board's statements place this one in perspective. Immediately following its acknowledgment that petitioner's claim was not demonstrably impossible, the Board observed that it would have to accept a number of illogical and unrealistic propositions in order to accept petitioner's most recent story. In essence, the Board made clear that the story could not be accepted by reasonable minds; and it concluded ultimately that petitioner's claim to citizenship "[had] been knowingly false since its inception." *Id.*, at xii.

## IV

However one may read the unclear language of § 106 (a)(5), it is at least clear that Congress did not intend duplicate judicial proceedings to follow administrative proceedings simply upon demand. If all that § 106 (a)(5) requires is a swearing contest—even when the Government's case is predicated on documents whose authenticity is uncontested—then *every* subject of deportation proceedings has it within his power to circumvent the obvious intention of the statutory scheme to minimize dilatory tactics by deportable aliens. The Court today has opened wide this inviting door.

Syllabus

# FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.

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

No. 76–1471. Argued January 16, 1978—Decided June 12, 1978*

After a lengthy rulemaking proceeding, the Federal Communications Commission (FCC) adopted regulations prospectively barring the initial licensing or the transfer of newspaper-broadcast combinations where there is common ownership of a radio or television broadcast station and a daily newspaper located in the same community ("co-located" combinations). Divestiture of existing co-located combinations was not required except in 16 "egregious cases," where the combination involves the sole daily newspaper published in a community and either the sole broadcast station or the sole television station providing that entire community with a clear signal. Absent waiver, divestiture must be accomplished in those 16 cases by January 1, 1980. On petitions for review of the regulations, the Court of Appeals affirmed the FCC's prospective ban but ordered adoption of regulations requiring dissolution of all existing combinations that did not qualify for waivers. The court held that the limited divestiture requirement was arbitrary and capricious within the meaning of § 10 (e) of the Administrative Procedure Act. *Held:* The challenged regulations are valid in their entirety. Pp. 793–815.

(a) The regulations, which are designed to promote diversification of the mass media as a whole, are based on public-interest goals that the FCC is authorized to pursue. As long as the regulations are not an unreasonable means for seeking to achieve those goals, they fall within the FCC's general rulemaking authority recognized in *United States* v. *Storer*

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*Together with No. 76–1521, *Channel Two Television Co. et al.* v. *National Citizens Committee for Broadcasting;* No. 76–1595, *National Association of Broadcasters* v. *Federal Communications Commission et al.;* No. 76–1604, *American Newspaper Publishers Assn.* v. *National Citizens Committee for Broadcasting et al.;* No. 76–1624, *Illinois Broadcasting Co., Inc., et al.* v. *National Citizens Committee for Broadcasting et al.;* and No. 76–1685, *Post Co. et al.* v. *National Citizens Committee for Broadcasting et al.,* also on certiorari to the same court.

*Broadcasting Co.*, 351 U. S. 192, and *National Broadcasting Co.* v. *United States*, 319 U. S. 190. Pp. 793–796.

(b) Although it is contended that the rulemaking record did not conclusively establish that the prospective ban would fulfill the stated purpose, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making quality judgments objectionable on both policy and First Amendment grounds," and evidence of specific abuses by common owners is difficult to compile. In light of these considerations, the FCC clearly did not take an irrational view of the public interest when it decided to impose the prospective ban, and was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination." In view of changed circumstances in the broadcasting industry, moreover, the FCC was warranted in departing from its earlier licensing decisions that allowed co-located combinations. Pp. 796–797.

(c) The contention that the First Amendment rights of newspaper owners are violated by the regulations ignores the fundamental proposition that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 388. In view of the limited broadcast spectrum, allocation and regulation of frequencies are essential. Nothing in the First Amendment prevents such allocation as will promote the "public interest" in diversification of the mass communications media. A newspaper owner need not forfeit his right to publish in order to acquire a station in another community; nor is he "singled out" for more stringent treatment than other owners of mass media under already existing multiple-ownership rules. Far from seeking to limit the flow of information, the FCC has acted "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." The regulations are a reasonable means of promoting the public interest in diversified mass communications, and thus they do not violate the First Amendment rights of those who will be denied broadcasting licenses pursuant to them. Pp. 798–802.

(d) The limited divestiture requirement reflects a rational weighing of competing policies. The FCC rationally concluded that forced dissolution of all existing co-located combinations, though fostering diversity, would disrupt the industry and cause individual hardship and would or might harm the public interest in several respects, specifically identified by the FCC. In the past, the FCC has consistently acted on the theory that preserving continuity of meritorious service furthers the

public interest. And in the instant proceeding the FCC specifically noted that the existing newspaper-broadcast combinations had a "long record of service" in the public interest and concluded that their replacement by new owners would not guarantee the same level of service, would cause serious disruption during the transition period, and would probably result in a decline of local ownership. Pp. 803–809.

(e) The function of weighing policies under the public-interest standard has been delegated by Congress to the FCC in the first instance, and there is no basis for a "presumption" that existing newspaper-broadcast combinations "do not serve the public interest." Such a presumption would not comport with the FCC's longstanding and judicially approved practice of giving controlling weight in some circumstances to its goal of achieving "the best practicable service to the public." There is no statutory or other obligation that diversification should be given controlling weight in all circumstances. The FCC has made clear that diversification of ownership is a less significant factor when the renewal of an existing license as compared with an initial licensing application is being considered, and the policy of evaluating existing licensees on a somewhat different basis from new applicants appears to have been approved by Congress. Since the decision to "grandfather" most existing combinations was based on judgments and predictions by the FCC, complete factual support in the record was not required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 29. Nor was it arbitrary for the FCC to order divestiture in only the 16 "egregious cases," since the FCC made a rational judgment in concluding that the need for diversification was especially great in cases of local monopoly. Pp. 809–815.

181 U. S. App. D. C. 1, 555 F. 2d 938, affirmed in part and reversed in part.

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 cases.

*Erwin N. Griswold* argued the cause for petitioners in Nos. 76–1521, 76–1595, 76–1604, 76–1624, and 76–1685. *Ernest W. Jennes* and *Russell H. Carpenter, Jr.*, filed briefs for petitioners in No. 76–1521; *Lee Loevinger, David B. Lytle,* and *Walter A. Smith, Jr.*, filed a brief for petitioner in No. 76–1595; *Arthur*

*B. Hanson, Aloysius B. McCabe,* and *Michael Yourshaw* filed briefs for petitioner in No. 76–1604; *John B. Kenkel* and *William M. Barnard* filed a brief for petitioners in No. 76–1624; and *John H. Midlen* and *John H. Midlen, Jr.,* filed a brief for petitioners in No. 76–1685.

*Daniel M. Armstrong* argued the cause for the Federal Communications Commission, petitioner in No. 76–1471 and a respondent in No. 76–1595. With him on the briefs were *Sheldon M. Guttmann* and *Keith H. Fagan.*

*Deputy Solicitor General Wallace* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, Frank H. Easterbrook, Barry Grossman, Robert B. Nicholson,* and *Bruce E. Fein.*

*Charles M. Firestone* argued the cause for National Citizens Committee for Broadcasting, a respondent in Nos. 76–1471, 76–1521, 76–1604, 76–1624, and 76–1685. With him on the brief were *Edward J. Kuhlmann* and *Nolan A. Bowie.*

*James A. McKenna, Jr.,* and *Thomas N. Frohock* filed a brief for American Broadcasting Companies, Inc., a respondent in Nos. 76–1471, 76–1521, 76–1604, 76–1624, and 76–1685.

*R. Russell Eagan, Robert A. Beizer, John P. Southmayd, Thomas H. Wall, Alan C. Campbell, Richard Hildreth,* and *James E. Greeley* filed a brief for Gray Communications Systems, Inc., et al., respondents in Nos. 76–1471, 76–1521, 76–1595, 76–1604, 76–1624, and 76–1685.

*Paul Dobin* and *Ian D. Volner* filed a brief in No. 76–1471 for Louisiana Television Broadcasting Corp., as respondent under this Court's Rule 21 (4).†

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†Briefs of *amici curiae* urging reversal were filed by *Mr. Griswold* and *Victor E. Ferrall, Jr.,* for Dispatch Printing Co. et al., and by *J. Roger Wollenberg, Timothy N. Black, John F. Cooney,* and *John E. Flick* for Times Mirror Co.

Briefs of *amici curiae* urging affirmance were filed by the National

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in these cases are Federal Communications Commission regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community. *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order,* 50 F. C. C. 2d 1046 (1975) (hereinafter cited as Order), as amended upon reconsideration, 53 F. C. C. 2d 589 (1975), codified in 47 CFR §§ 73.35, 73.240, 73.636 (1976). The regulations, adopted after a lengthy rulemaking proceeding, prospectively bar formation or transfer of co-located newspaper-broadcast combinations. Existing combinations are generally permitted to continue in operation. However, in communities in which there is common ownership of the only daily newspaper and the only broadcast station, or (where there is more than one broadcast station) of the only daily newspaper and the only television station, divestiture of either the newspaper or the broadcast station is required within five years, unless grounds for waiver are demonstrated.

The questions for decision are whether these regulations either exceed the Commission's authority under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.* (1970 ed. and Supp. V), or violate the First or Fifth Amendment rights of newspaper owners; and whether the lines drawn by the Commission between new and existing newspaper-broadcast combinations, and between existing combinations subject to divestiture and those allowed to continue in operation, are arbitrary or capricious within the meaning of § 10 (e) of the Administrative Procedure Act, 5 U. S. C. § 706 (2)(A) (1976 ed.). For the reasons set forth below, we sustain the regulations in their entirety.

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Emergency Civil Liberties Foundation, and by *Earle K. Moore* for the Office of Communication of the United Church of Christ et al.

## I

### A

Under the regulatory scheme established by the Radio Act of 1927, 44 Stat. 1162, and continued in the Communications Act of 1934, no television or radio broadcast station may operate without a license granted by the Federal Communications Commission. 47 U. S. C. § 301. Licensees who wish to continue broadcasting must apply for renewal of their licenses every three years, and the Commission may grant an initial license or a renewal only if it finds that the public interest, convenience, and necessity will be served thereby. §§ 307 (a), (d), 308 (a), 309 (a), (d).

In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power. See, *e. g., Multiple Ownership of Standard, FM and Television Broadcast Stations,* 45 F. C. C. 1476, 1476–1477 (1964). This perception of the public interest has been implemented over the years by a series of regulations imposing increasingly stringent restrictions on multiple ownership of broadcast stations. In the early 1940's, the Commission promulgated rules prohibiting ownership or control of more than one station in the same broadcast service (AM radio, FM radio, or television) in the same community.[1]

[1] See Multiple Ownership of Standard Broadcast Stations (AM radio), 8 Fed. Reg. 16065 (1943); Rules and Regulations Governing Commercial Television Broadcast Stations, § 4.226, 6 Fed. Reg. 2284, 2284–2285 (1941); Rules Governing Standard and High Frequency Broadcast Stations (FM radio), § 3.228 (a), 5 Fed. Reg. 2382, 2384 (1940). In 1941 the Commission issued "chain broadcasting" regulations that, among other things, prohibited any organization from operating more than one broadcast network and barred any network from owning more than one standard broadcast station in the same community. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 193, 206–208 (1943). In 1964 the Commission tightened its multiple-ownership regulations so as to prohibit

In 1953, limitations were placed on the total number of stations in each service a person or entity may own or control.[2] And in 1970, the Commission adopted regulations prohibiting, on a prospective basis, common ownership of a VHF television station and any radio station serving the same market.[3]

More generally, "[d]iversification of control of the media of mass communications" has been viewed by the Commission as "a factor of primary significance" in determining who, among competing applicants in a comparative proceeding, should receive the initial license for a particular broadcast facility. *Policy Statement on Comparative Broadcast Hearings,* 1 F. C. C. 2d 393, 394–395 (1965) (italics omitted). Thus, prior to adoption of the regulations at issue here, the fact that an applicant for an initial license published a newspaper in the community to be served by the broadcast station was taken into account on a case-by-case basis, and resulted in some instances in awards of licenses to competing applicants.[4]

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common ownership of any stations in the same broadcast service that have overlaps in certain service contours. See *Multiple Ownership of Standard, FM and Television Broadcast Stations,* 45 F. C. C. 1476 (1964).

[2] See *Multiple Ownership of AM, FM and Television Broadcast Stations,* 18 F. C. C. 288 (1953). The regulations limited each person to a total of seven AM radio stations, seven FM radio stations, and five VHF television stations. In *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956), the regulations were upheld by this Court.

[3] *Multiple Ownership of Standard, FM and Television Broadcast Stations,* 22 F. C. C. 2d 306 (1970), as modified, 28 F. C. C. 2d 662 (1971). No divestiture of existing television-radio combinations was required. The regulations also provided that license applications involving common ownership of a UHF television station and a radio station serving the same market would be considered on a case-by-case basis and that common ownership of AM and FM radio stations serving the same market would be permitted.

[4] See, *e. g., McClatchy Broadcasting Co.* v. *FCC,* 99 U. S. App. D. C. 195, 239 F. 2d 15 (1956), cert. denied, 353 U. S. 918 (1957); *Scripps-Howard Radio, Inc.* v. *FCC,* 89 U. S. App. D. C. 13, 189 F. 2d 677, cert. denied, 342 U. S. 830 (1951).

In the early 1940's, the Commission considered adopting rules barring

Diversification of ownership has not been the sole consideration thought relevant to the public interest, however. The Commission's other, and sometimes conflicting, goal has been to ensure "the best practicable service to the public." *Id.*, at 394. To achieve this goal, the Commission has weighed factors such as the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant—in addition to diversification of ownership—in making initial comparative licensing decisions. See *id.*, at 395–400. Moreover, the Commission has given considerable weight to a policy of avoiding undue disruption of existing service.[5] As a result, newspaper own-

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common ownership of newspapers and radio stations, see Order Nos. 79 and 79–A, 6 Fed. Reg. 1580, 3302 (1941), but, after an extensive rulemaking proceeding, decided to deal with the problem on an ad hoc basis, Newspaper Ownership of Radio Stations, Notice of Dismissal of Proceeding, 9 Fed. Reg. 702 (1944).

[5] The Commission's policy with respect to license renewals has undergone some evolution, but the general practice has been to place considerable weight on the incumbent's past performance and to grant renewal—even where the incumbent is challenged by a competing applicant—if the incumbent has rendered meritorious service. In 1970 the Commission adopted a policy statement purporting to codify its previous practice as to comparative license renewal hearings. *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,* 22 F. C. C. 2d 424. Citing considerations of predictability and stability, the statement adopted the policy that, where an incumbent's program service "has been substantially attuned to meeting the needs and interests of its area," the incumbent would be granted an automatic preference over any new applicant without consideration of other factors—including diversification of ownership—that are taken into account in initial licensing decisions. *Id.*, at 425. This policy statement was overturned on appeal, *Citizens Communications Center* v. *FCC,* 145 U. S. App. D. C. 32, 447 F. 2d 1201 (1971), on the ground that the Commission was required to hold full hearings at which all relevant public-interest factors would be considered. The court agreed with the Commission, however, that "incumbent licensees should be judged primarily on their records of past performance." *Id.*, at 44, 447 F. 2d, at 1213. The court stated further that "*superior* performance [by an incumbent] should be a plus of major significance in renewal

ers in many instances have been able to acquire broadcast licenses for stations serving the same communities as their newspapers, and the Commission has repeatedly renewed such licenses on findings that continuation of the service offered by the common owner would serve the public interest. See Order, at 1066–1067, 1074–1075.

B

Against this background, the Commission began the instant rulemaking proceeding in 1970 to consider the need for a more restrictive policy toward newspaper ownership of radio and television broadcast stations. Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F. C. C. 2d 339 (1970).[6] Citing studies showing the dominant role of television stations and daily newspapers as sources of local news and other information, *id.*, at 346; see *id.*, at 344–346,[7] the notice of

proceedings." *Ibid.* (emphasis in original). After the instant regulations were promulgated, the Commission adopted a new policy statement in response to the *Citizens Communications* decision, returning to a case-by-case approach in which all factors would be considered, but in which the central factor would still be the past performance of the incumbent. *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process,* 66 F. C. C. 2d 419 (1977), pet. for review pending *sub nom. National Black Media Coalition* v. *FCC,* No. 77–1500 (CADC).

[6] This proceeding was a continuation of the earlier proceeding that had resulted in adoption of regulations barring new licensing of radio-VHF television combinations in the same market, while permitting AM–FM combinations and consigning radio-UHF television combinations to case-by-case treatment. See *supra,* at 781, and n. 3. In addition to the proposal with respect to common ownership of newspapers and broadcast stations, the Further Notice of Proposed Rulemaking suggested the possibility of prohibiting AM–FM combinations and requiring divestiture of existing television-radio combinations serving the same market, but these latter proposals were not adopted and they are not at issue here. See Order, at 1052–1055.

[7] The studies generally showed that radio was the third most important source of news, ranking ahead of magazines and other periodicals. See 22 F. C. C. 2d, at 345.

rulemaking proposed adoption of regulations that would eliminate all newspaper-broadcast combinations serving the same market, by prospectively banning formation or transfer of such combinations and requiring dissolution of all existing combinations within five years, *id.*, at 346. The Commission suggested that the proposed regulations would serve "the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints." *Ibid.* At the same time, however, the Commission expressed "substantial concern" about the disruption of service that might result from divestiture of existing combinations. *Id.*, at 348. Comments were invited on all aspects of the proposed rules.

The notice of rulemaking generated a considerable response. Nearly 200 parties, including the Antitrust Division of the Justice Department, various broadcast and newspaper interests, public interest groups, and academic and research entities, filed comments on the proposed rules. In addition, a number of studies were submitted, dealing with the effects of newspaper-broadcast cross-ownership on competition and station performance, the economic consequences of divestiture, and the degree of diversity present in the mass media. In March 1974, the Commission requested further comments directed primarily to the core problem of newspaper-television station cross-ownership, Memorandum Opinion and Order (Docket No. 18110), 47 F. C. C. 2d 97 (1974), and close to 50 sets of additional comments were filed. In July 1974, the Commission held three days of oral argument, at which all parties who requested time were allowed to speak.

The regulations at issue here were promulgated and explained in a lengthy report and order released by the Commission on January 31, 1975. The Commission concluded, first, that it had statutory authority to issue the regulations under the Communications Act, Order, at 1048, citing 47 U. S. C. §§ 2 (a), 4 (i), 4 (j), 301, 303, 309 (a), and that the

regulations were valid under the First and Fifth Amendments to the Constitution, Order, at 1050–1051. It observed that "[t]he term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'" Order, at 1048, quoting *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945), and that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation," Order, at 1050. The Order further explained that the prospective ban on creation of co-located newspaper-broadcast combinations was grounded primarily in First Amendment concerns, while the divestiture regulations were based on both First Amendment and antitrust policies. *Id.,* at 1049. In addition, the Commission rejected the suggestion that it lacked the power to order divestiture, reasoning that the statutory requirement of license renewal every three years necessarily implied authority to order divestiture over a five-year period. *Id.,* at 1052.

After reviewing the comments and studies submitted by the various parties during the course of the proceeding, the Commission then turned to an explanation of the regulations and the justifications for their adoption. The prospective rules, barring formation of new broadcast-newspaper combinations in the same market, as well as transfers of existing combinations to new owners, were adopted without change from the proposal set forth in the notice of rulemaking.[8] While recog-

[8] The rules prohibit a newspaper owner from acquiring a license for a co-located broadcast station, either by transfer or by original licensing; if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later. See Order, at 1074–1076, 1099–1107. Noncommercial educational television stations and college newspapers are not included within the scope of the rules. 47 CFR § 73.636, and n. 10 (1976). For purposes of the rules, ownership is defined to include operation or control, § 73.636 n. 1; a "daily newspaper" is defined as "one which is published four or more days per week, which is in the English language

nizing the pioneering contributions of newspaper owners to the broadcast industry, the Commission concluded that changed circumstances made it possible, and necessary, for all new licensing of broadcast stations to "be expected to add to local diversity." *Id.*, at 1075.[9] In reaching this conclusion, the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily "spea[k] with one voice" or are harmful to competition. *Id.*, at 1085, 1089. In the Commission's view, the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated. See *id.*, at 1072–1073, 1085, 1089. The prospective rules were justified, instead, by reference to the Commission's policy of promoting diversification of ownership: Increases in diversification of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing." *Id.*, at 1076, 1080 n. 30.

With respect to the proposed across-the-board divestiture requirement, however, the Commission concluded that "a mere hoped-for gain in diversity" was not a sufficient justification. *Id.*, at 1078. Characterizing the divestiture issues as "the most difficult" presented in the proceeding, the Order explained that the proposed rules, while correctly recognizing the central importance of diversity considerations, "may have

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and which is circulated generally in the community of publication," § 73.636 n. 10; and a broadcast station is considered to serve the same community as a newspaper if a specified service contour of the station—"Grade A" for television, 2 mV/m for AM, and 1 mV/m for FM—encompasses the city in which the newspaper is published, Order, at 1075.

[9] The Commission did provide, however, for waiver of the prospective ban in exceptional circumstances. See Order, at 1076 n. 24, 1077; Memorandum Opinion and Order (Docket No. 18110), 53 F. C. C. 2d 589, 591, 592 (1975).

given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone." *Ibid.* Forced dissolution would promote diversity, but it would also cause "disruption for the industry and hardship for individual owners," "resulting in losses or diminution of service to the public." *Id.*, at 1078, 1080.

The Commission concluded that in light of these countervailing considerations divestiture was warranted only in "the most egregious cases," which it identified as those in which a newspaper-broadcast combination has an "effective monopoly" in the local "marketplace of ideas as well as economically." *Id.*, at 1080–1081. The Commission recognized that any standards for defining which combinations fell within that category would necessarily be arbitrary to some degree, but "[a] choice had to be made." *Id.*, at 1080. It thus decided to require divestiture only where there was common ownership of the sole daily newspaper published in a community and either (1) the sole broadcast station providing that entire community with a clear signal, or (2) the sole television station encompassing the entire community with a clear signal. *Id.*, at 1080–1084.[10]

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[10] Radio and television stations are treated the same under the regulations to the extent that, if there is only one broadcast station serving a community—regardless of whether it is a radio or television station—common ownership of it and a co-located daily newspaper is barred. On the other hand, radio and television stations are given different weight to the extent that the presence of a radio station does not exempt a newspaper-television combination from divestiture, whereas the presence of a television station does exempt a newspaper-radio combination. The latter difference in treatment was explained on the ground that "[r]ealistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern." Order, at 1083. The Commission also explained that the regulations did not take into account the presence of magazines and other periodicals, or out-of-town radio or television stations not encompassing the entire community with a clear signal, since—aside from their often small market share—these

The Order identified 8 television-newspaper and 10 radio-newspaper combinations meeting the divestiture criteria. *Id.*, at 1085, 1098. Waivers of the divestiture requirement were granted *sua sponte* to 1 television and 1 radio combination, leaving a total of 16 stations subject to divestiture. The Commission explained that waiver requests would be entertained in the latter cases,[11] but, absent waiver, either the newspaper or the broadcast station would have to be divested by January 1, 1980. *Id.*, at 1084–1086.[12]

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sources could not be depended upon for coverage of local issues. See *id.*, at 1081–1082.

[11] While noting that the Commission "would not be favorably inclined to grant any request premised on views rejected when the rule was adopted," the Order stated that temporary or permanent waivers might be granted if the common owner were unable to sell his station or could sell it only at an artificially depressed price; if it could be shown that separate ownership of the newspaper and the broadcast station "cannot be supported in the locality"; or, more generally, if the underlying purposes of the divestiture rule "would be better served by continuation of the current ownership pattern." *Id.*, at 1085.

[12] As to existing newspaper-broadcast combinations not subject to the divestiture requirement, the Commission indicated that, within certain limitations, issues relating to concentration of ownership would continue to be considered on a case-by-case basis in the context of license renewal proceedings. Thus, while making clear the Commission's view that renewal proceedings were not a proper occasion for any *"overall* restructuring" of the broadcast industry, the Order stated that diversification of ownership would remain a relevant consideration in renewal proceedings in which common owners were challenged by competing applicants. *Id.*, at 1088 (emphasis in original); see *id.*, at 1087–1089; n. 5, *supra*. The Order suggested, moreover, that where a petition to deny renewal is filed, but no competing applicant steps forward, the renewal application would be set for hearing if a sufficient showing were made of specific abuses by a common owner, or of economic monopolization of the sort that would violate the Sherman Act. Order, at 1080 n. 29, 1088.

The Order does not make clear the extent to which hearings will be available on petitions to deny renewal that do not allege specific abuses or economic monopolization. Counsel for the Commission informs us, however, that the Order was intended to "limi[t] such challengers only to the

On petitions for reconsideration, the Commission reaffirmed the rules in all material respects. Memorandum Opinion and Order (Docket No. 18110), 53 F. C. C. 2d 589 (1975).

C

Various parties—including the National Citizens Committee for Broadcasting (NCCB), the National Association of Broadcasters (NAB), the American Newspaper Publishers Association (ANPA), and several broadcast licensees subject to the divestiture requirement—petitioned for review of the regulations in the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U. S. C. § 402 (a) and 28 U. S. C. §§ 2342 (1), 2343 (1970 ed. and Supp. V). Numerous other parties intervened, and the United States—represented by the Justice Department—was made a respondent pursuant to 28 U. S. C. §§ 2344, 2348. NAB, ANPA, and the broadcast licensees subject to divestiture argued that the regulations went too far in restricting cross-ownership of newspapers and broadcast stations; NCCB and the Justice Department contended that the regulations did not go far enough and that the Commission inadequately justified its decision not to order divestiture on a more widespread basis.

Agreeing substantially with NCCB and the Justice Department, the Court of Appeals affirmed the prospective ban on new licensing of co-located newspaper-broadcast combinations, but vacated the limited divestiture rules, and ordered the Commission to adopt regulations requiring dissolution of all existing combinations that did not qualify for a waiver under the procedure outlined in the Order. 181 U. S. App. D. C. 1, 555 F. 2d 938 (1977); see n. 11, *supra*. The court held, first, that the prospective ban was a reasonable means of furthering

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extent that [the Commission] will not permit them to re-argue in an adjudicatory setting the question already decided in this rulemaking, *i. e.*, in what circumstances is the continued existence of co-located newspaper-broadcast combinations *per se* undesirable." Reply Brief for Petitioner in No. 76–1471, p. 8; see n. 13, *infra*.

"the highly valued goal of diversity" in the mass media, 181 U. S. App. D. C., at 17, 555 F. 2d, at 954, and was therefore not without a rational basis. The court concluded further that, since the Commission "explained why it considers diversity to be a factor of exceptional importance," and since the Commission's goal of promoting diversification of mass media ownership was strongly supported by First Amendment and antitrust policies, it was not arbitrary for the prospective rules to be "based on [the diversity] factor to the exclusion of others customarily relied on by the Commission." *Id.*, at 13 n. 33, 555 F. 2d, at 950 n. 33; see *id.*, at 11–12, 555 F. 2d, at 948–949.

The court also held that the prospective rules did not exceed the Commission's authority under the Communications Act. The court reasoned that the public interest standard of the Act permitted, and indeed required, the Commission to consider diversification of mass media ownership in making its licensing decisions, and that the Commission's general rulemaking authority under 47 U. S. C. §§ 303 (r) and 154 (i) allowed the Commission to adopt reasonable license qualifications implementing the public-interest standard. 181 U. S. App. D. C., at 14–15, 555 F. 2d, at 951–952. The court concluded, moreover, that since the prospective ban was designed to "increas[e] the number of media voices in the community," and not to restrict or control the content of free speech, the ban would not violate the First Amendment rights of newspaper owners. *Id.*, at 16–17, 555 F. 2d, at 953–954.

After affirming the prospective rules, the Court of Appeals invalidated the limited divestiture requirement as arbitrary and capricious within the meaning of § 10 (e) of the Administrative Procedure Act (APA), 5 U. S. C. § 706 (2)(A) (1976 ed.). The court's primary holding was that the Commission lacked a rational basis for "grandfathering" most existing combinations while banning all new combinations. The court reasoned that the Commission's own diversification policy, as

reinforced by First Amendment policies and the Commission's statutory obligation to "encourage the larger and more effective use of radio in the public interest," 47 U. S. C. § 303 (g), required the Commission to adopt a "presumption" that stations owned by co-located newspapers "do not serve the public interest," 181 U. S. App. D. C., at 25–26, 555 F. 2d, at 962–963. The court observed that, in the absence of countervailing policies, this "presumption" would have dictated adoption of an across-the-board divestiture requirement, subject only to waiver "in those cases where the evidence clearly discloses that cross-ownership is in the public interest." *Id.*, at 29, 555 F. 2d, at 966. The countervailing policies relied on by the Commission in its decision were, in the court's view, "lesser policies" which had not been given as much weight in the past as its diversification policy. *Id.*, at 28, 555 F. 2d, at 965. And "the record [did] not disclose the extent to which divestiture would actually threaten these [other policies]." *Ibid.* The court concluded, therefore, that it was irrational for the Commission not to give controlling weight to its diversification policy and thus to extend the divestiture requirement to all existing combinations.[13]

The Court of Appeals held further that, even assuming a difference in treatment between new and existing combina-

[13] The Court of Appeals apparently believed that, under the terms of the Order, future petitions to deny license renewal to existing cross-owners could be set for hearing only if they alleged economic monopolization, and not if they alleged specific programming abuses. See 181 U. S. App. D. C., at 29 n. 108, 555 F. 2d, at 966 n. 108. On the basis of this assumption, the court held that the standards for petitions to deny were unreasonable. Since we do not read the Order as foreclosing the possibility of a hearing upon a claim of specific abuses, and since the Commission itself is apparently of the view that the only issue foreclosed in petitions to deny is the question of whether newspaper-broadcast ownership is *per se* undesirable, see n. 12, *supra*, we cannot say that the Order itself unreasonably limits the availability of petitions to deny renewal. The reasonableness of the Commission's actions on particular petitions to deny filed subsequent to the Order is, of course, not before us at this time.

tions was justifiable, the Commission lacked a rational basis for requiring divestiture in the 16 "egregious" cases while allowing the remainder of the existing combinations to continue in operation. The court suggested that "limiting divestiture to small markets of 'absolute monopoly' squanders the opportunity where divestiture might do the most good," since "[d]ivestiture . . . may be more useful in the larger markets." *Id.*, at 29, 555 F. 2d, at 966. The court further observed that the record "[did] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets," nor did it demonstrate that the need for divestiture was stronger in those 16 markets. *Ibid.* On the latter point, the court noted that, "[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater." *Ibid.*

The Commission, NAB, ANPA, and several cross-owners who had been intervenors below, and whose licenses had been grandfathered under the Commission's rules but were subject to divestiture under the Court of Appeals' decision, petitioned this Court for review.[14] We granted certiorari, 434 U. S. 815 (1977), and we now affirm the judgment of the Court of Appeals insofar as it upholds the prospective ban and reverse the judgment insofar as it vacates the limited divestiture requirement.[15]

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[14] Upon motion of the Commission the Court of Appeals temporarily stayed its mandate—insofar as it overturned the Commission's limited divestiture requirement—pending the filing of a petition for certiorari by the Commission. 181 U. S. App. D. C. 30, 555 F. 2d 967 (1977). The Commission filed its petition for certiorari within the time allotted by the Court of Appeals, and thus the stay has remained in effect. See 28 U. S. C. § 2101 (f); Fed. Rule App. Proc. 41 (b).

[15] Several of the petitioners contend that the Court of Appeals exceeded the proper role of a reviewing court by directing the Commission to adopt a rule requiring divestiture of all existing combinations, rather than allowing the Commission to reconsider its decision and formulate its own approach

## II

Petitioners NAB and ANPA contend that the regulations promulgated by the Commission exceed its statutory rulemaking authority and violate the constitutional rights of newspaper owners. We turn first to the statutory, and then to the constitutional, issues.

### A

### (1)

Section 303 (r) of the Communications Act, 47 U. S. C. § 303 (r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." See also 47 U. S. C. §154 (i). As the Court of Appeals recognized, 181 U. S. App. D. C., at 14, 555 F. 2d, at 951, it is now well established that this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. If a license applicant does not qualify under standards set forth in such regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry. See *United States* v. *Storer Broadcasting Co.*,

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in light of the legal principles set forth by the court. Petitioners cite well-established authority to the effect that, absent extraordinary circumstances, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952); accord, *NLRB* v. *Food Store Employees*, 417 U. S. 1, 9–10 (1974); *South Prairie Constr. Co.* v. *Operating Engineers*, 425 U. S. 800, 805–806 (1976). In light of our disposition of these cases, we need not decide whether the Court of Appeals was justified in departing from the latter course of action.

351 U. S. 192 (1956); *National Broadcasting Co.* v. *United States,* 319 U. S. 190 (1943).

This Court has specifically upheld this rulemaking authority in the context of regulations based on the Commission's policy of promoting diversification of ownership. In *United States* v. *Storer Broadcasting Co., supra,* we sustained the portion of the Commission's multiple-ownership rules placing limitations on the total number of stations in each broadcast service a person may own or control. See n. 2, *supra.* And in *National Broadcasting Co.* v. *United States, supra,* we affirmed regulations that, *inter alia,* prohibited broadcast networks from owning more than one AM radio station in the same community, and from owning " 'any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing.' " See 319 U. S., at 206–208; n. 1, *supra.*

Petitioner NAB attempts to distinguish these cases on the ground that they involved efforts to increase diversification within the boundaries of the broadcasting industry itself, whereas the instant regulations are concerned with diversification of ownership in the mass communications media as a whole. NAB contends that, since the Act confers jurisdiction on the Commission only to regulate "communication by wire or radio," 47 U. S. C. § 152 (a), it is impermissible for the Commission to use its licensing authority with respect to broadcasting to promote diversity in an overall communications market which includes, but is not limited to, the broadcasting industry.

This argument undersells the Commission's power to regulate broadcasting in the "public interest." In making initial licensing decisions between competing applicants, the Commission has long given "primary significance" to "diversification of control of the media of mass communications," and has denied licenses to newspaper owners on the basis of this policy

in appropriate cases. See *supra,* at 781, and n. 4. As we have discussed on several occasions, see, *e. g., National Broadcasting Co.* v. *United States, supra,* at 210–218; *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 375–377, 387–388 (1969), the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the "public interest." And "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States, supra,* at 217. It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the "public interest" would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States,* 326 U. S., at 20. See *Red Lion Broadcasting Co.* v. *FCC, supra,* at 385, 390. See also *United States* v. *Midwest Video Corp.,* 406 U. S. 649, 667–669, and n. 27 (1972) (plurality opinion). And, while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard. See, *e. g., United States* v. *Radio Corp. of America,* 358 U. S. 334,

351 (1959); *National Broadcasting Co.* v. *United States*, *supra*, at 222–224. Indeed we have noted, albeit in dictum:

> "[I]n a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, *supra*, at 351–352.

(2)

It is thus clear that the regulations at issue are based on permissible public-interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases. Petitioner ANPA contends that the prospective rules are unreasonable in two respects:[16] first, the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media; and second, the regulations were based on the diversification factor to the exclusion of other service factors considered in the past by the Commission in making initial licensing decisions regarding newspaper owners, see *supra*, at 782. With respect to the first point, we agree with the Court of Appeals that, notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints. As the Court of Appeals observed, "[d]iversity and its effects are . . . elusive concepts, not easily defined let

[16] The rationality of the limited divestiture requirement is discussed in Part III, *infra*.

alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." 181 U. S. App. D. C., at 24, 555 F. 2d, at 961. Moreover, evidence of specific abuses by common owners is difficult to compile; "the possible benefits of competition do not lend themselves to detailed forecast." *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 96 (1953). In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." Order, at 1079–1080; see 181 U. S. App. D. C., at 25, 555 F. 2d, at 962.

As to the Commission's decision to give controlling weight to its diversification goal in shaping the prospective rules, the Order makes clear that this change in policy was a reasonable administrative response to changed circumstances in the broadcasting industry. Order, at 1074–1075; see *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940). The Order explained that, although newspaper owners had previously been allowed, and even encouraged, to acquire licenses for co-located broadcast stations because of the shortage of qualified license applicants, a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the number of channels open for new licensing had diminished substantially. It had thus become both feasible and more urgent for the Commission to take steps to increase diversification of ownership, and a change in the Commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service. In light of these considerations, the Commission clearly did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations.[17]

[17] NAB and ANPA make one final argument in support of their position that the regulations exceed the Commission's authority. They claim that—

## B

Petitioners NAB and ANPA also argue that the regulations, though designed to further the First Amendment goal of

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regardless of the otherwise broad scope of the Commission's rulemaking authority—both Congress and the Commission itself have indicated that the Commission lacks authority to promulgate any rules prohibiting newspaper owners from acquiring broadcast licenses. They rely on a legal opinion by the Commission's first General Counsel that was submitted to the Senate Interstate Commerce Committee, Memorandum to the Commission: Opinion of the General Counsel, Jan. 25, 1937, reprinted in App. 445–465, and the legislative history of proposed amendments to the Act that were considered in the late 1940's and early 1950's but never passed, S. 1333, § 25, Hearings on S. 1333 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. (1947); S. 1973, § 14, 81st Cong., 1st Sess. (1949); S. 658, 82d Cong., 2d Sess. (1952) (House amendment § 7 (c)).

This argument is wholly unavailing. Apart from any questions as to the weight that should be given to a General Counsel's opinion which was never formally adopted by the Commission, and to legislative statements made subsequent to enactment of the statute being construed, see, *e. g., United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 170 (1968); *United States* v. *Wise*, 370 U. S. 405, 411 (1962), the cited materials are simply irrelevant to the issue in this case. The Commission's General Counsel merely concluded that newspaper owners, as a class, could not be absolutely barred from owning broadcast stations; he did not address the much narrower question of whether a newspaper owner may be barred from acquiring a broadcast station located in the same community as the newspaper. See Opinion of the General Counsel, *supra*, App. 447, 449. Similarly, the proposed amendments to the Act apparently would have only precluded the Commission from adopting a total prohibition on newspaper ownership of broadcast stations. See Hearings on S. 1333, *supra*, at 44, 69–70; Hearings on S. 1973 before a Subcommittee of the Senate Committee on Interstate & Foreign Commerce, 81st Cong., 1st Sess., 20–21, 42–44, 103–105 (1949); S. Rep. No. 741, 81st Cong., 1st Sess., 2–3 (1949). Congress' rejection of the amendments as unnecessary, see House Conf. Rep. No. 2426, 82d Cong., 2d Sess., 18–19 (1952); S. Rep. No. 741, *supra*, at 2–3—following the Commission's representation that it lacked such authority even without the amendments, see Hearings on S. 1973, *supra*, at 103–104 (testimony of FCC Chairman Hyde)—sheds no light on the question at issue here.

achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press* v. *United States,* 326 U. S., at 20, nevertheless violate the First Amendment rights of newspaper owners. We cannot agree, for this argument ignores the fundamental proposition that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S., at 388.

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized. *Id.,* at 375–377, 387–388; *National Broadcasting Co.* v. *United States,* 319 U. S., at 210–218; *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 282 (1933); see *supra,* at 795. No one here questions the need for such allocation and regulation, and, given that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

NAB and ANPA contend, however, that it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcasting stations. In support, they point to our statement in *Buckley* v. *Valeo,* 424 U. S. 1 (1976), to the effect that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others," *id.,* at 48–49. As *Buckley* also recognized, however, " 'the broadcast media pose unique and special problems not present in the traditional free speech case.' " *Id.,* at 50 n. 55, quoting *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U. S.,

at 101. Thus efforts to " 'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be. 424 U. S., at 50–51, and n. 55, quoting *Red Lion Broadcasting Co.* v. *FCC, supra,* at 393; cf. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest" does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the "people as a whole . . . in free speech." *Red Lion Broadcasting Co., supra,* at 390. As we stated in *Red Lion,* "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' " 395 U. S., at 389, quoting *National Broadcasting Co.* v. *United States, supra,* at 227. See also *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co., supra.*

Relying on cases such as *Speiser* v. *Randall,* 357 U. S. 513 (1958), and *Elrod* v. *Burns,* 427 U. S. 347 (1976), NAB and ANPA also argue that the regulations unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper. Under the regulations, however, a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community.[18] More importantly, in the cases relied on by those petitioners, unlike the instant case, denial of a benefit had the effect of

[18] We note also that the regulations are in form quite similar to the prohibitions imposed by the antitrust laws. This court has held that application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment. See, *e. g., Associated Press* v. *United States,* 326 U. S. 1 (1945); *Lorain Journal Co.* v. *United States,* 342 U. S. 143 (1951); *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139–140 (1969). See also *United States* v. *Radio Corp. of America,* 358 U. S. 334, 351–352 (1959). Since the Commission relied primarily on First Amendment rather than antitrust considerations, however, the fact that the antitrust laws are fully applicable to newspapers is not a complete answer to the issues in this case.

abridging freedom of expression, since the denial was based solely on the content of constitutionally protected speech; in *Speiser* veterans were deprived of a special property-tax exemption if they declined to subscribe to a loyalty oath, while in *Elrod* certain public employees were discharged or threatened with discharge because of their political affiliation. As we wrote in *National Broadcasting, supra,* "the issue before us would be wholly different" if "the Commission [were] to choose among applicants upon the basis of their political, economic or social views." 319 U. S., at 226. Here the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it.

Finally, NAB and ANPA argue that the Commission has unfairly "singled out" newspaper owners for more stringent treatment than other license applicants.[19] But the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules, see *supra,* at 780–781, and nn. 1–3; owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936), in which this Court struck down a state tax imposed only on newspapers, is thus distinguishable in the degree to which newspapers were singled out for special treatment. In addition, the effect of the tax in *Grosjean* was "to limit the circulation of information to which the public is entitled," *id.,* at 250, an effect inconsistent with the protection conferred on the press by the First Amendment.

In the instant case, far from seeking to limit the flow of information, the Commission has acted, in the Court of Appeals' words, "to enhance the diversity of information heard by the public without on-going government surveillance of the

[19] NAB frames this argument in terms of the First Amendment; ANPA advances it as an equal protection claim under the Fifth Amendment.

content of speech." 181 U. S. App. D. C., at 17, 555 F. 2d, at 954. The regulations are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.[20] Being forced to "choose among applicants for the same facilities," the Commission has chosen on a "sensible basis," one designed to further, rather than contravene, "the system of freedom of expression." T. Emerson, The System of Freedom of Expression 663 (1970).

## III

After upholding the prospective aspect of the Commission's regulations, the Court of Appeals concluded that the Commission's decision to limit divestiture to 16 "egregious cases" of "effective monopoly" was arbitrary and capricious within the meaning of § 10 (e) of the APA, 5 U. S. C. § 706 (2)(A) (1976 ed.).[21] We agree with the Court of Appeals that regu-

[20] The reasonableness of the regulations as a means of achieving diversification is underscored by the fact that waivers are potentially available from both the prospective and the divestiture rules in cases in which a broadcast station and a co-located daily newspaper cannot survive without common ownership. See nn. 9, 11, *supra*.

[21] The APA provides in relevant part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . . . . .

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections

lations promulgated after informal rulemaking, while not subject to review under the "substantial evidence" test of the APA, 5 U. S. C. § 706 (2)(E) (1976 ed.) quoted in n. 21, *supra,* may be invalidated by a reviewing court under the "arbitrary or capricious" standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 413–416 (1971). Although this review "is to be searching and careful," "[t]he court is not empowered to substitute its judgment for that of the agency." *Id.,* at 416.

In the view of the Court of Appeals, the Commission lacked a rational basis, first, for treating existing newspaper-broadcast combinations more leniently than combinations that might seek licenses in the future; and, second, even assuming a distinction between existing and new combinations had been justified, for requiring divestiture in the "egregious cases" while allowing all other existing combinations to continue in operation. We believe that the limited divestiture requirement reflects a rational weighing of competing policies, and we therefore reinstate the portion of the Commission's order that was invalidated by the Court of Appeals.

A

(1)

The Commission was well aware that separating existing newspaper-broadcast combinations would promote diversification of ownership. It concluded, however, that ordering wide-

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556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U. S. C. § 706 (2) (1976 ed.).

spread divestiture would not result in "the best practicable service to the American public," Order, at 1074, a goal that the Commission has always taken into account and that has been specifically approved by this Court, *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 475 (1940); see *supra,* at 782. In particular, the Commission expressed concern that divestiture would cause "disruption for the industry" and "hardship for individual owners," both of which would result in harm to the public interest. Order, at 1078. Especially in light of the fact that the number of co-located newspaper-broadcast combinations was already on the decline as a result of natural market forces, and would decline further as a result of the prospective rules, the Commission decided that across-the-board divestiture was not warranted. See *id.,* at 1080 n. 29.

The Order identified several specific respects in which the public interest would or might be harmed if a sweeping divestiture requirement were imposed: the stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; "economic dislocations" might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming; [22] and local ownership of broadcast stations would probably decrease.[23] *Id.,* at 1078.

[22] Although the Order is less than entirely clear in this regard, the Commission's theory with respect to "economic dislocations" and programming apparently was that, because of high interest rates, new owners would have to devote a substantial portion of revenues to debt service, and insufficient working capital would remain to finance local programming. See Order, at 1068 (describing comments to this effect).

[23] In the Order the Commission expressed concern that a sweeping divestiture requirement "could reduce local ownership *as well as the involvement of owners in management.*" *Id.,* at 1078 (emphasis added). The Court of Appeals questioned the validity of any reliance on owner involvement in management, because "no evidence was presented that the local owners . . . are actively involved in daily management" and the Order itself had observed that "'[m]ost of the parties state that their

We cannot say that the Commission acted irrationally in concluding that these public-interest harms outweighed the potential gains that would follow from increasing diversification of ownership.

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proved broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance.[24] Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and should not be destroyed absent good cause. *Greater Boston Television Corp.* v. *FCC,* 143 U. S. App. D. C. 383, 396, 444 F. 2d 841, 854 (1970), cert. denied, 403 U. S. 923 (1971); see *Citizens Communications Center* v. *FCC,* 145 U. S. App. D. C. 32, 44, and n. 35, 447 F. 2d 1201, 1213, and n. 35 (1971); *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process,* 66 F. C. C. 2d 419, 420

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broadcast stations and newspapers have separate management, facilities, and staff . . .'" 181 U. S. App. D. C., at 27, 555 F. 2d, at 964, quoting Order, at 1059. Of course, the fact that newspapers and broadcast stations are separately managed does not foreclose the possibility that the common owner participates in management of the broadcast station and not the newspaper. But in any event, the Commission clearly did not place any significant weight on this factor, and we therefore need not consider it. See 5 U. S. C. § 706 (1976 ed.), quoted in part in n. 21, *supra* (rule of prejudicial error).

[24] We agree with the Court of Appeals that "[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public." 181 U. S. App. D. C., at 27–28, 555 F. 2d, at 964–965, citing *FCC* v.

(1977); n. 5, *supra*.[25] Accordingly, while diversification of ownership is a relevant factor in the context of license renewal as well as initial licensing, the Commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the "proved product" and grant renewal if the incumbent has rendered meritorious service. See generally *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, supra;* n. 5, *supra.*

In the instant proceeding, the Commission specifically noted that the existing newspaper-broadcast cross-owners as a group had a "long record of service" in the public interest; many were pioneers in the broadcasting industry and had established and continued "[t]raditions of service" from the outset. Order, at 1078.[26] Notwithstanding the Commission's diversification policy, all were granted initial licenses upon findings that the public interest would be served thereby, and those that had been in existence for more than three years had also had their

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*Sanders Bros. Radio Station*, 309 U. S. 470, 474–476 (1940), and *Carroll Broadcasting* v. *FCC*, 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). Private losses that result in discouragement of investment in quality service have such an effect.

[25] Section 301 of the Act provides that "no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U. S. C. § 301. The fact that a licensee does not have any legal or proprietary right to a renewal does not mean, however, that the Commission cannot take into account the incumbent's past performance in deciding whether renewal would serve the public interest. See *infra*, at 810–811, and n. 31.

[26] See B. Robbins, A Study of Pioneer AM Radio Stations and Pioneer Television Stations (1971), reprinted in App. 694–712.

licenses renewed on the ground that the public interest would be furthered. The Commission noted, moreover, that its own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed "an undramatic but nonetheless statistically significant superiority" over other television stations. *Id.*, at 1078 n. 26.[27] An across-the-board divestiture requirement would result in loss of the services of these superior licensees, and—whether divestiture caused actual losses to existing owners, or just denial of reasonably anticipated gains—the result would be that future licensees would be discouraged from investing the resources necessary to produce quality service.

At the same time, there was no guarantee that the licensees who replaced the existing cross-owners would be able to provide the same level of service or demonstrate the same long-term commitment to broadcasting. And even if the new owners were able in the long run to provide similar or better service, the Commission found that divestiture would cause serious disruption in the transition period. Thus, the Commission observed that new owners "would lack the long knowledge of the community and would have to begin raw," and—because of high interest rates—might not be able to obtain sufficient working capital to maintain the quality of local programming. *Id.*, at 1078; see n. 22, *supra*.[28]

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[27] Earlier in the Order, the Commission had noted that this study was the first to be based on the 1973 annual programming reports for television stations, which were not yet available at the time the programming studies submitted by the parties were conducted. Order, at 1073; see *id.*, at 1094.

The United States suggests that the Commission could not properly have relied on this study since it was not made available to the parties for comment in advance of the Commission's decision. Brief for United States 46 n. 39. No party petitioned the Commission for reconsideration on this ground, nor was the issue raised in the Court of Appeals or in any of the petitions for certiorari, and it is therefore not before us.

[28] Commissioner Hooks effectively summarized this complex of factors in

The Commission's fear that local ownership would decline was grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record, see Order, at 1068–1069, that many of the existing newspaper-broadcast combinations owned by local interests would respond to the divestiture requirement by trading stations with out-of-town owners. It is undisputed that roughly 75% of the existing co-located newspaper-television combinations are locally owned, see 181 U. S. App. D. C., at 26–27, 555 F. 2d, at 963–964, and these owners' knowledge of their local communities and concern for local affairs, built over a period of years, would be lost if they were replaced with outside interests. Local ownership in and of itself has been recognized to be a factor of some—if relatively slight—significance even in the context of initial licensing decisions. See *Policy Statement on Comparative Broadcast Hearings,* 1 F. C. C. 2d, at 396. It was not unreasonable, therefore, for the Commission to consider it as one of several factors militating against divestiture of combinations that have been in existence for many years.[29]

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his separate opinion, concurring in the Commission's decision not to order across-the-board divestiture, while dissenting on other grounds:

"[A]s I contemplate the superior performance of many newspaper-owned stations . . . and speculate on the performance of some unknown successor, my conditioned response yields 'a bird in the hand is worth two in the bush' philosophy. Opponents [of divestiture] ask: Why require divestiture for its own sake of a superior broadcaster, with experience, background and resources, for an unknown licensee whose operation may be inferior? Can we afford, through wide-scale divestiture, to experiment with a dogmatic diversity formula; and, after the churning has ceased, who will profit—the new owners or the public?" Order, at 1109.

[29] The fact that 75%, but not all, of the existing television-newspaper combinations are locally owned does not mean that it was irrational for the Commission to take into account local ownership as one of several factors justifying a decision to "grandfather" most existing combinations, including those that are not locally owned. The Commission has substantial discretion as to whether to proceed by rulemaking or adjudication, see *SEC* v.

In light of these countervailing considerations, we cannot agree with the Court of Appeals that it was arbitrary and capricious for the Commission to "grandfather" most existing combinations, and to leave opponents of these combinations to their remedies in individual renewal proceedings. In the latter connection we note that, while individual renewal proceedings are unlikely to accomplish any "overall restructuring" of the existing ownership patterns, the Order does make clear that existing combinations will be subject to challenge by competing applicants in renewal proceedings, to the same extent as they were prior to the instant rulemaking proceedings. Order, at 1087–1088 (emphasis omitted); see n. 12, *supra.* That is, diversification of ownership will be a relevant but somewhat secondary factor. And, even in the absence of a competing applicant, license renewal may be denied if, *inter alia,* a challenger can show that a common owner has engaged in specific economic or programming abuses. See nn. 12 and 13, *supra.*

(2)

In concluding that the Commission acted unreasonably in not extending its divestiture requirement across the board, the Court of Appeals apparently placed heavy reliance on a "presumption" that existing newspaper-broadcast combinations "do not serve the public interest." See *supra,* at 790–791. The court derived this presumption primarily from the Commission's own diversification policy, as "reaffirmed" by adoption of the prospective rules in this proceeding, and secondarily from "[t]he policies of the First Amendment," 181 U. S. App. D. C., at 26, 555 F. 2d, at 963, and the Commission's statutory duty to "encourage the larger and more effective use of radio in the public interest," 47 U. S. C. § 303 (g). As explained

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*Chenery Corp.,* 332 U. S. 194, 201–202 (1947), and—in the context of a rule based on a multifactor weighing process—every consideration need not be equally applicable to each individual case.

in Part II above, we agree that diversification of ownership furthers statutory and constitutional policies, and, as the Commission recognized, separating existing newspaper-broadcast combinations would promote diversification. But the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.[30]

Such a "presumption" would seem to be inconsistent with the Commission's longstanding and judicially approved practice of giving controlling weight in some circumstances to its more general goal of achieving "the best practicable service to the public." Certainly, as discussed in Part III–A (1) above, the Commission through its license renewal policy has made clear that it considers diversification of ownership to be a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing. Nothing in the language or the legislative history of § 303 (g) indicates that Congress intended to foreclose all differences in treatment between new and existing licensees, and indeed, in amending § 307 (d) of the Act in 1952, Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a

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[30] The Order at one point states: "If our democratic society is to function, *nothing can be more important* than insuring that there is a free flow of information from as many divergent sources as possible." Order, at 1079 (emphasis added). The Court of Appeals recognized, however, that "the Commission probably did not intend for this . . . statemen[t] to be read literally," 181 U. S. App. D. C., at 26, 555 F. 2d, at 963, and, indeed, it appears from the context that the statement was intended only as an explanation of why the Commission was adopting a First Amendment rather than an antitrust focus.

somewhat different basis from new applicants.[31] Moreover, if enactment of the prospective rules in this proceeding itself were deemed to create a "presumption" in favor of divestiture, the Commission's ability to experiment with new policies would be severely hampered. One of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner, see *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S., at 137–138, and we are unwilling to presume that the Commission acts unreasonably when it decides to try out a change in licensing policy primarily on a prospective basis.

The Court of Appeals also relied on its perception that the policies militating against divestiture were "lesser policies" to which the Commission had not given as much weight in the past as its diversification policy. See *supra,* at 791. This perception is subject to much the same criticism as the "presumption" that existing co-located newspaper-broadcasting combinations do not serve the public interest. The Commission's past concern with avoiding disruption of existing service is amply illustrated by its license renewal policies. In addition, it is worth noting that in the past when the Commission has

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[31] Prior to 1952, § 307 (d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." See Communications Act of 1934, § 307 (d), 48 Stat. 1084. In 1952 the section was amended to provide simply that renewal "may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act Amendments, 1952, § 5, 66 Stat. 714. The House Report explained that the previous language "is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases," H. R. Rep. No. 1750, 82d Cong., 2d Sess., 8 (1952), and the Senate Report specifically stated that the Commission has the "right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience, and necessity," S. Rep. No. 44, 82d Cong., 1st Sess., 7 (1951).

changed its multiple-ownership rules it has almost invariably tailored the changes so as to operate wholly or primarily on a prospective basis. For example, the regulations adopted in 1970 prohibiting common ownership of a VHF television station and a radio station serving the same market were made to apply only to new licensing decisions; no divestiture of existing combinations was required. See n. 3, *supra.* The limits set in 1953 on the total numbers of stations a person could own, upheld by this Court in *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956), were intentionally set at levels that would not require extensive divestiture of existing combinations. See *Multiple Ownership of AM, FM and Television Broadcast Stations,* 18 F. C. C., at 292. And, while the rules adopted in the early 1940's prohibiting ownership or control of more than one station in the same broadcast service in the same community required divestiture of approximately 20 AM radio combinations, FCC Eleventh Annual Report 12 (1946), the Commission afforded an opportunity for case-by-case review, see Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943). Moreover, television and FM radio had not yet developed, so that application of the rules to these media was wholly prospective. See Rules and Regulations Governing Commercial Television Broadcast Stations, *supra,* n. 1; Rules Governing Standard and High Frequency Broadcast Stations, *supra,* n. 1.

The Court of Appeals apparently reasoned that the Commission's concerns with respect to disruption of existing service, economic dislocations, and decreases in local ownership necessarily could not be very weighty since the Commission has a practice of routinely approving voluntary transfers and assignments of licenses. See 181 U. S. App. D. C., at 26–28, 555 F. 2d, at 963–965. But the question of whether the Commission should compel proved licensees to divest their stations is a different question from whether the public interest is served

by allowing transfers by licensees who no longer wish to continue in the business. As the Commission's brief explains:

> "[I]f the Commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving. Thus, the fact that the Commission approves assignments and transfers in no way undermines its decision to place a premium on the continuation of proven past service by those licensees who wish to remain in business." Brief for Petitioner in No. 76–1471, p. 38 (footnote omitted).[32]

The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission. 181 U. S. App. D. C., at 28, 555 F. 2d, at 965. However, to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature—*e. g.*, whether a divestiture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing crossowners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local program-

[32] The Commission also points out, Brief for Petitioner in No. 76–1471, p. 24, that it has a rule against "trafficking"—*i. e.*, the acquisition and sale of licenses to realize a quick profit—that applies to license transfers or assignments within three years after a licensee commences operations. See 47 CFR § 1.597 (1976); *Crowder* v. *FCC*, 130 U. S. App. D. C. 198, 201–202, and nn. 22–23, 399 F. 2d 569, 572–573, and nn. 22–23, cert. denied, 393 U. S. 962 (1968).

ming. In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 29 (1961); see *Industrial Union Dept., AFL–CIO* v. *Hodgson,* 162 U. S. App. D. C. 331, 338–339, 499 F. 2d 467, 474–475 (1974).

B

We also must conclude that the Court of Appeals erred in holding that it was arbitrary to order divestiture in the 16 "egregious cases" while allowing other existing combinations to continue in operation. The Commission's decision was based not—as the Court of Appeals may have believed, see *supra,* at 792—on a conclusion that divestiture would be more harmful in the "grandfathered" markets than in the 16 affected markets, but rather on a judgment that the need for diversification was especially great in cases of local monopoly. This policy judgment was certainly not irrational, see *United States* v. *Radio Corp. of America,* 358 U. S., at 351–352, and indeed was founded on the very same assumption that underpinned the diversification policy itself and the prospective rules upheld by the Court of Appeals and now by this Court—that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints.

As to the Commission's criteria for determining which existing newspaper-broadcast combinations have an "effective monopoly" in the "local marketplace of ideas as well as economically," we think the standards settled upon by the Commission reflect a rational legislative-type judgment. Some line had to be drawn, and it was hardly unreasonable for the Commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and

either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal. Cf. *United States* v. *Radio Corp. of America, supra,* at 351–352, quoted, *supra,* at 796. It was not irrational, moreover, for the Commission to disregard media sources other than newspapers and broadcast stations in setting its divestiture standards. The studies cited by the Commission in its notice of rulemaking unanimously concluded that newspapers and television are the two most widely utilized media sources for local news and discussion of public affairs; and, as the Commission noted in its Order, at 1081, "aside from the fact that [magazines and other periodicals] often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues." Moreover, the differences in treatment between radio and television stations, see n. 10, *supra,* were certainly justified in light of the far greater influence of television than radio as a source for local news. See Order, at 1083.

The judgment of the Court of Appeals is affirmed in part and reversed in part.

*It is so ordered.*

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

# NATIONAL BROILER MARKETING ASSN. *v.* UNITED STATES

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

No. 77–117. Argued February 21, 1978—Decided June 12, 1978

The United States brought an antitrust suit against petitioner, a nonprofit cooperative association the members of which are integrated producers of broiler chickens. The complaint alleged that petitioner, which performs various marketing and purchasing functions for its members, had conspired with others, including its members, in violation of § 1 of the Sherman Act. Petitioner asserted that its activities with its members were sheltered from suit under § 1 of the Capper-Volstead Act, which permits "[p]ersons engaged in the production of agricultural products as farmers" to join in cooperative associations. The District Court concluded that the activities of petitioner's members justified their classification as farmers and that the Capper-Volstead protection claimed was therefore available. The Court of Appeals reversed, holding that petitioner's members were not all "farmers" in the ordinary meaning of that word as it was used at the time the Capper-Volstead Act was passed. *Held:* Because not all of petitioner's members qualify as farmers under the Capper-Volstead Act, it is not entitled to the protection from the antitrust laws afforded by that Act. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384 (1967). Pp. 822–829.

(a) The language of the Capper-Volstead Act reveals that not all persons engaged in the production of agricultural products are entitled to form cooperatives protected by that Act. P. 823.

(b) The legislative history of the Act reveals that Congress did not intend the protection of the Act to extend to the processors and packers to whom farmers sold their goods, even when the relationship was such that the processors and packers bore a part of the risks of a fluctuating agricultural market. Pp. 824–827.

(c) Those among petitioner's members who own neither a breeder flock nor a hatchery and who maintain no "grow-out" facility at which broiler flocks are raised and whose economic roles are essentially those of packers or processors, are not "farmers" within the meaning of the Capper-Volstead Act. Pp. 827–829.

550 F. 2d 1380, affirmed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post,* p. 829. WHITE, J., filed a dissenting opinion, in which STEWART, J., joined, *post,* p. 840.

*Richard A. Posner* argued the cause for petitioner. With him on the briefs were *Michael A. Doyle* and *Frederick H. Von Unwerth.*

*Assistant Attorney General Shenefield* argued the cause for the United States. With on the brief were *Solicitor General McCree, Frank H. Easterbrook, John J. Powers III,* and *Bruce E. Fein.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again,[1] this time in an antitrust context, the Court is confronted with an issue concerning integrated poultry operations. Petitioner phrases the issue substantially as follows:

> Is a producer of broiler chickens precluded from qualifying as a "farmer," within the meaning of the Capper-

*A brief of *amici curiae* urging affirmance was filed for their respective States by *William J. Baxley,* Attorney General of Alabama; *Carl R. Ajello,* Attorney General of Connecticut; *John D. MacFarlane,* Attorney General of Colorado; *Robert L. Shevin,* Attorney General of Florida; *William J. Scott,* Attorney General of Illinois; *Robert F. Stephens,* Attorney General of Kentucky; *Francis X. Bellotti,* Attorney General of Massachusetts; *Frank J. Kelley,* Attorney General of Michigan; *William F. Hyland,* Attorney General of New Jersey; *William J. Brown,* Attorney General of Ohio; *Robert P. Kane,* Attorney General of Pennsylvania; *Richard C. Turner,* Attorney General of Iowa; *William J. Guste, Jr.,* Attorney General of Louisiana; *John D. Ashcroft,* Attorney General of Missouri; *Louis J. Lefkowitz,* Attorney General of New York; *Larry Derryberry,* Attorney General of Oklahoma; *James A. Redden,* Attorney General of Oregon; *Julius C. Michaelson,* Attorney General of Rhode Island; and *Marshall Coleman,* Attorney General of Virginia, joined by *Emmet Bondurant, David I. Shapiro,* and *James vanR. Springer. Allen A. Lauterbach* filed a brief for the American Farm Bureau Federation as *amicus curiae* urging affirmance.

[1] See *Bayside Enterprises, Inc.* v. *NLRB,* 429 U. S. 298 (1977).

> Volstead Act, when it employs an independent contractor to tend the chickens during the "grow-out" phase from chick to mature chicken? [2]

The issue apparently is of importance to the broiler industry and in the administration of the antitrust laws.[3]

## I

In April 1973, in the United States District Court for the Northern District of Georgia, the United States brought suit against petitioner National Broiler Marketing Association (NBMA). It alleged that NBMA had conspired with others not named, but including members of NBMA, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 (1976 ed.). It prayed for injunctive relief and that NBMA "be ordered to make whatever changes are necessary in its organization and operation to insure compliance with the judgment" of the court. Record 10. In its answer NBMA alleged, among other things, that its status, as a cooperative association of persons engaged in the production of agricultural products, sheltered it from antitrust liability for the acts alleged, under § 1 of the Capper-Volstead Act, also known as

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[2] The Court of Appeals described the issue in this manner:

"We must decide whether broiler industry companies that neither own nor operate farms can be 'farmers' within the meaning of a 1922 federal statute called the Capper-Volstead Act, which gives farmers' cooperatives some measure of protection from the antitrust laws" (footnote omitted). 550 F. 2d 1380, 1381 (CA5 1977).

[3] Nineteen States have filed a brief *amicus curiae* and assert interests as antitrust litigants. See *In re Chicken Antitrust Litigation,* M. D. L. No. 237, ND Ga. No. C74–2454A. See also Brown, United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?, 56 N. C. L. Rev. 29 (1978); Department of Agriculture, Farmer Cooperative Service, Legal Phases of Farmer Cooperatives (1976); Note, Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives, 61 Va. L. Rev. 341 (1975).

the Cooperative Marketing Associations Act, 42 Stat. 388, 7 U. S. C. § 291 (1976 ed.).[4]

On motion and cross-motion for partial summary judgment, the District Court concluded that the involvement of all the members of NBMA in the production of broiler chickens was sufficient to justify their classification as "farmers," within the meaning of the Act, and that NBMA therefore was a cooperative entitled to the limited exemption from the antitrust laws the Act afforded. 1975–2 Trade Cases ¶ 60,509.

On appeal,[5] the United States Court of Appeals for the Fifth Circuit reversed. It held that all the NBMA members were not farmers in the ordinary, popular meaning of that word and

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[4] Section 1 of the Capper-Volstead Act provides in pertinent part:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

The statute further provides that any such association must be operated for the mutual benefit of its members; that it may not pay dividends of more than 8% annually on its stock or membership capital; and that it "shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." Section 2 of the Act, 7 U. S. C. § 292 (1976 ed.), provides for certain regulation of the association by the Secretary of Agriculture.

[5] In order to facilitate the appeal, the United States, after the District Court's decision, amended the complaint to limit its allegations of conspiracy to the members of NBMA. App. 94–95. This was done without prejudice to any later renewal of allegations abandoned by the amendment. *Id.*, at 91. Noting that the United States did not dispute that if NBMA were a qualified cooperative, the exemption afforded by the Capper-Volstead Act provided a complete defense to the amended complaint, and restating its conclusion that NBMA's members were entitled to join in a cooperative under the Act, the District Court dismissed the amended complaint with prejudice. *Id.*, at 105–108; 1976–1 Trade Cases ¶ 60,801.

as it was employed in 1922 when the Capper-Volstead Act became law. 550 F. 2d 1380 (1977). Because of the importance of the issue for the agricultural community and for the administration of the antitrust laws, we granted certiorari. 434 U. S. 888 (1977).

## II

NBMA is a nonprofit cooperative association organized in 1970 under Georgia law.[6] It performs various cooperative marketing and purchasing functions on behalf of its members. App. 7.[7] Its membership has varied somewhat during the course of this litigation, but apparently it has included as many as 75 separate entities. *Id.*, at 172.

These members are all involved in the production and marketing of broiler chickens.[8] Production involves a number of distinct stages: the placement, raising, and breeding of breeder flocks to produce eggs to be hatched as broiler chicks;

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[6] Georgia Cooperative Marketing Act, Ga. Code § 65–201 *et seq.* (1975). The Act authorizes cooperative associations of "persons engaged in the production of . . . agricultural products." § 65–205. When first organized, NBMA was chartered as a cooperative association with capital stock. In December 1973, after the complaint in this suit had been filed, its articles of incorporation were amended to authorize the cancellation of its capital stock and the conversion of the association to a nonprofit membership cooperative association not having stock. App. 6.

There is no suggestion by the parties that this change in organization in any way affects the issue presented in the case.

[7] The record includes more specific but nevertheless limited references to NBMA's activities. It has been involved in the purchasing of feed ingredients and of other specialized products used by its members in raising broilers and preparing them for market, in market research and planning, and in conducting a foreign trade sales program. *Id.*, at 137–139. The full range of NBMA's activities may well be put in issue on remand.

[8] Broilers are chickens that are slaughtered at 7 to 9 (or 8 to 10) weeks of age and processed for sale to supermarkets, restaurants, hotels and other institutions. *Id.*, at 8, 93, 98. The United States has conceded that, for the purposes of this litigation, a broiler chicken is an agricultural product. *Id.*, at 7.

the hatching of the eggs and placement of those chicks; the production of feed for the chicks; the raising of the broiler chicks for a period, not to exceed, apparently, 10 weeks; the catching, cooping, and hauling of the "grown-out" broiler chickens to processing facilities; and the operation of facilities to process and prepare the broilers for market. *Id.*, at 7.

The broiler industry has become highly efficient and departmentalized in recent years,[9] and stages of production that in the past might all have been performed by one enterprise may now be split and divided among several, each with a highly specialized function. No longer are eggs necessarily hatched where they are laid, and chicks are not necessarily raised where they are hatched. Conversely, some stages that in the past might have been performed by different persons or enterprises are now combined and controlled by a single entity. Also, the owner of a breeder flock may own a processing plant.

All the members of NBMA are "integrated," that is, they are involved in more than one of these stages of production. Many, if not all, directly or indirectly own and operate a processing plant where the broilers are slaughtered and dressed for market. All contract with independent growers for the raising or grow-out of at least part, and usually a substantial part, of their flocks. *Id.*, at 8. Often the chicks placed with an independent grower have been hatched in the member's hatchery from eggs produced by the member's breeder flocks.

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[9] Compare, for example, Department of Agriculture, Agricultural Adjustment Administration, W. Termohlen, J. Kinghorne, & E. Warren, An Economic Survey of the Commercial Broiler Industry (1936), with V. Benson & T. Witzig, The Chicken Broiler Industry: Structure, Practices, and Costs (Dept. of Agriculture, Economic Rep. No. 381, 1977). See generally E. Roy, Contract Farming and Economic Integration, ch. 4, "Broiler Chickens" (2d ed. 1972); Department of Agriculture, Packers and Stockyards Administration, The Broiler Industry: An Economic Study of Structure, Practices and Problems (1967); Ohio Agricultural Research and Development Center, B. Marion & H. Arthur, Dynamic Factors in Vertical Commodity Systems: A Case Study of the Broiler System (1973).

The member then places its chicks with the independent grower for the grow-out period, provides the grower with feed, veterinary service, and necessary supplies, and, with its own employees, usually collects the mature chickens from the grower. Generally, the member retains title to the birds while they are in the care of the independent grower. *Ibid.*

It is established, however, *ibid.;* Brief for Petitioner 5 n. 2, that six NBMA members do not own or control any breeder flock whose offspring are raised as broilers, and do not own or control any hatchery where the broiler chicks are hatched. And it appears from the record that three members do not own a breeder flock or hatchery, and also do not maintain any grow-out facility.[10] These members, who buy chicks already hatched and then place them with growers, enter the production line only at its later processing stages.

## III

The Capper-Volstead Act removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market.[11] But if the cooperative includes among its members those not so privileged under the statute to act collectively, it is not entitled to the protection of the Act. *Case-Swayne Co.* v. *Sunkist Growers, Inc.,* 389 U. S. 384 (1967). Thus, in order for NBMA to enjoy the limited exemption of the Capper-Volstead Act, and, as a consequence, to avoid liability under the antitrust laws for its collective activity, *all* its members must be qualified to act collectively. It is not enough that a typical

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[10] See Table G–1, and the data as to Members 2, 3, and 20, attached to affidavit of I. R. Barnes, submitted by petitioner and accepted as to accuracy by the United States. Record 467; App. 187–188.

[11] The Act does not remove from the general operation of the antitrust laws the dealings of such cooperatives with others. *United States* v. *Borden Co.,* 308 U. S. 188, 203–205 (1939).

member qualify, or even that most of NBMA's members qualify. We therefore must determine not whether the typical integrated broiler producer is qualified under the Act but whether all the integrated producers who are members of NBMA are entitled to the Act's protection.

The Act protects "[p]ersons engaged in the production of agricultural products *as farmers, planters, ranchmen, dairymen, nut or fruit growers*" (emphasis added). A common-sense reading of this language [12] clearly leads one to conclude that not all persons engaged in the production of agricultural products are entitled to join together and to obtain and enjoy the Act's benefits: The italicized phrase restricts and limits the broader preceding phrase "[p]ersons engaged in the production of agricultural products . . . ." [13]

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[12] See *Malat* v. *Riddell,* 383 U. S. 569, 571 (1966); *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 618 (1944).

[13] The report on the bill that became the Act stressed that the limitations on "the kind of associations to which the legislation applies" were "aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers." H. R. Rep. No. 24, 67th Cong., 1st Sess., 1 (1921). See also H. R. Rep. No. 939, 66th Cong., 2nd Sess., 1 (1920).

Senator Kellogg, a supporter of the bill, read this language to have a restrictive meaning:

"Mr. CUMMINS . . . . Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?

"Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.

"Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

"Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers

The purposes of the Act, as revealed by the legislative history, confirm the conclusion that not all those involved in bringing agricultural products to market may join cooperatives exempt under the statute, and have the cooperatives retain that exemption. The Act was passed in 1922 to remove the threat of antitrust restrictions on certain kinds of collective activity, including processing and handling, undertaken by certain persons engaged in agricultural production. Similar organizations of those engaged in farming, as well as organizations of laborers, were already entitled, since 1914, to special treatment under § 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17 (1976 ed.).[14] This treatment, however, had proved to be inadequate. Only nonstock organizations were exempt under the Clayton Act, but various agricultural groups had discovered that, in order best to serve the needs of their members, accumulation of capital was required. With capital, cooperative associations could develop and provide the handling and processing services that were needed before their members' products could be sold. The Capper-Volstead Act was passed to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without

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farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"Mr. TOWNSEND. They must be persons who produce these things.

"Mr. KELLOGG. Yes; that has always been the understanding." 62 Cong. Rec. 2052 (1922).

[14] Section 6 of the Clayton Act reads:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

antitrust consequences, could perform certain functions in preparing produce for market. Mr. Justice Black summarized this legislative history in his opinion for a unanimous Court in *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–468 (1960), and it is further discussed in *Case-Swayne,* 389 U. S., at 391.[15]

Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he would sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers, however, so long as they could act only individually, had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever

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[15] See also, *e. g.,* 59 Cong. Rec. 7851–7852 (1920) (remarks of Rep. Morgan); *id.,* at 8017 (remarks of Rep. Volstead). See generally Ballantine, Co-operative Marketing Associations, 8 Minn. L. Rev. 1 (1923); L. Hulbert, Legal Phases of Cooperative Associations 43–47 (Department of Agriculture Bull. No. 1106, 1922).

The Court specifically has acknowledged the relationship of the exemption for labor unions and that for farm cooperatives:

"These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control." *Tigner* v. *Texas,* 310 U. S. 141, 145 (1940).

See also *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71, 92–93 (1928); *Frost* v. *Corporation Comm'n,* 278 U. S. 515, 538–543 (1929) (Brandeis, J., dissenting).

profits might be available from agricultural production.[16] By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.

NBMA argues that this history demonstrates that the Act was meant to protect all those that must bear the costs and risks of a fluctuating market,[17] and that all its members, because they are exposed to those costs and risks and must make decisions affected thereby, are eligible to organize in exempt cooperative associations.[18] The legislative history indicates, however, and does it clearly, that it is not simply exposure to those costs and risks, but the inability of the individual farmer to respond effectively, that led to the passage of the Act. The congressional debates demonstrate that the Act was meant to aid not the full spectrum of the agricultural sector but, instead, to aid only those whose economic position rendered them comparatively helpless. It was, very definitely, special-interest legislation. Indeed, several attempts were made to amend the Act to include certain processors who, according to preplanting contracts, paid growers amounts based on the market price of processed goods; these attempts were roundly rejected.[19] Clearly, Congress did not intend to extend the

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[16] See, *e. g.*, 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman); *id.*, at 9154 (extended remarks of Rep. Michener); 61 Cong. Rec. 1040 (1921) (remarks of Rep. Towner); 62 Cong. Rec. 2048–2049 (1922) (remarks of Sen. Kellogg); *id.*, at 2058 (remarks of Sen. Capper).

[17] Essentially the same argument was made and rejected by the Court in *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384, 393–396 (1967), in which it concluded that a cooperative of orange growers, which included some members who operated packing houses but grew no fruit, was not entitled to the protection of the Act.

[18] NBMA asserts that the integrator bears 90%, or more, of broiler production costs, as compared with the grower's 10%, or less. Tr. of Oral Arg. 13; Brief for Petitioner 16, 21.

[19] This amendment, repeatedly introduced by Senator Phipps, would have

benefits of the Act to the processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk.

Petitioner suggests that agriculture has changed since 1922, when the Act was passed, and that an adverse decision here "might simply accelerate an existing trend toward the absorption of the contract grower by the integrator," or "might induce the integrators to rewrite their contracts with the contract growers to designate the latter as lessor-employees rather than independent contractors." Brief for Petitioner 13; see *id.*, at 24, 26, and Tr. of Oral Arg. 17. We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *United States* v. *Sisson*, 399 U. S. 267, 297 (1970). Considerations of this kind are for the Congress, not the courts.

## IV

We, therefore, conclude that any member of NBMA that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act. The economic role of such a member in the production of broiler chickens is indistinguish-

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inserted the following language after "nut or fruit growers" (see n. 4, *supra*):

"and where any such agricultural product or products must be submitted to a manufacturing process, in order to convert it or them into a finished commodity, and the price paid by the manufacturer to the producer thereof is controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products, then any such manufacturers." 62 Cong. Rec. 2227, 2273–2275, 2281 (1922).

able from that of the processor that enters into a preplanting contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops.[20] Their participation involves only the kind of investment that Congress clearly did not intend to protect.[21] We hold that such members are not "farmers," as that term is used in the Act, and that a cooperative organization that includes them—or even one of

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[20] The dissent suggests, *post,* at 849, that petitioner's members "partake in substantially all of the risks of bringing a crop . . . from chick to broiler." Although it is true that petitioner's members bear some of the risks associated with bringing each flock to market, they do not bear all the risks. Growers dealing with many of petitioner's members, including M2, M3, and probably M20, receive no payment for their labor if a flock is lost due, in some cases, to the weather, and in other cases, to disease. See Table G–2, App. 195. And, perhaps more importantly, petitioner's members do not bear all the risks associated with changes in demand over a longer period of time. Very few of petitioner's members, not including M2 or M3, provide the growers with whom they deal anything more than "informal assurances" that the member will continue to place flocks with the grower and therefore that the grower will receive a return on the investment he has in his grow-out facilities. See Table G–7, App. 219.

[21] Because we conclude that these members have not made the kind of investment that would entitle them to the protection of the Act, we need not consider whether, even if they had, they would be ineligible for the protection of the Act because their economic position is such that they are not helplessly exposed to the risks about which Congress was concerned. Thus we need not consider here the status under the Act of the fully integrated producer that not only maintains its own breeder flock, hatchery, and grow-out facility, but also runs its own processing plant. Neither do we consider the status of the less fully integrated producer that, although maintaining a grow-out facility, also contracts with independent growers for a large portion of the broilers processed at its facility.

There is nothing in the record that would allow us to consider whether these integrators are "too small" to own their own breeder flocks, hatcheries, or grow-out facilities, or whether, because of the history of their economic development, they have concentrated only on the feed production and processing aspects of broiler production.

them—as members is not entitled to the limited protection of the Capper-Volstead Act.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings.

*It is so ordered.*

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. I agree that since several of NBMA's members were not engaged in the production of agriculture as farmers, *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384 (1967), compels the holding that NBMA's activities challenged by the United States cannot be afforded the Sherman Act exemption NBMA asserts. Since that disposition settles this aspect of the suit between the parties, it is unnecessary for the Court to consider, and the Court reserves, the question of "the status under the Act of the fully integrated producer that not only maintains its breeder flock, hatchery, and grow-out facility, but also runs its own processing plant." *Ante*, at 828 n. 21. I write separately only to suggest some considerations which bear on this broader question. I do so because the rationale of the dissent necessarily carries over to that question.

I

The Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291 *et seq.* (1976 ed.), like the Sherman Act which it modifies, was populist legislation which reacted to the increasing concentrations of economic power which followed on the heels of the industrial revolution. The Sherman Act was the first legislation to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans. Next enacted was § 6 of the Clayton Act, 38 Stat. 730, 15 U. S. C. § 17 (1976 ed.), which provides:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and oper-

> ation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

This legislation linked industrial labor and farmers as the kind of economic units of individuals for whom it was thought necessary to permit cooperation—cartelization in economic parlance—in order to survive against the economically dominant manufacturing, supplier, and purchasing interests with which they had to interrelate. The failure of § 6 expressly to authorize cooperative marketing activities, and to permit capital stock organizations coverage under it, prompted enactment of the Capper-Volstead Act in 1922 to remedy these omissions. Section 1 of that Act provides, *inter alia:*

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. . . ."

At the time the Capper-Volstead Act was enacted, farming was not a vertically integrated industry. The economic model was a relatively large number of small, individual, economic farming units which actually tilled the soil and husbanded animals, on the one hand, and, on the other hand, the relatively small number of large economic units which processed the agricultural products and resold them for wholesale and retail distribution. It was the disparity of power between the units at the respective levels of production that spurred

this congressional action. See, *e. g.,* 62 Cong. Rec. 2257 (1922) (remarks of Sen. Norris). Congress was concerned that the farmer, at the mercy of natural forces on one hand, and the economically dominant processors on the other, was being driven from the land and forced to migrate in ever-increasing numbers to the cities.

> "Senator Capper stated a point of view to be found on almost every page of the congressional debate on his bill, 'Middlemen who buy farm products act collectively as stockholders in corporations owning the business and through their representatives buy of farmers, and if farmers must continue to sell individually to these large aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market, then farmers must for all time remain at the mercy of the buyers.' 62 Cong. Rec. 2058 (1922)." *Post,* at 841 (footnote omitted).

The legislative history makes clear that the regime which Congress created in the Capper-Volstead Act to ameliorate this situation was one of voluntary cooperation. The Act would allow farmers to " 'combine with [their] neighbors and cooperate and act as a corporation, following [their] product from the farm as near to the consumer as [they] can, doing away in the meantime with unnecessary machinery and unnecessary middle men.' That is all this bill attempts to do." 62 Cong. Rec. 2257 (1922) (remarks of Sen. Norris). As the Court notes, however, "[c]learly, Congress did not intend to extend the benefits of the Act to processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk." *Ante,* at 826–827. This fact is demonstrated from several exchanges during the debate clarifying the intent behind the bill and also by the abortive Phipps amendment. In the colloquy between Senators Kellogg and Cummins, quoted *in extenso, ante,* at 823–824, n. 13, an intent not

to extend the benefits of the bill to processors of agricultural products is clear:

> "Mr. CUMMINS . . . Take the flouring mills of Minneapolis: They are engaged in a broad sense, in the production of an agricultural product. The packers are engaged in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?
>
> "Mr. KELLOGG: Certainly not . . . ." 62 Cong. Rec. 2052 (1922).

Debate surrounding the proposed Phipps amendment, quoted *ante*, at 827 n. 19, the effect of which would have been to exempt, for example, sugar refiners with preplanting contracts, yields a similar understanding. Senator Norris, in leading the successful rejection of the amendment, explained: "The amendment . . . is simply offered for the purpose of giving to certain manufacturers the right to be immune from any prosecution under the Sherman Antitrust Act. . . . *They are not cooperators;* they are not producers; it is not an organization composed of producers who incorporate together to handle their own products; that is not it." 62 Cong. Rec. 2275 (1922) (emphasis added). These statements show that Congress regarded both "manufacturers of finished agricultural products" and "processors" as ineligible. Whether or not there is a distinction in economic or other terms between "manufacturers" who refine sugar from beets, or "processors" who mill wheat into flour, both groups were thought of as beyond the reach of § 1—"They are not cooperators." Thus the legislative history demonstrates that the purpose of the legislation was to permit only individual economic units working at the farm level [1] to form cooperatives for purposes of

[1] See, *e. g.*, 59 Cong. Rec. 7855–7856 (1920) (remarks of Rep. Evans: "[T]he liberty sought in this bill for the man who tills the soil"); *id.*, at

"collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." This focus on collectives to replace the processors and middlemen is the key to application of the Act's policies to modern agricultural conditions.

## II

### A

The dissent is correct, of course, that "[t]he nature of agriculture has changed profoundly since the early 1920's when the Capper-Volstead Act was debated and adopted. The reality of integrated agribusiness admittedly antiquates some of the congressional characterizations of farming." *Post,* at 843. Most NBMA members are fully integrated, except for the grow-out stage which they contract out. Rather than groups of single-function farmers forming a collective jointly to handle, process, and market their agricultural products, these multifunction integrated units stand astride several levels of agricultural production which Congress in 1922 envisioned would be collectivized. Performing these functions for them-

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8017 (remarks of Rep. Volstead); *id.,* at 8022 (remarks of Rep. Sumners); *id.,* at 8025 (remarks of Rep. Hersman); *id.,* at 8026 (remarks of Rep. Towner: "[T]his privilege is not to dealers or handlers or speculators for profit; it is limited to the producers themselves"); *id.,* at 8033 (remarks of Rep. Fields); 61 Cong. Rec. 1034 (1921) (remarks of Rep. Walsh); *id.,* at 1037 (remarks of Rep. Blanton); *id.,* at 1040 (remarks of Rep. Towner: "The farmer is an individual unit. He must manage his own farm. He must have his own home"); *id.,* at 1044 (remarks of Rep. Hersey); 62 Cong. Rec. 2048, 2050 (1922) (remarks of Sen. Kellogg, noting the "individualistic nature of the farmer's occupation" and describing a farmer as "a small holder of land"); *id.,* at 2051 (remarks of Sen. Kellogg, observing that the legislation was designed to encourage the farmer "in his ownership, in the occupation of his farm, and in the cultivation of his own land"); *id.,* at 2052 (remarks of Sens. Cummins, Kellogg, and Townsend); *id.,* at 2156 (remarks of Sen. Walsh, observing that the legislation protects only "an organization of the producers themselves of the product of the farm"); *id.,* at 2058–2059 (remarks of Sen. Capper).

selves, the allegations of the complaint suggest, they now seek protection of the exemption not to permit collectivized processing but simply as a shield for price fixing. The issue is whether a fully integrated producer of agricultural products performing its own processing or manufacturing and which hence does not associate for purposes of common handling, processing, and marketing is nevertheless "engaged in the production of agricultural products as [a] farme[r]" for purposes of § 1's exemption for such cooperatives if also engaged in traditional farming activity. The dissent frankly recognizes that integrated poultry producers do not neatly fit the limitation Congress signified by the phrase "as farmers," but reads that limitation out of the Act in order to give effect to what it perceives as Congress' desire to aid the agricultural industry generally because of the uncertainty of profits in that industry caused by the combination of weather, fluctuations in demand, and perishability of the product. Elision of the limitation Congress placed on the exemption is sacrificed to this end, and the exemption extended to encompass all persons engaged in the production of agriculture. But that drastic restructuring of the statute is not only inconsistent with Congress' specific intent regarding the meaning of the limitation, but is unnecessary to give continuing effect to its broader purposes. Congress clearly intended, as the discussion in Part I, *supra*, demonstrates, to withhold exempting processors engaged in the production of agriculture notwithstanding that they bore risks common to agriculture generally, and that they may be "price takers" with respect to the product they sell to large chains of grocery stores. The dissent fails to explain how extending the exemption in the fashion it suggests can be reconciled with the fundamental purpose of this populist legislation to authorize farmers' cooperatives for collective handling, processing, and marketing purposes.

The dissent's construction, it seems to me, would permit the behemoths of agribusiness to form an exempt association

to engage in price fixing, and territorial and market division, so long as these concerns are engaged in the production of agriculture. It is hard to believe that in enacting a provision to authorize horizontal combinations for purposes of collective processing, handling, and marketing so as to eliminate middlemen, Congress authorized firms which integrated further downstream beyond the level at which cooperatives could be utilized for these purposes to combine horizontally as a cartel with license to carve up the national agricultural market. Such a construction would turn on its head Congress' manifest purpose to protect the small, individual economic units engaged in farming from exploitation and extinction at the hands of "these large aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market," 62 Cong. Rec. 2058 (1922) (remarks of Sen. Capper), by exempting instead, and thereby fomenting "these great trusts, these great corporations, these large moneyed institutions" at which the Sherman Act took aim. 21 Cong. Rec. 2562 (1890) (remarks of Sen. Teller). There is nothing in the legislative history, and much to the contrary, to indicate that Congress enacted § 1 to remake agriculture in the image of the great cartels.

B

Definition of the term "farmer" cannot be rendered without reference to Congress' purpose in enacting the Capper-Volstead Act. "When technological change has rendered its literal terms ambiguous, the . . . Act must be construed in light of [its] basic purpose." *Twentieth Century Music Corp.* v. *Aiken,* 422 U. S. 151, 156 (1975). I seriously question the validity of any definition of "farmer" in § 1 which does not limit that term to exempt only persons engaged in agricultural production who are in a position to use cooperative associations for collective handling and processing—the very activities for which the exemption was created. At some point along the path of downstream integration, the function of the

exemption for its intended purpose is lost, and I seriously doubt that a person engaged in agricultural production beyond that point can be considered to be a farmer, even if he also performs some functions indistinguishable from those performed by persons who are "farmers" under the Act. The statute itself may provide the functional definition of farmer as persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for cooperative handling, processing, and marketing. Thus, in my view, the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an association is exempt. The record before us does not provide evidence relevant to these considerations, and there is therefore no basis for appraising NBMA's entitlement to the exemption while it includes members whose operations are fully integrated whether or not they contract rather than perform the grow-out phase.

III

If, because of changes in agriculture not envisioned by it in 1922, Congress' purpose no longer can be achieved, there would be no warrant for judicially extending the exemption, even if otherwise it would fall into desuetude. In construing a specific, narrow exemption to a statute articulating a comprehensive national policy, we must, of course, give full effect to the specific purpose for which the exemption was established. But when that purpose has been frustrated by changed circumstances, the courts should not undertake to rebalance the conflicting interests in order to give it continuing effect. Cf. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U. S. 394, 414 (1974); *Fortnightly Corp.* v. *United Artists*, 392 U. S. 390, 401–402 (1968). Specific exemptions are the product of rough political accommodations responsive to the time and current conditions. If the passage of time

has "antiquated" the premise upon which that compromise was struck, the exemption should not be judicially reincarnated in derogation of the enduring national policy embodied in the Sherman Act.

The dissent's reconstruction of the exemption is doubly flawed, for it would frustrate the Act's purpose to protect that segment of agricultural enterprise as to which Congress' purpose retains vitality. The American Farm Bureau Federation, which has filed a brief *amicus curiae* in this case, "is a voluntary general farm organization, representing more than 2.5 million member families in every State (except Alaska) and Puerto Rico." Brief as *Amicus Curiae* 2. Speaking for the contract growers—those who actually own the land and husband the chicks from the time they are hatched until just before their slaughter—the Federation argues that extending the exemption to integrators would stand the Act on its head; the integrators who process the fully grown broilers could thereby combine to dictate the terms upon which they will deal with the contract growers to the latter's disadvantage.

Moreover, there is persuasive evidence that Congress' concern for protecting contract growers vis-à-vis processors and handlers has not abated. In 1968, Congress enacted the Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U. S. C. § 2301 *et seq.* (1976 ed.), designed to protect the "bargaining position" of "individual farmers" by prohibiting "handlers" from interfering with the "producers' " right "to join together voluntarily in cooperative organizations as authorized by law." § 2301. In doing so, Congress legislated specifically to protect contract growers from integrated broiler producers. Section 4 (b) of the Act prohibits a "handler" from discriminating against "producers" with respect to any term "of purchase, acquisition or *other handling of* agricultural products because of his membership in or contract with an association of producers." 7 U. S. C. § 2303 (b) (1976 ed.) (emphasis added). The definition of the term "producer" is identical to that in

§ 1 of Capper-Volstead, see 7 U. S. C. § 2302 (b) (1976 ed.), but the legislative history makes clear that for purposes of this Act, Congress considered integrated broiler producers to be "handlers" and acted to prevent them from preying on contract growers. The Senate Report makes this clear: [2]

> "As introduced, [§ 4 (b)] prohibited discrimination in the terms of 'purchase or acquisition' of agricultural products. The committee found that this provision would be ineffective with respect to much that it was manifestly intended to prohibit. *Thus a broiler contractor might furnish hatching eggs or chicks to a producer under a bailment contract where title remained in the contractor;* or a canning company might furnish seeds or tomato plants to a producer under a similar arrangement. *No 'purchase or acquisition' would be involved.* The committee amendment would extend this provision to 'other handling' of agricultural products, thereby covering the examples just given and greatly broadening the scope of this provision." S. Rep. No. 474, 90th Cong., 1st Sess., 5–6 (1967). (Emphasis added.)

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[2] Secretary Freeman, in recommending passage of the Agricultural Fair Practices Act, on behalf of the United States Department of Agriculture, said:

"Cooperative action in agricultural production and marketing is increasing. It is growing in response to the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.

"*These changes include the growing integration of production and marketing of agricultural products, the increased control of these functions by large, diversified corporations, and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers.*" Hearings on S. 109 before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess., 3–4 (1967). (Emphasis added.)

The anomaly of allowing the exemption to those who function more as processors uniquely to disadvantage the contract grower "producers" who today continue to fall within the conception of "farmers" Congress envisioned in 1922, points up the danger of judicially extending the exemption to conditions unforeseen by Congress in 1922.[3] The exemption provides a powerful economic weapon for the benefit of one economic interest group against another. However desirable the integrated broiler production system may be, and however needful of the exemption,[4] judges should not readjust the conflicting interests of growers and integrators; it is for Congress to address the problem of readjusting the power balance between

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[3] The dissenting opinion finds helpful in refuting the construction of the exemption suggested in this opinion two brief excerpts from the legislative history, quoted *post,* at 848 n. 14. These statements merely indicate that a processor like "Mr. Armour" who operates a farm would be entitled, free from antitrust liability, to cooperate with other producers in the common handling, processing, and marketing of the products they grow. Nothing in these statements suggests that the fact of farm ownership, however, would confer upon "Mr. Armour" the privilege to conspire with "Mr. Swift" to fix prices in their *processing* businesses. The dissent's assertion, moreover, that the third proviso of 7 U. S. C. § 291 (1976 ed.) allows a food processor by becoming a producer as well to acquire antitrust exemption for whatever he produces and up to 50% of the product of others is surely erroneous. Both the plain language of the proviso and the statement of Senator Walsh quoted indicate that the privilege to process up to 50% of nonmember producers' products while retaining the exemption belongs to the exempt association, not its members. Indeed, the full colloquy between Senators Kellogg and Walsh indicates that the intent was to exclude processors from the exemption with respect to their processing. "The object being that a few farmers should not organize a corporation simply as a selling agency and not personally really be cooperative members." 62 Cong. Rec. 2268 (1922) (remarks of Sen. Kellogg).

The statement of Senator Kellogg quoted, moreover, refers to an amendment which was not passed and which is simply irrelevant.

[4] See Brown, United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?, 56 N. C. L. Rev. 29 (1978).

them. *Teleprompter Corp.*, 415 U. S., at 414; *Fortnightly Corp.*, 392 U. S., at 401–402.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting.

The majority opinion fails to provide a functional definition of what it means to be a farmer within the sense of the Capper-Volstead Act. We are alternatively told that antitrust protection was not intended for "the full spectrum of the agricultural sector, but, instead . . . only those whose economic position rendered them comparatively helpless," *ante*, at 826, and then that certain members of the National Broiler Marketing Association are not entitled to protection because they are not big enough to own their own breeder flock, hatchery, or grow-out facility, *ante*, at 827. The rule of the case evidently is that ownership of one of those facilities is somehow requisite in order to be a farmer. But no attempt is made to link that conclusion to the motivating factors behind an antitrust exemption for agriculture.

Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. This one factor, more than any other, underlay the legislative recognition that allowing farmers to combine in marketing cooperatives was necessary for the economic survival of agriculture. "It is folly to suggest to the farmer with a carload of cattle on the market to 'take them home' or to 'haul back his load of wheat' or other commodity." 59 Cong. Rec. 7856 (1920) (Cong. Evans).[1]

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[1] Congressman Evans was commenting on an earlier version of the bill. "[T]he cooperative association is most helpful and its widest field of operation is in those products which are not sold upon exchanges . . . take the fruit crop, the apple crop, the potato crop. It must be harvested at a certain time. . . . You can not dump all the production on the country at once and have the farmer receive a good price." 62 Cong. Rec. 2052 (1922) (Sen. Kellogg). See also *Id.*, at 2263 (Sen. Hitchcock).

Even in a reasonably competitive market, physical inability to withhold produce will place a producer at a disadvantage. But the farmer did not face a reasonably competitive market. A theme running through the legislative history almost as persistently as perishability is the farmer's vulnerability to a small number of middlemen, organized, and capable of driving the price down below the farmer's cost of production.[2] Senator Capper stated a point of view to be found on almost every page of the congressional debate on his bill: "Middlemen who buy farm products act collectively as stockholders in corporations owning the business and through their representatives buy of farmers, and if farmers must continue to sell individually to these large aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market, then farmers must for all time remain at the mercy of the buyers." 62 Cong. Rec. 2058 (1922).[3]

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[2] See, *e. g.*, Senator Capper's speech, *id.*, at 2058, summing up his support for "growers . . . [who were] compelled to dump [their products] on a glutted market at prices below cost of production."

[3] "Agriculture sells its product to the highest bidder in a restricted market. It sells in this sort of market at the price fixed by purchasers. . . . There must be given to agriculture some compensatory advantage to offset the present economic advantage which industry holds by reason of the fact that it can write into the selling price which it fixes all cost of production plus a profit." 59 Cong. Rec. 8022 (1920) (remarks of Cong. Sumners on an earlier version of the bill). "Operating individually, [the farmer] is helpless and falls an easy victim to the organized operators who deal in his output." *Id.*, at 8025 (remarks of Cong. Hersman on earlier bill). "The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist—a condition that is very unfair under the present law. Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little, if anything, to say about the price." *Id.*, at 8033 (remarks of Cong. Fields on earlier bill). The Congressman stressed that the bill would give

The aid extended to farmers by the Capper-Volstead Act was of a very special variety. It was not a system of price supports or surplus purchases. The assistance offered farmers by the Capper-Volstead Act was to allow combination in a way that would otherwise violate the antitrust laws. Such protection was chosen for a specific purpose. A Government price support program could lift price as surely as allowing agricultural cooperatives to operate, if lifting price were the only objective. The specific goal of permitting agricultural organizations was to combat, and even to supplant, purchasers' organizations facing the farmer.

Economics teaches that the result in such circumstances is "bilateral monopoly" with a potentially beneficial impact on the eventual consumer and a sharing of cartel profits between the organized suppliers and the organized buyers.[4] The House Report for this reason concluded that the organization of agricultural cooperatives could actually lead to a lowering of the price paid by consumers,[5] if the middleman were elimi-

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farmers "protection against the gamblers in agricultural products, who rob the producer with one hand and the consuming public with the other." *Ibid.* The farmer "stands defenseless against combinations of corporations. He finds that when he goes out to do business in the world that he has to do business with a combination that represents 40 or 50 or 100,000 individual incorporators, but the farmer is a unit and he can not incorporate." 61 Cong. Rec. 1040 (1921) (remarks of Cong. Towner on earlier bill). "[I]t is better to have the control of producers extend nearer than now to consumers as against the control of prices by the speculator, who has no concern in the maintenance of stable prices but whose concern is only his immediate profit." *Id.*, at 1041 (remarks of Cong. Sumners on earlier bill). "[Cooperatives] have tended to prevent much of the gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers." H. R. Rep. No. 24, 67th Cong., 1st Sess., 3 (1921).

[4] See G. Stigler, The Theory of Price 207–208 (3d ed. 1966); M. Friedman, Price Theory 191–192 (1976); G. Becker, Economic Theory 94–95 (1971).

[5] H. R. Rep. No. 24, *supra*, n. 3, at 3.

nated altogether. Senator Norris elaborated that the purpose of the bill was to permit farmers " 'to combine with [their] neighbors and cooperate and act as a corporation, following [their] product from the farm as near to the consumer as [they] can, doing away in the meantime with unnecessary machinery and unnecessary middle men.' That is all this bill attempts to do." 62 Cong. Rec. 2257 (1922).

The legislative history thus comports with the economic reality of farming, and provides a consistent rationale for an agricultural antitrust exemption. Farmers were price takers because their goods could not be stored, and because they dealt with a small number of well-organized middlemen.

The nature of agriculture has changed profoundly since the early 1920's when the Capper-Volstead Act was debated and adopted. The reality of integrated agribusiness admittedly antiquates some of the congressional characterizations of farming. But this Court has interpreted other statutory exemptions in the light of a changing economy,[6] and the Court errs in failing to apply the sense and wording of the agriculture exemption because the industry's organization has changed.

The important reasons for granting antitrust immunity to farmers have not changed. Their produce is still, in large part, incapable of being withheld for a higher price. And in this case, that factor is particularly relevant. The overwhelming demand is for fresh, not frozen, 8-to-10-week-old broiler chickens, and integrators must sell their produce within four days of slaughter.[7] The result is a buyer's market. And the

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[6] See, *e. g., Connell Constr. Co.* v. *Plumbers & Steamfitters,* 421 U. S. 616 (1975) (labor exemption); *Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965) (labor exemption); and *SEC* v. *National Securities, Inc.,* 393 U. S. 453 (1969) (concerning the McCarran-Ferguson Act exemption for insurance).

[7] Brown, United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?, 56 N. C. L. Rev. 29, 44 (1978).

buyers in this market are few and powerful: "[T]he market for broilers is oligopsonistic, dominated by large retail chains such as A & P, Kroger and Safeway and institutional food outlets such as Kentucky Fried Chicken." [8] A recurrent pattern of prices below actual cost to the producer has been observed since the start of the current decade.[9]

All of this makes the present case a very poor one in which to depart from the wording of the antitrust exemption for farmers. Broiler chickens are agricultural products.[10] Integrators produce them. Hence, integrators are "persons engaged in the production of agricultural products." They own the "crop" from chicks to dressed broilers.[11] They are engaged in the production of agricultural products as farmers, within the meaning of 7 U. S. C. § 291 (1976 ed.).

The majority's insistence that Capper-Volstead protection not be extended unless the broiler producers own a breeder flock, hatchery, or grow-out facility is sought to be explained by the rationale that "[t]he economic role" of a producer who does not own one of these facilities "is indistinguishable from that of [a] processor that enters into a preplanting contract with its supplier . . . ." *Ante,* at 827–828. Such processors were sought to be included within the Act by Senator Phipps' amendment, which was rejected.

It is inaccurate to equate broiler producers with processors of agricultural commodities, even those with preplanting contracts. Such an equation ignores the important distinction that members of the NBMA are all *producers* of broilers, whereas a mere processor of an agricultural commodity is *not* a producer. The Act extends protection to "[p]ersons engaged in the *production* of agricultural products as farmers."

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[8] *Ibid.*

[9] *Ibid.*

[10] See *ante,* at 820 n. 8.

[11] For most of the NBMA members, of course, ownership starts even earlier with the eggs produced by their own breeder flock.

(Emphasis added.) Opposition to the Phipps amendment was centered on precisely the fact that it would extend protection to those who did not produce agricultural commodities.

A leading critic explained his opposition: "The amendment . . . is simply offered for the purpose of giving to a certain class of manufacturers the right to be immune from any prosecution under the Sherman Antitrust Act . . . . They are not cooperators; they are not producers; it is not an organization composed of producers who incorporate together to handle their own products; that is not it." 62 Cong. Rec. 2275 (1922) (Sen. Norris). The problem with the proposal, therefore, was not that processing was involved. The statute's own words are conclusive that the activity of processing by producers was to be exempted from antitrust scrutiny.[12] The objection to Senator Phipps' proposal was that processors *who were not also producers* were protected.

This hostility to Senator Phipps' amendment was understandable, given the frequent legislative references to the pernicious effect of middlemen. But NBMA members are not middlemen. Whether or not they own hatcheries or grow-out facilities, they are producers of agricultural commodities.[13]

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[12] The Act explicitly protects farmers who associate for the purpose of "collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." And the produce of a cooperative's own members need comprise no more than 50% of the total handled by the cooperative; so it was clear that some members could be doing more processing than producing of agricultural commodities. They would still be entitled to protection because what produce they did raise was contributed to the cooperative.

[13] This fact distinguishes *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384 (1967). Capper-Volstead Act protection was denied to orange growers cooperatives in that case because they included several "nonproducer interests" in the form of orange processors who did not themselves grow any citrus at all. All of the members of NBMA, by contrast, produce broiler chickens. Some contract out various stages of the growing process, but all members own the agricultural product throughout its production, from chick to broiler.

They enter the production system before the chickens are hatched, and withdraw only at the time the dressed broilers are sold. They own the chickens throughout the raising process. They should be allowed to "follo[w their] product from the farm as near to the consumer as [they] can."

There is a functional dimension to this dichotomization of producers and processors. It involves the realities of risk-bearing. The Phipps amendment extended protection to manufacturers who paid a price for raw agricultural products that was "controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products." *Id.*, at 2273. Hence, the risk held in common by the Phipps-type processors and actual producers is only the fluctuation of final market price. All other risks are borne exclusively by the producer, including fluctuating prices for feed and medicine (all of which the producers supply to the grow-out facilities), damage in transit, and risk of death at any point in the growing process. All of these risks are identically suffered by NBMA members, whether or not they own their own breeder flocks, hatcheries, or grow-out facilities, because of the cost-plus nature of the grow-out contracts. The majority unwarrantedly relies upon the fact that the Senate rejected antitrust immunity for Phipps-type processors, who shared only *one* of these risks, to conclude that parties sharing *all* these elements of risk should also be denied protection.

There is cause to applaud the majority opinion in some respects: most importantly in its studious avoidance of any embracing of the United States' point of view. The United States urges that, in determining what subclass of agricultural producers should be considered farmers, attention must focus on ownership of land and husbanding of flocks.

> "The integrators are not 'actual farmers' and do not claim to be so. They do not till the land or husband the flocks. They do not own the land on which the flocks are raised." Brief for United States 14.

> "Petitioner therefore draws no sustenance from the fact that both sharecroppers and the owners of sharecropped land may be 'farmers': the sharecroppers work the farmland and the owners own it. Integrators do neither." *Id.*, at 14 n. 28.

Tying antitrust exemption to ownership of land has no legal or economic validity.

Under the United States' theory, an integrator of the type found unprotected in today's opinion could achieve antitrust exemption by purchasing the land on which the grow-out facility was maintained (perhaps leasing it back to the independent "grower"). Or he could achieve protection by hiring his grower as an employee, thereby achieving surrogate status for himself as a husbander of flocks. The anomalous aspect of either of these steps is that antitrust protection would thereby be attained by an expansion of the size of an operation—that is entirely the wrong direction, based on the majority's reading of congressional sentiment (with which I largely concur) that small, nonintegrated farmers were those most to be protected by the Act.[14]

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[14] The concurring opinion insists that the interpretation presented here "would permit the behemoths of agribusiness to form an exempt association . . . so long as these concerns are engaged in the production of agriculture." *Ante*, at 834–835. If this is a fatal flaw, it is shared equally by the majority opinion, which conditions exempt status on ownership of a breeder flock, hatchery, or grow-out facility. *Ante*, at 827. For all the majority opinion holds, antitrust exemption would apply to the NBMA if only it purged its membership of those integrators *too small* to own their own flock, hatchery, or grow-out facility.

In concluding that the possible extension of any antitrust exemption to large concerns was contrary to congressional intent, the concurring opinion has overlooked several explicit references in the legislative history. These passages demonstrate the point impliedly recognized by the majority opinion and this dissent: that one necessary evil of the bill, accepted by its sponsors, was that just as producers could combine and become processors as well as producers, and yet retain their exemption, large food processors

The United States cites 20 instances from the congressional debates assertedly supporting its view that the proper test involves ownership of land or tilling the soil. Brief for United States 13, and nn. 21–27. Without exception, however, those citations refer to landowning or tilling merely in a shorthand way. It was customary throughout this long debate to observe Representatives and Senators filling pages of the Congressional Record with observations on agriculture's focal role in the American Republic, but one will search in vain for any discussion of why ownership of land was a logical prerequisite to antitrust exemption for a farmer who, in re-

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could, by becoming producers, fall within the protection of the Act for whatever they produced (and up to 50% of the product of others not even eligible for exemption. 7 U. S. C. § 291 (third proviso) (1976 ed.)). In light of these explicit passages, the thrust of the concurring opinion's search of the legislative history is largely blunted.

"The Senator from Ohio [Mr. POMERENE] at the last session of the Senate inquired very pertinently whether that provision would not, for instance, permit Mr. Swift or Mr. Armour, or Mr. Wilson, each of whom, I undertake to say, owns a farm and raises hogs, for instance, to organize under this proposed act and deal in the products of their own farms, and also to buy extensively from other producers. I think that that could be accomplished under the House bill. Recognizing that there is an evil there, and that the act might easily be abused, the Senate bill provides that such organizations cannot deal in products other than those produced by their members to an amount greater than the amount of the products which they get from their members. So that if the three gentlemen to whom I refer should organize an association under this proposed law, they could throw the product of their own farms into the association and could put just so much more into the business, but no more." 62 Cong. Rec. 2157 (1922) (Sen. Walsh).

"[W]e have not given the farmers the power to organize a complete monopoly. This amendment applies to every association, whether it is a monopoly or an attempt to create a monopoly or not, for it provides that any association must admit anyone who is qualified. If Mr. Armour should be a farmer he would have to be admitted; if a sugar manufacturer should happen to raise a little sugar he would have to be admitted." *Id.*, at 2268 (Sen. Kellogg).

sponse to the strains of price taking, joined an agricultural marketing association.

The cumulative weight of the legislative history is that antitrust protection was needed for the cooperative efforts of those unable to combine in corporate form, whose product was thrown on the market in inelastic supply, where it faced an elastic demand. Perishability of agricultural product figured far more realistically than ownership of land as a reason for the inelastic supply of farmers' produce at market time. And it was that inelastic supply that made farmers so very vulnerable to oligopsonistic demand. Put plainly, farmers had to sell but middlemen did *not* have to buy.

Antitrust exemption should be extended to agricultural producers who partake in substantially all of the risks of bringing a crop from seed to market, or, in this case, from chick to broiler. This is what it means to be a farmer. This rule would not exempt mere processors of agricultural produce, as the Phipps amendment had sought to do. It does not tie antitrust exemption to the irrelevant criterion of ownership of land, or tilling of the soil. But it does prove faithful, in a way the majority formulation does not, to the economic realities underlying Congress' concern for agriculture: the perishability of product and organization of purchaser that make the individual farmer a price taker.

I respectfully dissent.

# TERK *v.* GORDON, DIRECTOR, NEW MEXICO DEPARTMENT OF FISH AND GAME, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 77–1042. Decided June 12, 1978

The District Court's judgment upholding, against constitutional challenge, a New Mexico statute imposing higher hunting license fees for nonresidents than for residents of the State is affirmed on authority of *Baldwin* v. *Montana Fish & Game Comm'n, ante,* p. 371.

Affirmed.

PER CURIAM.

This case originated as a challenge, under the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2, cl. 1, and under the Fourteenth Amendment, to New Mexico's statutes requiring licenses to hunt game in that State. A three-judge United States District Court upheld the State's statutory provisions insofar as they imposed higher license fees for nonresidents than for residents, but the court also ruled that the statutes governing the allocation of licenses to hunt certain rare species of game were unconstitutional. Plaintiff-appellant Terk, a Texas resident, appeals from that portion of the District Court's judgment that upheld the New Mexico fee discrimination. The defendant-appellees, who are the Director of the State's Department of Game and Fish and the members of the State Game Commission, did not seek review of that portion of the judgment that held the allocation of licenses to be unconstitutional.

The issue as to the fee discrimination between residents and nonresidents is controlled by this Court's recent decision in *Baldwin* v. *Montana Fish & Game Comm'n, ante,* p. 371. On appellant Terk's appeal, therefore, the judgment of the

United States District Court is affirmed. We express no view, however, on the allocation issue as to which no review was sought.

*Affirmed.*

## Reporter's Note

The next page is purposely numbered 901. The numbers between 851 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 MAY 12 THROUGH JUNE 12, 1978

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## MAY 12, 1978

*Dismissal Under Rule 60*

No. 76–1837. PUNTA GORDA ISLES, INC. *v.* LIVESAY ET AL. C. A. 8th Cir. [Certiorari granted, 434 U. S. 954.] Writ of certiorari dismissed under this Court's Rule 60.

## MAY 15, 1978

*Appeals Dismissed.* (See also No. 77–293, *ante,* p. 84.)

No. 77–950. COLLECTION CONSULTANTS, INC., ET AL. *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 556 S. W. 2d 787.

No. 77–6409. CONRAD *v.* COMMERCE BANK OF KANSAS CITY. Appeal from Ct. App. Mo., St. Louis Dist., dismissed for want of substantial federal question. Reported below: 560 S. W. 2d 388.

No. 77–6447. SMITH *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th 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: 49 Ill. App. 3d 1134, 368 N. E. 2d 233.

*Vacated and Remanded on Appeal*

No. 76–1616. COUNTY OF LOS ANGELES ET AL. *v.* CHAVEZ-SALIDO ET AL. Appeal from D. C. C. D. Cal. Judgment vacated and case remanded for further consideration in light of *Foley* v. *Connelie,* 435 U. S. 291 (1978). Reported below: 427 F. Supp. 158.

*Miscellaneous Orders*

No. A–726. KAPLAN *v.* NEW JERSEY. C. A. 3d Cir. Application for stay, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–866 (77–6639). CHAPMAN *v.* FEDERAL NATIONAL MORTGAGE ASSN. Ct. App. Mich. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–904 (77–1538). ABRAHAMS, AKA CARR *v.* UNITED STATES. C. A. 1st Cir. Application for bail, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–930. CITY OF MOBILE ET AL. *v.* BOLDEN ET AL. C. A. 5th Cir. Application for recall and stay of mandate, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST would grant the application.

No. 77–1373. MAINE CENTRAL RAILROAD CO. *v.* HALPERIN ET AL. Appeal from Sup. Jud. Ct. Me. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 77–1438. WALSH *v.* WANGELIN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied.

No. 77–6362. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE; and

No. 77–6379. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. Motions for leave to file petitions for writs of mandamus denied.

*Probable Jurisdiction Noted*

No. 76–808. NYQUIST, COMMISSIONER, NEW YORK STATE DEPARTMENT OF EDUCATION, ET AL. *v.* NORWICK ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 417 F. Supp. 913.

No. 77–1254. VANCE, SECRETARY OF STATE, ET AL. *v.* BRADLEY ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 436 F. Supp. 134.

No. 77–6431. CABAN *v.* MOHAMMED ET UX. Appeal from Ct. App. N. Y. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 43 N. Y. 2d 708, 372 N. E. 2d 42.

*Certiorari Granted.* (See also No. 77–293, *ante,* p. 84.)

No. 77–1172. NATIONAL MUFFLER DEALERS ASSN., INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 565 F. 2d 845.

No. 77–1359. UNITED STATES *v.* KIMBELL FOODS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 557 F. 2d 491.

*Certiorari Denied.* (See also No. 77–6447, *supra.*)

No. 76–1163. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* SURMELI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 556 F. 2d 560.

No. 77–1002. VIGORITO *v.* UNITED STATES;
No. 77–1004. DELUCA ET AL. *v.* UNITED STATES;
No. 77–6026. DIMATTEO *v.* UNITED STATES;
No. 77–6035. MASCITTI *v.* UNITED STATES; and
No. 77–6165. SCAFIDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 564 F. 2d 633.

No. 77–1074. AFFILIATED UTE CITIZENS OF UTAH *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 935, 566 F. 2d 1191.

No. 77–1086. KERR, POLICE DIRECTOR OF THE CITY OF NEWARK, ET AL. *v.* GASPARINETTI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 311.

No. 77–1144. DUNCAN ET AL. *v.* FURROW AUCTION CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 564 F. 2d 1107.

No. 77–1153. REESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–1161. DREBIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 557 F. 2d 1316 and 572 F. 2d 215.

No. 77–1213. LLORENTE *v.* NEW YORK; and DORONZORO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 57 App. Div. 2d 526, 393 N. Y. S. 2d 575.

No. 77–1227. MOITY *v.* SWIFT AGRICULTURAL CHEMICALS CORP. C. A. 5th Cir. Certiorari denied.

No. 77–1228. NICKELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 552 F. 2d 684.

No. 77–1236. GENERAL ATOMIC CO. *v.* FELTER, JUDGE, ET AL.; and

No. 77–1269. GENERAL ATOMIC CO. *v.* FELTER, JUDGE, ET AL. Sup. Ct. N. M. Certiorari denied.

No. 77–1240. MAHROOM *v.* HOOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1369.

No. 77–1263. ANTHONY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1168.

No. 77–1267. WIREMAN *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 367 N. E. 2d 1368.

No. 77–1272. VINER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–1276. OXBERGER *v.* WINEGARD. Sup. Ct. Iowa. Certiorari denied. Reported below: 258 N. W. 2d 847.

No. 77–1278. CLARK COUNTY, NEVADA *v.* ALPER ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 93 Nev. 569, 571 P. 2d 810.

No. 77–1299. FOUR WINDS, INC. *v.* INDIANA AERONAUTICS COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 137, 368 N. E. 2d 1340.

No. 77–1300. EISENBERG *v.* ED MARGIS PLUMBING & HEATING CO., INC. Sup. Ct. Wis. Certiorari denied. Reported below: 80 Wis. 2d 577, 258 N. W. 2d 720.

No. 77–1311. SHELL OIL CO. ET AL. *v.* FRED WEBER, INC. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 602.

No. 77–1313. BAILEY *v.* STREET. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 580.

No. 77–1314. HARRY GOODKIN & CO. *v.* ABRAHAMSON ET UX. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 862.

No. 77–1315. LAWRENCE ET AL. *v.* KLEIN ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 58 App. Div. 2d 751, 396 N. Y. S. 2d 223.

No. 77–1316. CADY *v.* GOULD ET AL. Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 558 S. W. 2d 755.

No. 77–1317. KENT *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 49 Ill. App. 3d 1030, 365 N. E. 2d 239.

No. 77–1319. SMITH ET AL. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 363 N. E. 2d 227.

No. 77–1320. WILLIAMS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 34 N. C. App. 408, 238 S. E. 2d 668.

No. 77–1323. HUBBARD BROADCASTING, INC., ET AL. *v.* AMMERMAN ET AL. Ct. App. N. M. Certiorari denied. Reported below: 91 N. M. 250, 572 P. 2d 1258.

No. 77–1333. THORSTAD *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 261 N. W. 2d 899.

No. 77–1335. INTERSTATE PROPERTIES ET AL. *v.* BECKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 569 F. 2d 1203.

No. 77–1348. CONNECTICUT *v.* PENLAND. Sup. Ct. Conn. Certiorari denied. Reported below: 174 Conn. 153, 384 A. 2d 356.

No. 77–1353. OWENDALE-GAGETOWN SCHOOL DISTRICT *v.* STATE BOARD OF EDUCATION ET AL. Ct. App. Mich. Certiorari denied.

No. 77–1361. CALVERT FIRE INSURANCE CO. *v.* AMERICAN MUTUAL REINSURANCE CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 52 Ill. App. 3d 922, 367 N. E. 2d 104.

No. 77–1362. VE-RI-TAS, INC., ET AL. *v.* ADVERTISING REVIEW COUNCIL OF METROPOLITAN DENVER, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 567 F. 2d 963.

No. 77–1365. DACEY *v.* HOUSE ET AL.; and DACEY *v.* DORSEY. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1289 (first case); 568 F. 2d 275 (second case).

No. 77–1368. DONDICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–1369. SANTO *v.* FEICK SECURITY SYSTEMS ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 354 So. 2d 985.

No. 77–1377. HULL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 349 So. 2d 237.

No. 77–1384. FLOTA MERCANTE GRANCOLOMBIANA, S. A. *v.* HUDSON WATERWAYS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1290.

No. 77–1412. BARBER ET AL. *v.* SKYLINE AVIATION, INC. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 1178.

No. 77–1414. BECKWITH *v.* BECKWITH. Ct. App. D. C. Certiorari denied. Reported below: 379 A. 2d 955.

No. 77–1416. TEMPORALE *v.* CONNECTICUT. App. Sess., Super. Ct. Conn. Certiorari denied. Reported below: See 174 Conn. 802, 382 A. 2d 1332.

No. 77–1433. CECIL *v.* UNITED STATES; and
No. 77–1441. MANZER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–1440. SUGAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 349.

No. 77–1471. EDWARDS ET AL., MEMBERS OF CONGRESS *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 1, 580 F. 2d 1055.

No. 77–1477. FINLEY ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 571 F. 2d 430.

No. 77–1480. IANNELLI ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 572.

No. 77–1487. WOODY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 1353.

No. 77–6147. WILLIAMS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 378 A. 2d 117.

No. 77–6156. FAISON *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 563 F. 2d 1135.

No. 77–6158. STEWART ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 77–6170. NAPOLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 348.

No. 77–6194. PIPES *v.* RONALD A. COCO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–6208. COZZA *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied.

No. 77–6235. BRETZ *v.* CRIST, WARDEN. Sup. Ct. Mont. Certiorari denied. Reported below: 575 P. 2d 44.

No. 77–6250. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 573 P. 2d 1215.

No. 77–6268. TEEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 349.

No. 77–6303. BANKS ET AL. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 565 F. 2d 528.

No. 77–6304. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 499.

No. 77–6308. NIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6318. WOLGEMUTH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 69 Ill. 2d 154, 370 N. E. 2d 1067.

No. 77–6356. CONANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–6363. LEWIS *v.* ROSE, WARDEN; and
No. 77–6404. HODGES *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 643.

No. 77–6368. JACKSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 583.

No. 77–6377. HOHMANN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6380. HETLAND *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 31 Ore. App. 529, 570 P. 2d 1201.

No. 77–6381. YOUNG *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77–6382. MULERO ET UX. *v.* AUTORIDAD DE LAS FUENTES FLUVIALES DE PUERTO RICO. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 77–6391. GIBSON *v.* ROSE, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 77–6392. PINEDA *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 1163.

No. 77–6399. BATTEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–6402. HARDIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 77–6408. CLAYTON *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6412. JUSTICE *v.* HESSELDEN PLUMBING CO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 77–6419. BOWERS *v.* BATTLES, CAMP SUPERVISOR, HARLAN COUNTY FORESTRY CAMP. C. A. 6th Cir. Certiorari denied. Reported below: 568 F. 2d 1.

No. 77–6420. WION *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6426. DOWNING *v.* FRAGGASSI ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 26 Pa. Commw. 517, 364 A. 2d 748.

No. 77–6427. GARCIA *v.* STONE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 77–6433. BRAHAM *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 571 P. 2d 631.

No. 77–6435. IN RE ESTATE OF BASALYGA. Sup. Ct. Pa. Certiorari denied. Reported below: 474 Pa. 606, 379 A. 2d 305.

No. 77–6440. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–6441. CLOUDY *v.* ALLISON. C. A. 7th Cir. Certiorari denied.

No. 77–6448. WINTERS *v.* WARDEN, TENNESSEE STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied.

No. 77–6455. DRUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 77–6457. BAMOND *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–6471. CASTILLO (LOPEZ) *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 405.

No. 77–6482. RICHARDSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 476 Pa. 571, 383 A. 2d 510.

No. 77–6503. DeSantis *v.* United States;
No. 77–6529. Boscia *v.* United States;
No. 77–6556. Scolieri *v.* United States; and
No. 77–6557. Plusquellec *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 827.

No. 77–6506. McDonald *v.* Thompson, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1311.

No. 77–6513. Pallan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 497.

No. 77–6518. Caruso *v.* United States Board of Parole. C. A. 3d Cir. Certiorari denied. Reported below: 570 F. 2d 1150.

No. 77–6525. Maguire *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 571 F. 2d 675.

No. 77–6527. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 159.

No. 77–6530. Cruz *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 77–6533. Heft *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 571 F. 2d 543.

No. 77–6535. Wakefield *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1312.

No. 77–6550. Spicer *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 105.

No. 77–6552. Arlt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 1295.

No. 77–6561. Cyphers *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 77–6568. STANCELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 77–6580. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 948.

No. 77–6590. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6597. WILCOX, AKA TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6608. WIMBLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 354.

No. 77–6609. SHANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 77–6613. BAER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6620. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 657.

No. 77–1003. NAPOLI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 564 F. 2d 633.

No. 77–1066. ENSLIN *v.* BEAN, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 565 F. 2d 156.

No. 77–1201. ZEIGLER COAL CO. *v.* LOCAL UNION NO. 1870, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 7th Cir. Motion of Bituminous Coal Operators' Assn., Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 566 F. 2d 582.

No. 77–1275. MARTIN B. GLAUSER DODGE CO. *v.* CHRYSLER CORP. ET AL. C. A. 3d Cir. Motion of Independent Dealers Committee Dedicated to Action for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 570 F. 2d 72.

No. 77–1279. FLESCHNER ET AL. *v.* ABRAHAMSON ET UX. C. A. 2d Cir. Motion of Investment Counsel Association of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL would grant certiorari. Reported below: 568 F. 2d 862.

No. 77–1284. GAUDET *v.* EXXON CORP.; and

No. 77–1328. ST. PIERRE *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 562 F. 2d 351.

No. 77–1345. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 77–1341. VINCENT, CORRECTIONAL SUPERINTENDENT *v.* SANTIAGO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 573 F. 2d 1295.

No. 77–1346. TAYLOR, DIRECTOR OF PERSONNEL OF PHILADELPHIA, ET AL. *v.* RODRIGUEZ. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 569 F. 2d 1231.

No. 77–1421. LAHMAN MANUFACTURING CO., INC., ET AL. *v.* FARMHAND, INC. C. A. 8th Cir. Motion to defer consideration of petition for writ of certiorari and certiorari denied. Reported below: 568 F. 2d 112.

No. 77–6095. SAWYER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 346 So. 2d 1071.

No. 77–6202. ST. JOHN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 563 F. 2d 168.

No. 77–6378. THOMAS *v.* GEORGIA; and

No. 77–6424. CORN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 77–6378, 240 Ga. 393, 242 S. E. 2d 1; No. 77–6424, 240 Ga. 130, 240 S. E. 2d 694.

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.

No. 77–6542. HOPSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 567 F. 2d 392.

*Rehearing Denied*

No. 77–1088. CHESTNUTT CORP. *v.* GALFAND ET AL., 435 U. S. 943;

No. 77–1142. ROBLES *v.* UNITED STATES, 435 U. S. 925;

No. 77–5644. JENKINS *v.* DISTRICT OF COLUMBIA, 434 U. S. 1018;

No. 77–6080. BILLINGSLEY ET AL. *v.* SEIBELS, MAYOR OF BIRMINGHAM, ET AL., 435 U. S. 929; and

No. 77–6107. MITCHELL *v.* HOPPER, WARDEN, 435 U. S. 937. Petitions for rehearing denied.

No. 77–6108. SAYLES *v.* HAYWOOD, JUDGE, 435 U. S. 929;

No. 77–6127. NOONE *v.* SZORADI ET AL., 435 U. S. 930;

No. 77–6163. FAHRIG ET AL. *v.* BERGER ET AL., 435 U. S. 945;

No. 77–6183. WILLIAMS ET AL. *v.* HOYT ET AL., 435 U. S. 946;

No. 77–6186. MCELROY *v.* WILSON ET AL., 435 U. S. 931; and

No. 77–6213. HERNANDEZ ET AL. *v.* COLORADO, 435 U. S. 954. Petitions for rehearing denied.

No. 76–1359. BANKERS TRUST CO. *v.* MALLIS ET AL., 435 U. S. 381. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

MAY 22, 1978

*Appeals Dismissed*

No. 77–1371. CONWAY *v.* WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 80 Wis. 2d 268, 258 N. W. 2d 717.

No. 77–1380. HEPPERLE *v.* RICKS 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: 566 F. 2d 104.

*Miscellaneous Orders*

No. A–954. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* MCI TELECOMMUNICATIONS CORP. ET AL.; and

No. A–966. UNITED STATES INDEPENDENT TELEPHONE ASSN. *v.* MCI TELECOMMUNICATIONS CORP. ET AL. Applications for stay of April 14, 1978, order of the United States Court of Appeals for the District of Columbia Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–891. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Application for an extension of time in which to file a petition for writ of certiorari, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted and time to file such petition extended to and including May 30, 1978.

No. 73, Orig. CALIFORNIA *v.* NEVADA. Motion of California State Assemblyman Mike Cullen for leave to file a brief as *amicus curiae;* motion of Nevada for leave to file amended answer setting forth counterclaim; and motion of California for leave to file amended complaint, referred to Special Master. [For earlier order herein, see 433 U. S. 918.]

No. 77–5992. ADDINGTON *v.* TEXAS. Sup. Ct. Tex. [Probable jurisdiction noted, 435 U. S. 967.] Motion of appellant for appointment of counsel granted, and it is ordered that Martha L. Boston, of Austin, Tex., be appointed to serve as counsel for appellant in this case.

No. 77–6657. CONRAD *v.* FIRST STATE BANK & TRUST CO. Motion for leave to file petition for writ of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 77–1134. MONTANA ET AL. *v.* UNITED STATES. Appeal from D. C. Mont. Probable jurisdiction noted. Reported below: 437 F. Supp. 354.

*Certiorari Granted*

No. 77–1258. MINNESOTA *v.* FIRST OF OMAHA SERVICE CORP. ET AL.; and

No. 77–1265. MARQUETTE NATIONAL BANK OF MINNEAPOLIS *v.* FIRST OF OMAHA SERVICE CORP. ET AL. Sup. Ct. Minn. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue jurisdictional issue as to whether the petitions were timely filed. Reported below: 262 N. W. 2d 358.

No. 77–1387. FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM *v.* MERRILL. C. A. D. C. Cir. Certiorari granted. Reported below: 184 U. S. App. D. C. 203, 565 F. 2d 778.

*Certiorari denied.* (See also No. 77–1380, *supra.*)

No. 77–1123. DUNNING ET AL. *v.* BOYES. Sup. Ct. Ala. Certiorari denied. Reported below: 351 So. 2d 883.

No. 77–1126. STANLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–1169. BAZZANO *v.* UNITED STATES;
No. 77–6097. GUFFEY *v.* UNITED STATES; and
No. 77–6236. MATZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 570 F. 2d 1120.

No. 77–1273. HAWN ET AL. *v.* COUNTY OF VENTURA, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 73 Cal. App. 3d 1009, 141 Cal. Rptr. 111.

No. 77–1282. SERVICE ARMAMENT CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 199, 567 F. 2d 377.

No. 77–1290. SHEPHERD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 74 Cal. App. 3d 334, 141 Cal. Rptr. 379.

No. 77–1297. LAX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–1307. MINNESOTA ET AL. *v.* ZAY ZAH ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 259 N. W. 2d 580.

No. 77–1379. GODIN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 371 N. E. 2d 438.

No. 77–1382. BALLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 2d 1313.

No. 77–1386. FRISCO LAND & MINING CO. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 74 Cal. App. 3d 736, 141 Cal. Rptr. 820.

No. 77–1391. DELESDERNIER *v.* ESTATE OF LOGA ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 354 So. 2d 576.

No. 77–1392. NEVADA EX REL. WESTERGARD, STATE ENGINEER, ET AL. *v.* SALMON RIVER CANAL CO., LTD. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 1244.

No. 77–1400. TANGORA ET AL. *v.* PETZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–1403. ROBINSON, DBA DO-RITE GROCERY & MARKET *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 553 S. W. 2d 196.

No. 77–1404. FOX ET AL. *v.* KNEIP ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: —— S. D. ——, 260 N. W. 2d 371.

No. 77–1449. OLMSTEAD *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 261 N. W. 2d 880.

No. 77–1474. HUNT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–1478. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* WIDENER. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 75 Cal. App. 3d 415, 142 Cal. Rptr. 304.

No. 77–1498. TAXE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 216.

No. 77–1541. GARRETT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 2d 778.

No. 77–6059. O'LEARY *v.* A. O. SMITH HARVESTORE PRODUCTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 561 F. 2d 631.

No. 77–6087. MOORER ET AL. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 561 F. 2d 175.

No. 77–6180. DANIELS *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 77–6247. WITHEROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6267. YODER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1300.

No. 77–6274. RODRIGUEZ-GASTELUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 482.

No. 77–6323. GILLINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 1307.

No. 77–6332. CASCIOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 778.

No. 77–6346. WOODSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1171.

No. 77–6353. WEDDELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 767.

No. 77–6357. HOHENSEE ET AL. *v.* CARTER. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 155.

No. 77–6371. BUNTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 351.

No. 77–6374. GOMEZ-SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6383. BASILE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 1053.

No. 77–6397. YOUNG, AKA CLOUDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 522.

No. 77–6411. SHRADER *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6421. SEK *v.* BETHLEHEM STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 153.

No. 77–6422. MUNCASTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied.

No. 77–6423. HINTZ *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied.

No. 77–6445. O'NEAL *v.* GRIFFIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 77–6467. GROOMES *v.* WHITNER ET AL. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 530, 241 S. E. 2d 604.

No. 77–6472. BRAKE *v.* ADAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 772.

No. 77–6474. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 353 So. 2d 818.

No. 77–6475. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 354 So. 2d 107.

No. 77–6478. HARDIN *v.* EVANS, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 77–6481. SATTERFIELD *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 572 F. 2d 443.

No. 77–6487. KING *v.* CHAVEZ, PRISON SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 350.

No. 77–6492. GARCIA *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–6498. MCBRIDE *v.* DELTA AIR LINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 581.

No. 77–6499. MENARD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 199 Neb. 456, 259 N. W. 2d 479.

No. 77–6500. CLEVELAND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–6504. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 584 P. 2d 1340.

No. 77–6505. WATSON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 75 N. J. 593, 384 A. 2d 823.

No. 77–6507. TODD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 143 Ga. App. 619, 239 S. E. 2d 188.

No. 77–6509. GOODE *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 581.

No. 77–6512. KICKASOLA *v.* JIM WALLACE OIL CO. ET AL. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 758, 242 S. E. 2d 483.

No. 77–6515. HILL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 748.

No. 77–6523. DUDAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6524. SNYDER *v.* SNYDER ET AL. C. A. 8th Cir. Certiorari denied.

No. 77–6534. LYON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 77–6565. DELAY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 560 S. W. 2d 823.

No. 77–6593. CARTER *v.* EXECUTIVE BRANCH OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–6606. WRIGHT *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 77–6633. PIERCE *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–6672. FRIST *v.* WALKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1172.

No. 77–689. INDIANA & MICHIGAN ELECTRIC CO. *v.* CITY OF MISHAWAKA, INDIANA, ET AL. C. A. 7th Cir. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 560 F. 2d 1314.

No. 77–1015. PRATE ET AL. *v.* FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 573 F. 2d 1294.

No. 77–1106. O'BRIEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 475 Pa. 123, 379 A. 2d 1313.

No. 77–1408. DANDO ENTERPRISES, LTD. *v.* PRITCHETT ET AL. C. A. 8th Cir. Motion of respondent for damages and certiorari denied. Reported below: 568 F. 2d 570.

No. 77–6325. WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE POWELL would grant certiorari. Reported below: 573 F. 2d 1300.

*Rehearing Denied*

No. 77–959. HULVER *v.* UNITED STATES, 435 U. S. 951;
No. 77–5874. LITTLE *v.* ARKANSAS, 435 U. S. 957;
No. 77–5995. REDA *v.* UNITED STATES, 435 U. S. 973;
No. 77–6079. SMITH *v.* UNITED STATES, 435 U. S. 953;
No. 77–6276. PHILLIPS *v.* OLIAN ET AL., 435 U. S. 975; and
No. 77–6462. BEGLEY *v.* CARTER ET AL., 435 U. S. 994.
Petitions for rehearing denied.

MAY 25, 1978

*Miscellaneous Order*

No. A–997. DOUTHIT *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of the death sentence in this case, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the stay.

MAY 30, 1978

*Affirmed on Appeal*

No. 77–1150. CONCERNED CITIZENS OF SOUTHERN OHIO, INC., ET AL. *v.* PINE CREEK CONSERVANCY DISTRICT ET AL. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

*Appeals Dismissed*

No. 77–6354. NORTHERN *v.* DEPARTMENT OF HUMAN RESOURCES OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed as moot. Reported below: See 563 S. W. 2d 197.

No. 77–5063. SCOTT ET UX. *v.* FEDERAL NATIONAL MORTGAGE ASSN. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 548 S. W. 2d 545.

No. 77–6217. STACY *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 355 So. 2d 517.

*Certiorari Granted—Vacated and Remanded*

No. 77–371. SHIRLEY ET AL. *v.* RETAIL STORE EMPLOYEES UNION ET AL. Sup. Ct. Kan. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters, ante,* p. 180. Reported below: 222 Kan. 373, 565 P. 2d 585.

*Miscellaneous Orders*

No. A–967. DER-RONG CHOUR *v.* FERRO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Application for stay of deportation, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would reject the application since it was not signed by counsel.

No. 77–6727. GREEN *v.* LEE, GOVERNOR OF MARYLAND, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 77–6555. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

*Probable Jurisdiction Noted*

No. 77–1119. ORR *v.* ORR. Appeal from Ct. Civ. App. Ala. Probable jurisdiction noted. Reported below: 351 So. 2d 904.

*Certiorari Granted*

No. 77–1177. SCOTT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari granted. Reported below: 68 Ill. 2d 269, 369 N. E. 2d 881.

No. 77–1337. NEVADA ET AL. *v.* HALL ET AL. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 74 Cal. App. 3d 280, 141 Cal. Rptr. 439.

No. 77–1388. MASSACHUSETTS *v.* WHITE. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: —— Mass. ——, 371 N. E. 2d 777.

*Certiorari Denied.* (See also No. 77–6217, *supra.*)

No. 77–123. LOCAL No. 757, ICE CREAM DRIVERS & EMPLOYEES UNION, ET AL. *v.* BARCLAY'S ICE CREAM CO., LTD. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 269, 360 N. E. 2d 956.

No. 77–1171. LATHROP ET UX. *v.* BELL FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Ill. Certiorari denied. Reported below: 68 Ill. 2d 375, 370 N. E. 2d 188.

No. 77–1193. STEARSMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 972, 566 F. 2d 1192.

No. 77–1197. PULAWA ET AL. *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 58 Haw. 377, 569 P. 2d 900.

No. 77–1217. SIMKOVICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–1239. FIRST NATIONAL BANK OF AKRON *v.* JUDICIAL PANEL ON MULTIDISTRICT LITIGATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–1247. GIBSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 567 F. 2d 1237.

No. 77–1293. PETERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 348.

No. 77–1310. RICCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 433.

No. 77–1321. PALUMBO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770 and 771.

No. 77–1331. NATIONAL CITIZENS COMMITTEE FOR BROADCASTING *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 186 U. S. App. D. C. 102, 567 F. 2d 1095.

No. 77–1338. MUMMERT *v.* UNITED STATES; and
No. 77–6384. REYNOSO-ULLOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 1329.

No. 77–1429. ANTILL *v.* SIGMAN. Sup. Ct. Ga. Certiorari denied. Reported below: 240 Ga. 511, 241 S. E. 2d 254.

No. 77–1431. FRINK *v.* FRINK. Super. Ct. N. J. Certiorari denied.

No. 77–1434. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* GRIFFITH. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 559 S. W. 2d 278.

No. 77–1436. SETCHELL *v.* ANOKA COUNTY, MINNESOTA, SHERIFF'S CIVIL SERVICE COMMISSION. Sup. Ct. Minn. Certiorari denied. Reported below: 261 N. W. 2d 354.

No. 77–1437. PELTZ *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 60 App. Div. 2d 587, 400 N. Y. S. 2d 511.

No. 77–1445. MELENDY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 348.

No. 77–1446. SOUTHERN CAPITAL CORP. *v.* SOUTHERN PACIFIC CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 590.

No. 77–1454. ABERNATHY, ADMINISTRATOR *v.* SCHENLEY INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 77–1456. PECK *v.* DUNN ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 574 P. 2d 367.

No. 77–1461. BERG *v.* GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 262 N. W. 2d 412.

No. 77–1516. PELTZMAN *v.* CENTRAL GULF LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1294.

No. 77–1555. BENSABAT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1226.

No. 77–1602. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–5737. MATTHEWS ET AL. *v.* LOCAL UNION No. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6216. FELLOWS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–6218. SMITH, AKA THOMAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 354 So. 2d 985.

No. 77–6233. WILMORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–6251. McAllister *v.* Garrison, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 813.

No. 77–6285. Allsup *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 77–6286. Levine *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 569 F. 2d 1175.

No. 77–6293. Harris *v.* United States District Court for the District of Kansas. C. A. 10th Cir. Certiorari denied.

No. 77–6388. Brown et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 572 and 573.

No. 77–6393. Tierney *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–6451. Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 77–6494. Gooden *v.* Harris County Commissioners Court et al. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1365.

No. 77–6497. Sellars *v.* Busch et al. C. A. 9th Cir. Certiorari denied.

No. 77–6514. Espinoza *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 77–6517. Wilson *v.* Armstrong et al. C. A. 6th Cir. Certiorari denied.

No. 77–6526. Jiranek *v.* Bank of America. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1182.

No. 77–6538. Brown *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Reported below: 91 N. M. 349, 573 P. 2d 1204.

No. 77–6545. WILSON *v.* CRISP, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–6546. NANCE *v.* UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION. C. A. 4th Cir. Certiorari denied.

No. 77–6554. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6560. SCOTT *v.* OVERBURG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–6562. TAYLOR ET AL. *v.* ALLEN SUPERIOR COURT, CRIMINAL-FELONY DIVISION. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 366 N. E. 2d 206.

No. 77–6564. SCHERER *v.* WOLFF, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 77–6584. MCNEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6587. ELDRIDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 319.

No. 77–6623. SCHMITZ *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6629. FRAZEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6634. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 320.

No. 77–6643. NUNEZ-CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6647. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1302.

No. 77–6653. GREATHOUSE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 571 F. 2d 586.

No. 77–6655. NUNEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 769.

No. 77–6659. SUPPLEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1303.

No. 77–6674. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–6681. BETTKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 388.

No. 77–6687. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 1177.

No. 77–6688. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–1523. SWOAP, DIRECTOR, DEPARTMENT OF BENEFIT PAYMENTS OF CALIFORNIA *v.* GARCIA ET AL. Ct. App. Cal., 2d App. Dist. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 63 Cal. App. 3d 903, 134 Cal. Rptr. 137.

No. 76–1799. TRANSCONTINENTAL GAS PIPE LINE CORP. *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 this petition. Reported below: 183 U. S. App. D. C. 146, 562 F. 2d 664.

No. 76–1826. LONDON ET AL. *v.* UNITED STATES;

No. 76–1852. GENCO *v.* UNITED STATES; and

No. 76–6978. SHADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 556 F. 2d 709.

No. 76–6637. DAVIAGE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 179 U. S. App. D. C. 281, 551 F. 2d 467.

No. 76–6828. FURY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 554 F. 2d 522.

No. 77–5291. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 183 U. S. App. D. C. 129, 561 F. 2d 1022.

No. 77–1077. GRAVES ET UX. *v.* WHITE MOUNTAIN APACHE TRIBE, DBA FORT APACHE TIMBER CO., ET AL. Ct. App. Ariz. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 117 Ariz. 32, 570 P. 2d 803.

No. 77–1226. LONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 562 F. 2d 185.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In September 1975, a friend of petitioner in West Germany mailed petitioner a magazine, entitled Stellungen. A customs officer, assigned to the Post Office opened the envelope containing the magazine and forwarded it to customs officials who determined that the magazine was obscene, seized it, and began forfeiture proceedings against it under 19 U. S. C. § 1305 [1] in the District Court for the Southern District of New York. Petitioner appeared in response to a notice of the impending forfeiture, see 19 CFR § 12.40 (1977), and argued that the magazine was not obscene under standards prevailing in Lancaster, Pa., petitioner's home and the address to which

[1] "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book [or] pamphlet . . . and all such articles . . . shall be subject to seizure and forfeiture . . . ."

the magazine was sent. The trial judge agreed with petitioner that the relevant inquiry related to community standards in Lancaster and dismissed the complaint since the United States had failed to produce evidence of the relevant community standard.[2] The Court of Appeals for the Second Circuit reversed, holding that the relevant community standards were those at the port of entry, the Southern District of New York.

I continue to adhere to the view expressed in my dissent in *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123, 138 (1973):

> "Whatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is . . . clearly overbroad and unconstitutional on its face."

Accordingly, I would reverse the judgment of the Court of Appeals.

No. 77–1253. NIMMO ET AL. *v.* GRAINGER ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 547 F. 2d 303.

No. 77–1330. ISAKSON ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 567 F. 2d 730.

No. 77–1339. ROBINSON *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. Reported below: 353 So. 2d 528 and 534.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted of two separate offenses of knowingly and unlawfully exhibiting an allegedly obscene motion

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[2] In addition, the trial court ruled that the procedures afforded under § 1305 were insufficient to satisfy the First Amendment. Cf. *Freedman* v. *Maryland,* 380 U. S. 51 (1965). The Court of Appeals disagreed.

picture film under Birmingham City Ordinance No. 67–2, § 3. He was sentenced to pay a fine of $300 and perform hard labor for the city of Birmingham for 180 days on the first conviction and to pay a fine of $150 and perform hard labor for 90 days on the second. Prior to each trial, petitioner moved to suppress the film involved on the ground that the warrant for the seizure of the film was improper in that the magistrate who issued the warrant had not first viewed the film to ensure that there was probable cause to believe the film was obscene. In each case the motion to suppress was denied and these rulings were affirmed on appeal.

Birmingham City Ordinance No. 67–2, § 3, under which petitioner was convicted, provides:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter." Brief in Opposition 3.

Birmingham City Ordinance No. 74–18, which authorizes the issuance of warrants to seize allegedly obscene material, provides:

> "Section 1. The following words and terms, shall when used in this ordinance, have the following respective meanings:
>
> "A. *'Obscene Motion Picture':* A motion picture which to the average person, applying contemporary community standards, the predominant appeal of which motion picture taken as a whole is to prurient interest, that is, a shameful or morbid interest in sexual conduct, nudity or excretion, and depicts or describes in a patently offensive manner sexual conduct, which motion picture taken as a whole lacks serious literary, artistic, political or scientific value.
>
> . . . . .

"Section 2. Search warrants for the seizure as evidence of motion picture films alleged to be obscene as defined herein and to have been exhibited publicly in the City . . . in violation of Ordinance Number 67–2 . . . may be issued by a Recorder or by a Magistrate as hereinafter provided in this ordinance.

"Section 3. Any police officer of the City or other individual who shall accuse any person of publicly exhibiting in the City . . . an obscene motion picture film in violation of said Ordinance Number 67–2 . . . may appear before a Recorder or Magistrate and testify under oath to the facts upon which he bases such accusation . . . .

"Section 4. If such Recorder or Magistrate determines from said affidavit or affidavits . . . that there is probable cause to believe such motion picture film is obscene, he shall proceed to issue a search warrant for the seizure of said motion picture film and a warrant for the arrest of the person or persons accused of publicly exhibiting the same in the City . . . in violation of said Ordinance Number 67–2 . . . ." App. to Pet. for Cert. A. 18–A. 20.

As the text of Birmingham's ordinances suggests, Birmingham has attempted to declare obscene all material that it could constitutionally declare obscene under this Court's guidelines in *Miller* v. *California,* 413 U. S. 15 (1973). See 353 So. 2d 528, 533 (Ala. Crim. App.), cert. denied, 353 So. 2d 534 (Ala. 1977). Birmingham has, moreover, allowed warrants to issue for the seizure of allegedly obscene motion pictures on a showing of probable cause to believe a film is obscene under the *Miller* standards.

In this Court and in the courts below, petitioner has contended that Ordinance No. 74–18 is unconstitutional because it allows a warrant to issue under the authority of a judicial officer who has not personally seen the allegedly obscene motion picture. This argument is not insubstantial, but I need not address it since I continue to adhere to my view 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 (1973) (dissenting opinion). Under this test, Birmingham Ordinance No. 67–2 is unconstitutionally overbroad and invalid on its face. See *Miller* v. *California, supra,* at 47 (BRENNAN, J., dissenting). Similarly, Birmingham Ordinance No. 74–18 is also invalid in that it allows the seizure of a film on a showing that cannot, under my view of the First and Fourteenth Amendments, constitute probable cause to believe a crime has been committed. For these reasons, I would grant certiorari and summarily reverse petitioner's convictions.

No. 77–1418. CONSOLIDATED MOTOR INNS *v.* ALIAS ENTERPRISES, LTD. C. A. 5th Cir. Motion of BVA Credit Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 77–1490. ALFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 355 So. 2d 108.

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

The issue presented is whether a sentence of death may constitutionally be imposed by a trial judge who has been made "aware" of, but states that he has not "considered," certain information in a presentence report not revealed to the defendant.

I

Petitioner was convicted by a jury of first-degree murder and rape in 1973. The trial judge, following the jury's recommendation, sentenced petitioner to death. The Florida Supreme Court affirmed the judgment, 307 So. 2d 433 (1975),

and this Court denied certiorari. 428 U. S. 912 (1976).[1] After our decision in *Gardner* v. *Florida,* 430 U. S. 349 (1977), the Florida Supreme Court directed the trial judge to file a response "stating whether he imposed the death sentence . . . on the basis of consideration of any information not known to appellant," and provided that petitioner would have an opportunity to move to vacate the sentence thereafter. The trial judge filed a response, stating that he had not considered any information not known to petitioner in imposing the death penalty.[2]

Petitioner then filed a motion to vacate the death sentence. He alleged that the "confidential evaluation" portion of the presentence report (which defense counsel had obtained after sentencing through clemency proceedings) affirmatively contradicted the trial judge's response, indicating that prior to sentencing the probation officer had given the judge certain information about petitioner which had not been disclosed to

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[1] At that time, MR. JUSTICE BRENNAN and I dissented from the denial of certiorari. We noted there:

"Petitioner contends that his right of confrontation, guaranteed by the Sixth and Fourteenth Amendments, was violated because the transcript of the preliminary hearing testimony of a material prosecution witness was read at his trial and the prosecution, although it was aware that the witness would leave Florida prior to the trial, failed to use available procedures to assure the witness' presence at trial or to depose the witness before the trial began. See *Barber* v. *Page,* 390 U. S. 719 (1968). On the record in this case, we would grant certiorari and set the case for oral argument.

"In any event, the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia,* [428 U. S. 153,] 227 (BRENNAN, J., dissenting); *id.,* p. 231 (MARSHALL, J., dissenting). We would therefore grant certiorari and vacate the judgment in this case insofar as it leaves undisturbed the death sentence imposed."

[2] The judge's "response" stated that he "did not consider information unknown to the Appellant in conjunction with any matter in this case." App. to Pet. for Cert. A12. Attached to this response was a letter written by the judge prior to sentencing, to the probation officer who prepared the

him. In a 4–3 decision, the Florida Supreme Court denied petitioner's motion and upheld the death sentence. 355 So. 2d 108 (1978).

The majority agreed with the State that there is a difference between a trial judge's being "aware" of and "considering" facts. It purported to find support in MR. JUSTICE STEVENS' statement in *Gardner, supra,* at 359–360, written on behalf of himself and two other Members of the Court,[3]

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presentence report. The letter, which appears in App. II to Response to Pet. for Cert., is reproduced in its entirety below:

September 12, 1973

Joel Padgett, Probation Supervisor
Probation and Parole Department
County Courthouse
West Palm Beach, Florida

Re: Learie Leo Alford

Dear Joel:

I know you have expended a great deal of time, effort and conscientious evaluation in the preparation of the pre-sentence report concerning Learie Leo Alford. I recall that you indicated to me that the revelation of the confidential section of this report to the defense would be damaging and compromising to sources who had confided in you. I respect your judgment in this.

I feel, however, in a case in which the jury has recommended the supreme penalty known to our law, that there well may be a constitutional right to disclosure of this confidential section to the defendant. As far as I know, there is not yet a judicial decision on what the meaning of 'factual material' in Rule 3.713 (b) may be. I feel that if I cannot release the confidential section to the defendant, I should not review it myself in this particular case. I know that this means that I shall not have the benefit of a major portion of your work in this report because of this view and I regret that this is so.

Accordingly, do not deliver that section of your report to me.

Thank you.

Very truly yours,
MARVIN MOUNTS, JR.,
Circuit Judge.

[3] The Florida Supreme Court apparently mistakenly believed that MR. JUSTICE STEVENS was speaking for the Court. See 355 So. 2d, at 109.

that "[i]n those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material." Without further analysis,[4] the majority concluded that "the trial judge complied with the requirements of *Gardner* and the motion to vacate is denied."

Justice Boyd, dissenting, argued that any facts of which the trial judge was privately made aware should have been disclosed to defense counsel with an opportunity to refute them. In his view, it was "unconstitutional for courts to impose sentences upon persons convicted of crime without affording the accused persons an opportunity to refute any information known to the sentencing judge." 355 So. 2d, at 110. Noting that absent such procedures, "incorrect representations, perhaps made in good faith," could be used by the court in setting punishment, the justice stated: "Such protection is more important in capital cases, where the defendant's life is at stake, than in any other kind of case." *Ibid.* Justice Hatchett also dissented, joined by Justices Boyd and Sundberg, arguing that the majority's distinction between "consideration" and "awareness" was not supported by our decision in *Gardner* and was inconsistent with the thrust of that opinion. He argued that a trial judge may constitutionally "disregard" material of which he is aware only after presenting it to the defendant for an opportunity to contest facts. 355 So. 2d, at 110.

II

I continue to adhere to my view that the death penalty is unconstitutional under all circumstances. *Furman* v. *Georgia,* 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia,* 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I would therefore grant certiorari and vacate the death sentence on this basis alone. However, as I wrote in *Gardner* v. *Florida, supra,* at 365, if the State is to be permitted to impose such an irreversible penalty it ought at the least to do

[4] The majority noted that a judge may be aware of proffered inadmissible evidence without considering it. *Ibid.*

so only through procedures that provide the maximum assurance of accuracy and fairness in the sentencing determination. In *Gardner,* we vacated a Florida death sentence imposed by a judge, in part on the basis of the confidential portion of a presentence report not disclosed to defense counsel. In the instant case, three of the seven justices on the Florida State Supreme Court believed that the procedures followed herein were unfair, unconstitutional, and not in conformity with this Court's opinion in *Gardner.* In so important an area as life and death, I should think this factor alone would have persuaded my Brethren to give plenary consideration to the issue.

The due process question raised by the dissents below is a substantial one. As noted below, "[t]he first paragraph of the confidential evaluation indicates that the sentencing judge 'was made aware of some of [the report's] facts' by the [probation] supervisor." 355 So. 2d, at 109. The trial judge anticipated our decision in *Gardner* to some extent and attempted to avoid reliance on facts not disclosed to petitioner.[5] But it is not disputed that the judge and the probation supervisor had *ex parte* communications in this case in which some adverse information about petitioner was imparted to the judge and not revealed to the petitioner.[6]

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[5] See n. 2, *supra,* and n. 6, *infra.*

[6] The papers before us do not clearly reflect what particular facts the trial judge was made aware of. Petitioner has annexed to his petition an extract from a "Deposition of Joel Padgett," the probation supervisor who wrote the confidential evaluation. App. to Pet. for Cert. A15. Respondent states that the deposition was apparently taken after the motion to vacate the death sentence was filed, and has not been made part of the record or served upon counsel for respondent, Response to Pet. for Cert. 7; respondent does not, however, dispute the accuracy of its contents. In this deposition, Padgett stated that he told the judge over the telephone that a confidential informant who had been in the county jail with petitioner advised him that petitioner was involved with prostitutes. Padgett also stated that he might have told the judge on the phone that the informant stated that petitioner had admitted to him his guilt. At some point in their telephone conversation, Padgett testified, the judge had cut him off, saying he did not want to hear any more.

In this context, the distinction between "awareness" of adverse facts and "consideration" of them is one too tenuous on which to make a life turn. Persons acting in complete good faith may attempt to put out of their minds information received; with respect to many kinds of decisionmaking, we act on the assumption that they are successful in doing so. Yet we should not be blind to the fact that this "assumption" is often a mere fiction: surely we have all experienced the difficulty in actually excising from our consciousness apparently salient factors that have been brought to our attention. See *Lakeside* v. *Oregon*, 435 U. S. 333, 345 (1978) (STEVENS, J., dissenting). This is particularly true where, as is alleged to have occurred in the instant case, see n. 6, *supra*, a sentencing judge is advised *ex parte* that a defendant who went to trial had admitted to another inmate in the jail that he had committed the crime.[7]

Where imposition of so "unique" a penalty is concerned, a punctilious attempt to achieve complete, factual accuracy in decisionmaking should be insisted upon. This can be achieved only by requiring complete disclosure of every fact relating to the defendant that has come to the sentencing judge's attention, and by affording the defendant a complete opportunity to contest and rebut those facts. The spirit of our holding in *Gardner* requires no less. I agree with the three dissenting justices below that this standard has not been met here.[8]

For these reasons, I dissent from the denial of certiorari.

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[7] Since petitioner's defense at trial was that of alibi, receipt of such information might have influenced the judge to enhance the sentence on the ground that the defendant deliberately permitted false testimony to be presented on his behalf. Cf. *United States* v. *Hendrix*, 505 F. 2d 1233 (CA2 1974), cert. denied, 423 U. S. 897 (1975).

[8] Sadly, this case once again illustrates the fallacy of the premise upon which some of my Brethren sustained the Florida death penalty statute in *Proffitt* v. *Florida*, 428 U. S. 242 (1976)—that the statute's procedures would eliminate inaccuracy, unfairness, and arbitrariness in the imposition of the death sentence.

No. 77–1510. SURETY TITLE INSURANCE AGENCY, INC. *v.* VIRGINIA STATE BAR. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 571 F. 2d 205.

*Rehearing Denied*

No. 77–1050. DEKAM ET AL. *v.* CITY OF SOUTHFIELD ET AL., 435 U. S. 919;

No. 77–1140. DOYLE *v.* BOARD OF FIRE & POLICE COMMISSIONERS OF THE VILLAGE OF SCHAUMBERG, 435 U. S. 970;

No. 77–1188. BREZA *v.* CITY OF TRIMONT, 435 U. S. 963;

No. 77–1358. GAETANO ET AL. *v.* OBERDORFER, U. S. DISTRICT JUDGE, 435 U. S. 967;

No. 77–6149. HARPER *v.* DUFFY, 435 U. S. 963;

No. 77–6244. MARSCHALL ET UX. *v.* KRISTENSEN ET AL., 435 U. S. 963; and

No. 77–6299. PLEMONS *v.* ESTELLE, CORRECTIONS DIRECTOR, 435 U. S. 998. Petitions for rehearing denied.

JUNE 5, 1978

*Affirmed on Appeal*

No. 77–1376. UNITED STATES *v.* GEORGIA ET AL. Affirmed on appeal from D. C. N. D. Ga. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would vacate the judgment and remand the case for further consideration in light of *United States* v. *Board of Commissioners of Sheffield, Alabama,* 435 U. S. 110 (1978).

No. 77–1450. BANG ET AL. *v.* NOREEN ET AL. Affirmed on appeal from D. C. Minn. Reported below: 442 F. Supp. 758.

*Appeals Dismissed*

No. 77–1472. PENA *v.* SOUTHERN PACIFIC TRANSPORTATION CO. Appeal from Ct. Civ. App. Tex., 8th Sup. Jud. 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: 555 S. W. 2d 184.

No. 77–1606. RUSSELL ET AL. *v.* PARKER ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–1485. HILLIGOSS ET AL. *v.* LADOW, MAYOR OF KOKOMO, ET AL. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. App. ——, 368 N. E. 2d 1365.

*Certiorari Granted—Vacated and Remanded*

No. 77–497. NEW ORLEANS PUBLIC SERVICE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marshall* v. *Barlow's, Inc., ante,* p. 307. Reported below: 553 F. 2d 459.

No. 77–605. MISSISSIPPI POWER & LIGHT CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marshall* v. *Barlow's, Inc., ante,* p. 307. Reported below: 553 F. 2d 480.

No. 77–557. CONSOLIDATION COAL CO. *v.* UNITED STATES;
No. 77–606. MARKS *v.* UNITED STATES; and
No. 77–622. ZITKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Marshall* v. *Barlow's, Inc., ante,* p. 307; and *Michigan* v. *Tyler, ante,* p. 499. Reported below: 560 F. 2d 214.

No. 77–1270. UNITED STATES *v.* LABRIOLA ET AL. C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Mauro, ante,* p. 340. Reported below: 573 F. 2d 1298.

*Miscellaneous Orders*

No. A–1005. LITTLE *v.* CIUROS, CORRECTION COMMISSIONER. C. A. 2d Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–135. IN RE DISBARMENT OF KUTZA. It is ordered that William Henry Kutza, of Fort Myers, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 77–747. ALLIED STRUCTURAL STEEL CO. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. D. C. Minn. [Probable jurisdiction noted, 434 U. S. 1045.] Motion of Allied Structural Steel Co. for leave to file supplemental brief after argument granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

*Certiorari Granted*

No. 76–1309. UNITED STATES *v.* CACERES. C. A. 9th Cir. Certiorari granted. Reported below: 545 F. 2d 1182.

No. 77–1327. LAKE COUNTRY ESTATES, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 566 F. 2d 1353.

No. 77–1413. ARONSON *v.* QUICK POINT PENCIL CO. C. A. 8th Cir. Certiorari granted. Reported below: 567 F. 2d 757.

*Certiorari Denied.* (See also Nos. 77–1472 and 77–1606, *supra.*)

No. 76–6559. SCALLION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 1168.

No. 77–206. KENAAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 557 F. 2d 912.

No. 77–1162. JONES TRANSFER CO. ET AL. *v.* UNITED STATES ET AL.;

No. 77–1189. NATIONAL INDUSTRIAL TRAFFIC LEAGUE *v.* UNITED STATES ET AL.; and

No. 77–1370. FORD MOTOR CO. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 569 F. 2d 196.

No. 77–1184. PERLONGO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 982, 566 F. 2d 1192.

No. 77–1195. WOLAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 584.

No. 77–1260. ATKINSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 565 F. 2d 1283.

No. 77–1303. SUN OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 258.

No. 77–1318. WESTERN UNION INTERNATIONAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 1012.

No. 77–1324. ANDERSON, CLAYTON & CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 972.

No. 77–1336. HAMILTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 1302.

No. 77–1347. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 184 U. S. App. D. C. 213, 565 F. 2d 788.

No. 77–1352. LITTLETON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1154.

No. 77–1356. FLECHA ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 567 F. 2d 1154.

No. 77–1372. INTERSTATE MOTOR FREIGHT SYSTEM *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 186 U. S. App. D. C. 329, 569 F. 2d 160.

No. 77–1398. FINEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 572.

No. 77–1443. MELIA *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1213.

No. 77–1451. YOUNG *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF TOLEDO ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 77–1453. BIRGE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 240 Ga. 501, 241 S. E. 2d 213.

No. 77–1459. SUN PUBLISHING CO. *v.* STEVENS. Sup. Ct. S. C. Certiorari denied. Reported below: 270 S. C. 65, 240 S. E. 2d 812.

No. 77–1462. SUNSHINE REALTY, INC., ET AL. *v.* CUYAHOGA COUNTY BOARD OF REVISION ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–1475. ELECTRONICS CORPORATION OF AMERICA *v.* SCULLY SIGNAL CO.; and

No. 77–1484. SCULLY SIGNAL CO. *v.* ELECTRONICS CORPORATION OF AMERICA. C. A. 1st Cir. Certiorari denied. Reported below: 570 F. 2d 355.

No. 77–1479. PLUNKETT *v.* CITY OF LAKEWOOD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–1482. AUTOHAUS BRUGGER, INC. *v.* SAAB MOTORS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 2d 901.

No. 77–1494. HINCKLEY PLASTIC, INC. *v.* REED-PRENTICE DIVISION PACKAGE MACHINERY CO. ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 70 Ill. 2d 1, 374 N. E. 2d 437.

No. 77–1496. HOUSER, DBA HOUSER AUTOMOTIVE *v.* DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 349.

No. 77–1522. ALEXANDER ET AL. *v.* AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 565 F. 2d 1364.

No. 77–1564. SOUTHPARK SQUARE, LTD. *v.* CITY OF JACKSON, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 338.

No. 77–1596. GARMON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316 and 1317.

No. 77–1605. EISENBERG *v.* BOARD OF WISCONSIN STATE BAR COMMISSIONERS. Sup. Ct. Wis. Certiorari denied. Reported below: 81 Wis. 2d 175, 259 N. W. 2d 745.

No. 77–5252. RIDGEWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 558 F. 2d 357.

No. 77–5582. RANDALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 133, 566 F. 2d 798.

No. 77–5590. CUMBERBATCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 563 F. 2d 49.

No. 77–5706. CHICO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 558 F. 2d 1047.

No. 77–6215. GREEN ET AL. *v.* HESS, ACTING WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6221. SWINNEN *v.* DEES, WARDEN. Sup. Ct. La. Certiorari denied.

No. 77–6252. TYLER *v.* CALLAHAN, ASSISTANT CIRCUIT ATTORNEY, CITY OF ST. LOUIS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 2d 1313.

No. 77–6261. ANGUISH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1287.

No. 77–6307. MCCRAVY *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1310.

No. 77–6309. FAHRIG ET AL. *v.* CUMMING ET AL. C. A. 6th Cir. Certiorari denied.

No. 77–6366. ERICKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6387. JAFFESS *v.* SCHAFFNER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1291.

No. 77–6389. PARTAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–6410. SLUK *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1299.

No. 77–6416. JAMES *v.* HOGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 204.

No. 77–6425. OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 1155.

No. 77–6432. SLOCUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 589.

No. 77–6439. GUBELMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 571 F. 2d 1252.

No. 77–6444. CODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 563 F. 2d 244.

No. 77–6459. GUARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1298.

No. 77–6566. CARTER *v.* PROPERTY SERVICES OF AMERICA, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–6567. FINKELSTEIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 60 App. Div. 2d 796, 399 N. Y. S. 2d 959.

No. 77–6572. TOWNSEND ET AL. *v.* CLOVER BOTTOM HOSPITAL & SCHOOL ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 560 S. W. 2d 623.

No. 77–6582. CARTER *v.* ROMINES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 560 F. 2d 395.

No. 77–6585. CLOUDY *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 77–6588. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 256, 369 N. E. 2d 623.

No. 77–6592. MONTOYA *v.* KILLINGER ET AL. C. A. 5th Cir. Certiorari denied.

No. 77–6596. MASON *v.* GAGNON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 77–6601. LEHMAN *v.* GABOR. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–6611. DRAYER *v.* KRASNER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 348.

No. 77–6618. LEE *v.* EWING, COLE, ERDMAN & EUBANK ET AL. C. A. 3d Cir. Certiorari denied.

No. 77–6642. MCGUFF *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 939.

No. 77–6678. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1317.

No. 77–6697. HERNANDEZ ET AL. *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1291.

No. 77–6700. WILLIAMSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 320.

No. 77–6706. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 680.

No. 77–6707. RAMOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6708. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 77–6716. HAHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 1382.

No. 77–6719. WALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6720. BAILS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 351.

No. 77–6732. WRIGHT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 573 F. 2d 681.

No. 77–593. UNITED STATES *v.* SORRELL; and UNITED STATES *v.* THOMPSON. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 562 F. 2d 227 (first case); 562 F. 2d 232 (second case).

No. 77–326. UNITED STATES *v.* FERRO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 556 F. 2d 630.

No. 77–970. SONSTEGARD *v.* CITY OF KETTERING. Ct. App. Ohio, Montgomery County. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 53 Ohio App. 2d 334, 374 N. E. 2d 163.

No. 77–1058. HELGEMOE, WARDEN, ET AL. *v.* MELOON. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant the petition and reverse summarily notwithstanding the new statute, N. H. Rev. Stat. Ann., ch. 632–A (Supp. 1977). Reported below: 564 F. 2d 602.

No. 77–1407. KITSIS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 77 Cal. App. 3d Supp. 1, 143 Cal. Rptr. 537.

No. 77–6400. WIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 566 F. 2d 944.

No. 77–6470. SMITH *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 240 Ga. 93, 239 S. E. 2d 510.

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. 77–6466. CASSIDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would grant certiorari. Reported below: 571 F. 2d 534.

No. 77–6589. SMITH *v.* CONNECTICUT PAROLE BOARD ET AL. C. A. 2d Cir. Certiorari and other relief denied.

No. 77–6703. EMERSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied for failure to file petition within the time provided by 28 U. S. C. § 2101 (c). Reported below: 560 F. 2d 1021.

*Rehearing Denied*

No. 77–1013. PUGLISI ET AL. *v.* UNITED STATES, 435 U. S. 968;

No. 77–1063. EISENBERG *v.* UNITED STATES, 435 U. S. 995;

No. 77–1065. LAWRIW *v.* UNITED STATES, 435 U. S. 969;

No. 77–1241. WAGNER ET AL. *v.* BURLINGTON NORTHERN, INC., ET AL., 435 U. S. 996;

No. 77–5953. RILEY *v.* ILLINOIS, 435 U. S. 1000;

No. 77–6288. GIBSON *v.* FLORIDA, 435 U. S. 1004;

No. 77–6345. APEL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF REHABILITATION OF FLORIDA, 435 U. S. 1009;

No. 77–6352. TOWNSLEY *v.* LINDSAY, JUDGE, ET AL., 435 U. S. 1006;

No. 77–6417. WATKINS, DBA BELTONE HEARING AID CENTER *v.* LOU BACHRODT CHEVROLET, INC., 435 U. S. 999;

No. 77–6430. FERMIN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 435 U. S. 1010; and

No. 77–6479. RICKS *v.* COLLINS, WARDEN, 435 U. S. 994. Petitions for rehearing denied.

No. 76–1750. STUMP ET AL. *v.* SPARKMAN ET VIR, 435 U. S. 349. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

JUNE 6, 1978

*Dismissal Under Rule 60*

No. 77–1395. VETTERLI ET AL., MEMBERS OF PASADENA CITY BOARD OF EDUCATION *v.* REAL, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus dismissed under this Court's Rule 60.

JUNE 12, 1978

*Appeals Dismissed*

No. 77–1185. MEMORIAL CONSULTANTS, INC. *v.* ILLINOIS EX REL. LINDBERG, COMPTROLLER OF ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 50 Ill. App. 3d 1005, 366 N. E. 2d 127.

No. 77–1535. HEILMAN *v.* A & M RECORDS, INC. Appeal from Ct. App. Cal., 2d App. 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: 75 Cal. App. 3d 554, 142 Cal. Rptr. 390.

*Vacated and Remanded on Appeal*

No. 77–1306. JAQUES *v.* STATE BAR GRIEVANCE ADMINISTRATOR. Appeal from Sup. Ct. Mich. Judgment vacated and case remanded for further consideration in light of *Ohralik* v. *Ohio State Bar Assn., ante,* p. 447. Reported below: 401 Mich. 516, 258 N. W. 2d 443.

*Miscellaneous Orders*

No. A–980 (77–6683). CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–990 (77–1161). DREBIN ET AL. *v.* UNITED STATES, *ante,* p. 904. Application for extension of time in which to file petition for rehearing, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–992. HUGHES *v.* TEXAS. Ct. Crim. App. Tex. Application for appointment of counsel to prepare and file petition for writ of certiorari, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–1037 (77–1736). SMITH, PRESIDENT, VILLAGE OF SKOKIE, ILLINOIS, ET AL. *v.* COLLIN ET AL. C. A. 7th Cir. Application for stay of mandate or, in the alternative, for stay of enforcement of judgment pending action on petition for certiorari, presented to MR. JUSTICE STEVENS, and by him referred to the Court, denied.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I feel that the decision of the United States Court of Appeals for the Seventh Circuit is in some tension with this Court's decision, 26 years ago, in *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952). *Beauharnais* has never been overruled or formally limited in any way. I therefore would grant the stay pending consideration of the applicants' petition for certiorari, which has now been filed, and pending further order of the Court.

No. D–95. IN RE DISBARMENT OF OHRALIK. Disbarment entered. [For earlier order herein, see 429 U. S. 1035.]

No. 76–1694. MOBIL OIL CORP. *v.* LIGHTCAP ET AL., 434 U. S. 876. Respondents are requested to file a response to petition for rehearing within 30 days. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 77–803. BARRY, CHAIRMAN, RACING AND WAGERING BOARD OF NEW YORK, ET AL. *v.* BARCHI. D. C. S. D. N. Y. [Probable jurisdiction noted, 435 U. S. 921.] Motion of New York Racing Assn., Inc., for leave to file a brief as *amicus curiae* granted.

No. 77–753. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* DANIEL; and

No. 77–754. LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* DANIEL. C. A. 7th Cir. [Certiorari granted, 434 U. S. 1061.] Motions for leave to file briefs as *amici curiae* filed by American Academy of Actuaries, Chamber of Commerce of the United States of America, American Bankers Assn., National Coordinating Committee for Multiemployer Plans, and ERISA Industry Committee, granted.

No. 77–837. NEW MOTOR VEHICLE BOARD OF CALIFORNIA ET AL. *v.* ORRIN W. FOX CO. ET AL.; and

No. 77–849. NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSN. ET AL. *v.* ORRIN W. FOX CO. ET AL. D. C. C. D. Cal. [Probable jurisdiction noted, 434 U. S. 1060.] Motion of National Automobile Dealers Assn. for leave to file a brief out of time as *amicus curiae* denied. Motion of appellants in No. 77–849 for additional time for oral argument denied; alternative request for divided argument granted.

No. 77–1115. LALLI *v.* LALLI, ADMINISTRATRIX, ET AL. Ct. App. N. Y. [Probable jurisdiction noted, 435 U. S. 921.] Motion of Legal Aid Society of New York City et al. for leave to file a brief as *amicus curiae* granted.

No. 77–5781. RAKAS ET AL. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. [Certiorari granted, 435 U. S. 922.] Motion of Americans for Effective Law Enforcement, Inc., for leave to file a brief as *amicus curiae* granted.

No. 77–1254. VANCE, SECRETARY OF STATE, ET AL. *v.* BRADLEY ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 903.] Motion of appellees to dispense with printing appendix granted.

No. 77–1202. MICHIGAN *v.* DORAN. Sup. Ct. Mich. [Certiorari granted, 435 U. S. 967.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

*Probable Jurisdiction Postponed*

No. 77–1378. JAPAN LINE, LTD., ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Appeal from Sup. Ct. Cal. Motion of Sea Land Service, Inc., for leave to file a brief as *amicus curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 20 Cal. 3d 180, 571 P. 2d 254.

*Certiorari Granted*

No. 77–1410. BUTNER *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 566 F. 2d 1207.

No. 77–1489. NEW JERSEY *v.* PORTASH. Super. Ct. N. J. Certiorari granted. Reported below: 151 N. J. Super. 200, 376 A. 2d 950.

No. 77–648. FEDERAL ENERGY REGULATORY COMMISSION *v.* PENNZOIL PRODUCING CO. ET AL. C. A. 5th Cir. Certiorari granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 553 F. 2d 485.

No. 77–1465. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* RASMUSSEN ET AL.; and

No. 77–1491. GEO CONTROL, INC., ET AL. *v.* RASMUSSEN ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 567 F. 2d 1385.

No. 77–1493. GLADSTONE, REALTORS ET AL. *v.* VILLAGE OF BELLWOOD ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 569 F. 2d 1013.

*Certiorari Denied.* (See also No. 77–1535, *supra.*)

No. 77–1098. BELL, SECURITIES COMMISSIONER OF ARKANSAS *v.* INTERNATIONAL TRADING, LTD., ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 262 Ark. 244, 556 S. W. 2d 420.

No. 77–1268. PALM *v.* VETERANS' ADMINISTRATION OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1294.

No. 77–1283. KARCH *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 209, 568 F. 2d 722.

No. 77–1322. PRO-FOOTBALL, INC., ET AL. *v.* HECHT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 73, 570 F. 2d 982.

No. 77–1325. M & M LEASING CORP. ET AL. *v.* SEATTLE FIRST NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 563 F. 2d 1377.

No. 77–1326. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1265.

No. 77–1351. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO *v.* JOHNS-MANVILLE PRODUCTS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1126.

No. 77–1355. MCNIFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–1363. BRADSHAW *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 569 F. 2d 777.

No. 77–1364. CENTRAL ARKANSAS AUCTION SALE, INC., ET AL. *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 724.

No. 77–1366. GILES LOWERY STOCKYARDS, INC., DBA LUFKIN LIVESTOCK EXCHANGE *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 321.

No. 77–1374. C. K. SMITH & CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 569 F. 2d 162.

No. 77–1405. RAMOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 77–1411. CAULFIELD ET AL. *v.* HIRSCH, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 77–1424. JACOBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 2d 346.

No. 77–1442. AKERS MOTOR LINES, INC., OF DELAWARE ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1172.

No. 77–1469. CARTER *v.* HAWSEY, JUDGE. 14th Jud. Dist. Ct. La., Calcasieu Parish. Certiorari denied.

No. 77–1495. MILLER *v.* UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY, LOCAL UNION NO. 198. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–1509. RELIANCE INSURANCE CO. *v.* F & D ELECTRICAL CONTRACTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1159.

No. 77–1524. MILLER *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–1529. INGRAM ET AL. *v.* CHAMPLIN PETROLEUM CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 560 F. 2d 994.

No. 77–1558. CRAMER *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Mich. Certiorari denied. Reported below: 401 Mich. 252, 258 N. W. 2d 20.

No. 77–1591. MICHIGAN *v.* BORMAN, JUDGE (ALEXANDER, REAL PARTY IN INTEREST). Ct. App. Mich. Certiorari denied. Reported below: 79 Mich. App. 495, 261 N. W. 2d 63.

No. 77–1619. LAPUMA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–1626. HIGGINS ET AL. *v.* UNITED STATES; and
No. 77–6747. SWAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 365.

No. 77–1627. MCCOY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 14.

No. 77–6177. MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6204. PARTEE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 52 Ill. App. 3d 178, 367 N. E. 2d 188.

No. 77–6347. CEPHUS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–6372. VALENZUELA (DELGADO) *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–6348. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6386. DANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 840.

No. 77–6390. LE BRUN *v.* CUPP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ore. Certiorari denied.

No. 77–6406. DENOMIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6413. MCRAE ET AL. *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 185 U. S. App. D. C. 132, 566 F. 2d 797.

No. 77–6438. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 589.

No. 77–6465. FLYNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1297.

No. 77–6468. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 565 F. 2d 1273.

No. 77–6476. MISSOURI *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6477. ROBEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–6483. COTTON *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 567 F. 2d 958.

No. 77–6485. PITTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 343.

No. 77–6488. BURKHART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1184.

No. 77–6502. ANTONMARCHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 770.

No. 77–6516. LENTINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1291.

No. 77–6521. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 571 F. 2d 586.

No. 77–6549. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–6558. MAGDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–6569. GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 566 F. 2d 1166.

No. 77–6575. MORRIS *v.* MORTON-NORWICH PRODUCTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 389.

No. 77–6617. WAMPLER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 30 Ore. App. 931, 569 P. 2d 46.

No. 77–6619. ANDERSON *v.* WYNNE, CLERK OF SUPERIOR COURT, MARTIN COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 772.

No. 77–6622. MOORE *v.* WAGELEY, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 77–6626. DOCTOR *v.* RAY, GOVERNOR OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6628. TATUM *v.* GOLDEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 753.

No. 77–6630. SMITH *v.* COWAN, WARDEN; and
No. 77–6631. RANDOLPH *v.* COWAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 560 F. 2d 1298.

No. 77–6632. HENDRICKS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 496, 371 N. E. 2d 1312.

No. 77–6637. SMITH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 52 Ill. App. 3d 583, 367 N. E. 2d 756.

No. 77–6638. MOORE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 401 Mich. 844, —— N. W. 2d ——.

No. 77–6639. CHAPMAN *v.* FEDERAL NATIONAL MORTGAGE ASSN. Ct. App. Mich. Certiorari denied.

No. 77–6649. HARRIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 572, 372 N. E. 2d 174.

No. 77–6650. STANLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 350 So. 2d 475.

No. 77–6686. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 415.

No. 77–6705. ZUNIGA-LARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1286.

No. 77–6722. KENNEDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6737. BURNETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 578.

No. 77–6741. TANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1122.

No. 77–6752. ALLSUP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1141.

No. 77–1207. BLUM, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* TOOMEY ET UX. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 565 F. 2d 1259.

No. 77–1251. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. *v.* DEMAR. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 354 So. 2d 366.

No. 77–1390. ALTON BOX BOARD CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 570 F. 2d 347.

No. 77–1415. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* D. H. HOLMES CO., LTD. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 556 F. 2d 787.

No. 77–1419. BELL, ATTORNEY GENERAL, ET AL. *v.* SOCIALIST WORKERS PARTY ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL would grant certiorari. Reported below: 565 F. 2d 19.

No. 77–1425. BALLEW *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner, convicted of distributing obscene materials under Ga. Code § 26–2101 (1975), for a second time asks this Court to decide the question:

> "Whether . . . jury instructions on *scienter* allowing a finding of 'constructive knowledge' in an obscenity case are sufficient to meet . . . constitutional minimum standards. . . ?" Pet. for Cert. 2.

In *Ballew* v. *Georgia,* 435 U. S. 223 (1978) (*Ballew I*), which involved petitioner's earlier conviction under § 26–2101, we granted certiorari to consider, but did not reach, precisely this issue. See Pet. for Cert. in *Ballew* v. *Georgia,* O. T. 1977, No. 76–761, p. 2. I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew I.* For this reason, I would grant certiorari. See also *Sewell* v. *Georgia,* 435 U. S. 982 (1978) (BRENNAN, J., dissenting from dismissal of appeal); *Teal* v. *Georgia,* 435 U. S. 989 (1978) (same); *Robinson* v. *Georgia,* 435 U. S. 991 (1978) (dissenting from vacation of judgment and remand). Barring this, I would grant this petition and summarily reverse. See *Ballew I, supra,* at 246 (opinion of BRENNAN, J.); *Sanders* v. *Georgia,* 424 U. S. 931 (1976) (dissent from denial of certiorari).

No. 77–6486. BARELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would grant certiorari. Reported below: 571 F. 2d 1108.

No. 77–1521. MARKER ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., ET AL. C. A. D. C. Cir. Motion for leave to file petition for writ of certiorari and/or petition for writ of certiorari denied.

*Rehearing Denied*

No. 77–1029. CLAY *v.* BOMAR, 435 U. S. 943;

No. 77–1068. PFISTER *v.* WADDY, U. S. DISTRICT JUDGE, and PFISTER *v.* DELTA AIR LINES, INC., ET AL., 435 U. S. 995; and

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, 435 U. S. 993. Petitions for rehearing denied.

No. 77–6265. THOMPSON *v.* FLORIDA and SURACE *v.* FLORIDA, 435 U. S. 998;

No. 77–6278. KNIGHT *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 435 U. S. 1006;

No. 77–6358. SIDDLE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL., 435 U. S. 1006; and

No. 77–6359. ROSS *v.* HOPPER, WARDEN, 435 U. S. 1018. Petitions for rehearing denied.

## Reporter's Note

The next page is purposely numbered 1301. The numbers between 964 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

## OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS ON JUNE 7, 1978

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## LITTLE *v.* CIUROS, COMMISSIONER OF CORRECTION OF NEW YORK CITY, ET AL.

ON REAPPLICATION FOR STAY

No. A–1007. Decided June 7, 1978

Reapplication for stay denied. *United States* v. *Rauscher,* 119 U. S. 407, distinguished.

MR. JUSTICE MARSHALL, Circuit Justice.

The application for a stay in this case was denied by the Court on June 5, 1978. *Ante,* p. 943.

This new application is based on the following allegation:

> "Following this Court's denial on June 5, 1978, of Petitioner's original application for the aforesaid stay, counsel for Petitioner has been informed that the Office of the Attorney General of the State of North Carolina has stated publicly that it intends to prosecute Petitioner for the crime of escape upon her return to said jurisdiction."

In support of this new application it is stated:

> "Under the principle of specialty, a demanding country may not try an individual who has been extradicted [*sic*] for any offense other than that for which extradition was granted, unless the alleged offense was committed *after* extradition. *United States* v. *Rauscher,* 119 U. S. 407 (1886)."

It just so happens that *United States* v. *Rauscher* was controlled by a treaty between the United States and Great Britain. Needless to say, there is no treaty involved here.

The application is, therefore, without legal support and is

*Denied.*

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**NEWSPAPERS.** See **Constitutional Law, V; VII, 2; Federal Communications Commission.**

**NEW YORK.** See **Civil Rights Act of 1871**, 1.

**NONDOMICILIARIES AS SUBJECT TO STATE-COURT JURISDICTION.** See **Constitutional Law**, I, 1.

**NONRESIDENT HUNTING LICENSES.** See **Constitutional Law**, II; VI.

**NOTICE OF UTILITY SERVICE TERMINATION.** See **Constitutional Law**, I, 2.

**OBSCENITY.**

1. *Advertising brochures—Propriety of pandering instruction.*—In prosecution under 18 U. S. C. § 1461 for mailing obscene materials and advertising brochures therefor, pandering instruction, which permitted jury to consider touting descriptions in brochures, along with materials themselves, to determine whether materials were intended to appeal to prurient interest in sex, was proper. Pinkus v. United States, p. 293.

2. *Community by whose standards obscenity judged—Children and "sensitive persons" as within community.*—In prosecution under 18 U. S. C. § 1461 for mailing obscene materials, it was error to instruct jury that children are part of community by whose standards obscenity is judged, but inclusion of "sensitive persons" in charge was not error. Pinkus v. United States, p. 293.

3. *Prurient appeal—Deviant sexual groups as consideration.*—In prosecution under 18 U. S. C. § 1461 for mailing obscene materials, it was not improper to instruct jury that members of deviant sexual groups could be considered in determining whether materials appealed to prurient interest in sex. Pinkus v. United States, p. 293.

**OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970.** See **Constitutional Law**, VII, 1.

**OHIO.** See **Constitutional Law**, IV.

**OIL AND GAS LEASES.** See **Federal Power Commission.**

**OIL PIPELINES.** See **Interstate Commerce Act.**

**OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.**

*Wiretaps—Minimization requirement—Standard for compliance.*—Proper approach for evaluating compliance with Act's Title III requirement that wiretapping "be conducted in such a way as to minimize" interceptions of communications not otherwise subject to interception under Title III, is objectively to assess agent's actions in light of facts and circumstances confronting him at time without regard to his underlying intent or motive, and even if he makes no good-faith efforts at minimization, that is not itself a violation of statute requiring suppression; here Court of Appeals, in holding that suppression was not appropriate, prop-

**OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968**—Continued.

erly analyzed reasonableness of wiretap in question. Scott v. United States, p. 128.

**PANDERING AS CONSIDERATION IN DETERMINING OBSCENITY.** See **Obscenity**, 1.

**PECUNIARY LOSS.** See **Death on the High Seas Act.**

**PERSONAL JURISDICTION.** See **Constitutional Law**, I, 1.

**PERSONAL LIABILITY OF CORPORATE OFFICER FOR EMPLOYEES' WITHHOLDING TAXES.** See **Internal Revenue Code.**

**PICKETING.** See **Federal-State Relations**, 2.

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**PRE-EMPTION OF STATE JURISDICTION.** See **Federal-State Relations**, 2.

**PRESIDENTIAL PROCLAMATIONS.** See **Submerged Lands Act.**

**PRESUMPTION-OF-INNOCENCE INSTRUCTIONS TO JURY.** See **Constitutional Law**, I, 3.

**PRISONERS.** See **Interstate Agreement on Detainers; Mootness**, 3.

**PRIVILEGES AND IMMUNITIES CLAUSE.** See **Constitutional Law**, VI.

**PRODUCERS OF BROILER CHICKENS.** See **Antitrust Acts.**

**PROPERTY INTERESTS.** See **Constitutional Law**, I, 2.

**PROSPECTIVE BAR OF NEWSPAPER-BROADCAST COMBINATIONS.** See **Federal Communications Commission.**

**PRURIENT INTEREST IN SEX.** See **Obscenity**, 1, 3.

**PUBLIC ASSISTANCE.** See **Social Security Act.**

**RADIO STATIONS.** See **Federal Communications Commission.**

**RECREATIONAL BIG-GAME HUNTING.** See **Constitutional Law**, II; VI.

**REGULATION OF LEGAL PROFESSION.** See **Constitutional Law**, III; IV.

**REGULATORY AUTHORITY OF FEDERAL COMMUNICATIONS COMMISSION.** See **Federal Communications Commission.**

**RESPONDEAT SUPERIOR.** See **Civil Right Act of 1871**, 2.

**RIGHT TO FAIR TRIAL.** See **Constitutional Law**, I, 3.

**RIGHT TO PROPERTY.** See **Constitutional Law**, I, 2.

**RULEMAKING AUTHORITY OF FEDERAL COMMUNICATIONS COMMISSION.** See **Federal Communications Commission.**

**SALE OF STORED GOODS BY WAREHOUSEMAN.** See **Civil Rights Act of 1871**, 1.

**SEARCHES AND SEIZURES.** See **Constitutional Law**, V; VII.

**SEARCHES FOR EVIDENCE OF CRIME BY THIRD PARTIES.** See **Constitutional Law**, V; VII, 2.

**SEARCHES OF FIRE-DAMAGED PREMISES.** See **Constitutional Law**, VII, 3.

**SEARCH WARRANTS.** See **Constitutional Law**, V; VII, 2.

**SECURITIES AND EXCHANGE COMMISSION.** See **Mootness**, 1; **Securities Exchange Act of 1934.**

**SECURITIES EXCHANGE ACT OF 1934.**

*Summary orders suspending stock trading—Securities and Exchange Commission's authority.*—SEC does not have authority under § 12 (k) of Act, based upon a single set of circumstances, to issue a series of summary orders that would suspend trading in stock beyond initial 10-day period, even though SEC periodically determines that such action is required by "public interest" and for "protection of investors." SEC v. Sloan, p. 103.

**"SENSITIVE PERSONS" AS PART OF COMMUNITY FOR JUDGING OBSCENITY.** See **Obscenity**, 2.

**SHERMAN ACT.** See **Antitrust Acts.**

**SOCIAL SECURITY ACT.**

*Emergency assistance to needy families—State program—Eligibility for matching federal funds.*—Illinois is not precluded from receiving matching federal funds for either an Emergency Assistance to Needy Families with Children program under Title IV–A of Act or a "special needs" program simply because it limits eligibility for aid under that program more narrowly than § 406 (e) of Act. Quern v. Mandley, p. 725.

**SOLICITATION OF CLIENTS BY AN ATTORNEY.** See **Constitutional Law**, IV.

**SOUTH CAROLINA.** See **Constitutional Law**, III.

**SOVEREIGN IMMUNITY OF INDIAN TRIBES FROM SUIT.** See **Indian Civil Rights Act of 1968.**

**"SPECIAL NEEDS" PROGRAMS.** See **Social Security Act.**

**STATE ACTION.** See **Civil Rights Act of 1871, 1.**

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**STATE COURT'S NONCOMPLIANCE WITH SUPREME COURT'S MANDATE.** See **Mandamus.**

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**STATE PRISONERS.** See **Interstate Agreement on Detainers; Mootness, 3.**

**STORAGE COMPANIES' LIENS.** See **Civil Rights Act of 1871, 1.**

**SUABILITY OF LOCAL GOVERNMENTS AND OFFICIALS UNDER CIVIL RIGHTS ACT OF 1871.** See **Civil Rights Act of 1871, 2.**

**SUBMERGED LANDS ACT.**

*Channel Islands National Monument—Dominion in California.*—California, not United States, has dominion over submerged lands and waters within Channel Islands National Monument, which is situated within 3-mile marginal sea off southern California mainland. United States v. California, p. 32.

**SUMMARY SUSPENSION OF SECURITIES TRADING.** See **Mootness, 1; Securities Exchange Act of 1934.**

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**"THIRD-PARTY" SEARCHES.** See **Constitutional Law, V; VII, 2.**

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**TRANSFER OF NEWSPAPER-BROADCAST COMBINATIONS.** See **Federal Communications Commission.**

**TRANSFER OF PRISONERS TO MENTAL HOSPITALS.** See **Mootness**, 3.

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**WARRANTLESS SEARCHES AND SEIZURES.** See **Constitutional Law**, VII, 1, 3.

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**WELFARE ASSISTANCE.** See **Social Security Act.**

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**WITHHOLDING TAXES.** See **Internal Revenue Code.**

**WORDS AND PHRASES.**

1. *"Any person required to collect, truthfully account for, and pay over any tax imposed by this title."* § 6672, Internal Revenue Code of 1954, 26 U. S. C. § 6672. Slodov v. United States, p. 238.

2. *"Farmers."* § 1, Capper-Volstead Act, 7 U. S. C. § 291 (1976 ed.). National Broiler Marketing Assn. v. United States, p. 816.

3. *"New."* § 15 (7), Interstate Commerce Act, 49 U. S. C. § 15 (7). Trans Alaska Pipeline Rate Cases, p. 631.

4. *"Person."* Civil Rights Act of 1871, 42 U. S. C. § 1983. Monell v. New York City Dept. of Social Services, p. 658.

5. *"Valuable mineral."* 30 U. S. C. § 22. Andrus v. Charlestone Stone Products Co., p. 604.

6. *"Written request for temporary custody."* Interstate Agreement on Detainers, Art. IV (a), 18 U. S. C. App. § 2, p. 1396 (1976 ed.). United States v. Mauro, p. 340.

**WRIT OF HABEAS CORPUS AD PROSEQUENDUM.** See **Interstate Agreement on Detainers.**

**WRIT OF MANDAMUS.** See **Mandamus.**

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**WRONGFUL-DEATH ACTIONS.** See **Death on the High Seas Act.**

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 265-304