UNITED STATES REPORTS

VOLUME 439

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1978

(BEGINNING OF TERM)

OCTOBER 2, 1978, THROUGH FEBRUARY 1, 1979

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

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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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WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.*
ALFRED WONG, Marshal.
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*Mr. Putzel retired as Reporter of Decisions on February 24, 1979. Preliminary publication of material in this volume was supervised by Mr. Putzel through February 23, 1979, and after that date by Henry C. Lind, who was appointed to succeed Mr. Putzel as Reporter of Decisions effective February 25, 1979. Final publication was supervised by Mr. Lind.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

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

For the Second Circuit, Thurgood Marshall, Associate Justice.

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

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

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

For the Sixth Circuit, Potter Stewart, Associate Justice.

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

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

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

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

December 19, 1975.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

LONG ISLAND RAIL ROAD CO. *v.* ABERDEEN & ROCKFISH RAILROAD CO. ET AL.

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

No. 77-1515. Decided October 16, 1978

The Interstate Commerce Commission initially denied petitioner railroad's request for an interim terminal surcharge to offset the increased taxes imposed by the Railroad Retirement Amendments of 1973 to fund additional retirement benefits for railroad employees. But after a three-judge District Court set aside this denial and enjoined the ICC from refusing petitioner's terminal surcharge as an interim rate increase under § 15a (6)(b) of the Interstate Commerce Act, the ICC allowed an interim terminal surcharge. On respondent railroads' petition to set aside the ICC's order, the Court of Appeals directed that the interim surcharge be held in a separate trust fund pending the ICC's determination of final rates on remand. *Held:* The Court of Appeals' imposition of the trust fund requirement is contrary to § 15a (6)(b)'s purpose of providing an expeditious method of allowing higher rates in order to minimize the effect that the increased railroad retirement taxes would have on the railroads' financial condition. Under § 15a (6)(b), once the interim rates were filed, the ICC could not suspend them until it made final rate determinations. By impressing the trust on proceeds from these interim charges made by petitioner, the Court of Appeals exercised authority that Congress did not repose even in the ICC.

Certiorari granted; 565 F. 2d 327, reversed in part and remanded.

PER CURIAM.

Petitioner, the Long Island Rail Road Co., seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit setting aside an order of the Interstate Commerce Commission. That judgment directed that proceeds collected by petitioner pursuant to an interim terminal surcharge be held in a separate trust fund pending determination of final rates by the Commission on remand. We stayed the trust fund portion of the court's order on March 6, 1978, and we now grant the petition for certiorari, limited to Question 1 presented by petitioner,[1] and reverse the judgment of the Court of Appeals insofar as it impresses a trust on the proceeds from the interim terminal surcharge.

The Railroad Retirement Amendments of 1973 imposed increased taxes on railroads in order to fund additional retirement benefits for railroad employees. 87 Stat. 162. Coupled with that action, Congress amended § 15a of the Interstate Commerce Act to permit railroads to offset the increased tax liability imposed by the Amendments by means of increases in general rate levels. § 201 (4), 87 Stat. 166, 49 U. S. C. § 15a (6). Section 15a (6)(a) authorizes the Commission promptly to establish requirements for petitions for adjustment of interstate rates of common carriers based on increases in railroad retirement taxes. Such procedures are to be designed to "facilitate fair and expeditious action on any such petition." Section 15a (6)(b) directs the Commission to permit interim increases in the general level of interstate rates within 30 days of the filing of a proper petition, "[n]otwithstanding any other provision of law." The Commission can withhold its permission only if it finds that the requested increase is not "in an amount approximating that needed to offset

[1] "Did the Court of Appeals thwart the purpose of the Railroad Retirement Amendments and frustrate the final judgment of a three-judge court when it deprived the LIRR of the immediate use of its interim terminal surcharge?" Pet. for Cert. 2.

increases in expenses" resulting from the Amendments. Finally, § 15a (6)(c) requires the Commission to commence hearings for the purpose of making final rate determinations within 60 days of the establishment of the interim rates. Such final rates are to be determined in accordance with the "standards and limitations applicable to ratemaking generally." If the final increases in rates are less than the interim increases, refunds must be made by the carrier, subject to such tariff provisions as the Commission deems sufficient.

Since the issue on which we grant certiorari does not relate directly to the rate increase proceedings, the briefest description of them will suffice. All railroads other than petitioner sought permission from the Commission to increase their rates in order to offset the increased taxes imposed by the Amendments. Petitioner, because of its unique revenue structure, sought permission to impose a surcharge for the use of its terminal facilities for the same purpose. The Commission allowed the railroads other than petitioner to increase their interim rates, but denied petitioner's request for an interim terminal surcharge. *Increases in Freight Rates and Charges—1973,* 346 I. C. C. 305 (1973). Petitioner sought review of the denial of its request by the Commission in a three-judge District Court, and that court set aside the relevant portions of the Commission's order and enjoined the Commission from refusing petitioner's terminal surcharge as an interim rate increase under § 15a (6)(b). *Long Island R. Co.* v. *United States,* 388 F. Supp. 943 (EDNY 1974).

No appeal was taken from this judgment, and the Commission subsequently allowed petitioner to impose an interim terminal surcharge in the amount of 12.5%. Thereafter the Commission issued a report and order which approved petitioner's request for a permanent 12.5% terminal surcharge, and required all railroads to incorporate that surcharge into their tariffs to and from points on petitioner's lines. *Increases in Freight Rates and Charges—1973,* 350 I. C. C. 673 (1973).

Respondent railroads petitioned the Fifth Circuit to set aside the Commission's order. The Court of Appeals, for reasons which do not concern us here, set aside the order of the Commission allowing petitioner to impose the terminal surcharge and remanded for further proceedings to determine final rates. *Aberdeen & Rockfish R. Co.* v. *United States,* 565 F. 2d 327, 333–335 (1977). Then, stating that "[i]t seems to us equitable," the court *sua sponte* "restore[d]" the 12.5% interim terminal surcharge that petitioner had been collecting prior to the Commission's final order, but directed that the proceeds be kept "in a separate trust fund . . . subject to further just and equitable orders of the Interstate Commerce Commission." *Id.,* at 335.

We agree with petitioner and the United States that the Court of Appeals' direction to hold proceeds from the interim terminal surcharge in a separate trust fund pending determination of final rates by the Commission is contrary both to the earlier holding of the three-judge court and to Congress' intent in adopting the Amendments. The interim terminal surcharge approved by the three-judge court clearly was meant to remain in effect until a permanent rate was approved by the Commission. See *Long Island R. Co.* v. *United States, supra,* at 947. Because of the Court of Appeals' decision setting aside the Commission's order, there has as yet been no determination of final rates by the Commission. The Court of Appeals' order explicitly recognizes as much. *Aberdeen & Rockfish R. Co.* v. *United States, supra,* at 334. We also agree that petitioner could have continued to collect the interim terminal surcharge whether or not the Court of Appeals had explicitly authorized it to do so. Thus, far from maintaining the relative positions of the parties pending final order of the Commission, normally considered the "status quo," the Court of Appeals' imposition of the trust fund requirement significantly altered those positions.

Such an alteration is at odds with the purpose of § 15a (6)(b). The entire thrust of § 15a (6)(b) is to provide an expeditious method of allowing higher rates in order to minimize the effect that increased railroad retirement taxes would have on the railroads' financial condition. At the time of the adoption of the Amendments, Congress was acutely aware of the deteriorating financial condition of the Nation's railroads and the drain which the increased tax liabilities would have on their already dwindling resources. S. Rep. No. 93–221, pp. 2–4 (1973). Congress also recognized that the Commission's normal ratemaking processes would not be responsive to the railroads' needs to recover immediately their increased retirement benefit contributions.[2] The delays experienced in approving the final rates have shown the legitimacy of Congress' concerns.

Section 15a (6)(b) was enacted to ensure that the much-needed funds would get to the railroads as soon as possible: once the interim rates were filed, they could not be suspended until final rate determinations by the Commission. While the Commission normally has the power under § 15 (7) of the Interstate Commerce Act to suspend rates for a period not to exceed seven months, Congress deprived the Commission of even that limited authority in § 15a (6)(b), which begins with the words: "Notwithstanding any other provision of law." The Conference Report on the Amendments to the Interstate Commerce Act states:

> "The Commission could withhold permission to file tariffs if it found that the proposed increase clearly exceeded the amount needed to cover the increases in costs, but other-

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[2] S. Rep. No. 93–221, p. 3 (1973); H. R. Rep. No. 93–204, pp. 7–8 (1973). The agreement between representatives of railroad labor and management to support increases in railroad retirement taxes conditioned such support on the simultaneous passage of legislation to modify the Commission's existing ratemaking procedures to permit prompt rate increases. S. Rep. No. 93–221, pp. 2, 7 (App. A).

wise *once the tariffs were filed the Commission would have no authority to suspend them pending final determination.*" Joint Explanatory Statement of the Committee of the Conference, H. R. Rep. No. 93–319, p. 12 (1973) (emphasis added).

By impressing the trust on proceeds from these interim charges made by petitioner, the Court of Appeals has exercised authority which Congress clearly did not wish to repose even in the Commission. We have held that where Congress has vested the Commission with authority to suspend rates pending final determination of their lawfulness, that power may not be exercised by a court. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963); see *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800, 820 (1973) (plurality opinion); *id.*, at 828–829 (WHITE, J., concurring in part and dissenting in part); *United States* v. *SCRAP*, 412 U. S. 669, 691 (1973). We think it follows *a fortiori* from these decisions that where Congress has *denied* authority to the Commission to suspend interim rates, as it has here, a reviewing court may not exercise such power, absent a declaration of unlawfulness by the Commission. See *Arrow Transp. Co.* v. *Southern R. Co., supra*, at 667 n. 14; *Board of R. Comm'rs* v. *Great Northern R. Co.*, 281 U. S. 412, 429–430 (1930). Congress provided a refund mechanism in § 15a (6)(c) in the event that the final rates approved by the Commission are less than the interim rates. Congress undoubtedly was satisfied that this procedure was adequate to protect the interests of the parties affected by the terminal surcharge, and respondent railroads have advanced no reasons for concluding otherwise.

In *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, supra*, the plurality recognized a limited power in a reviewing court to suspend rates pending review of a final order of the Commission. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942). That conclusion was based on the fact that there was no "provision in the relevant statutes

depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review." *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, supra,* at 820. The plurality also noted that subsequent legislation might "affect the relation between court and agency and so the propriety of injunctive relief." 412 U. S., at 823 n. 16. In the limited context of interim rate increases under § 15a (6)(b), we think the Amendments are "subsequent legislation" that evidences a clear purpose to oust any equitable power that a reviewing court might otherwise possess to disturb those interim rates pending determination of final rates by the Commission. See *Arrow Transp. Co.* v. *Southern R. Co., supra,* at 671 n. 22.

The petition for certiorari accordingly is granted, limited to the question set forth in footnote 1, *supra.* The judgment of the Court of Appeals is reversed insofar as it requires petitioner to keep the proceeds collected from its interim terminal surcharge in a separate trust, and the case is remanded for proceedings consistent with this opinion.

So ordered.

CAREY, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS *v.* WYNN ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 78–229. Decided October 16, 1978*

This Court has no jurisdiction under 28 U. S. C. § 1253 over appeals from a three-judge District Court's declaratory judgment invalidating certain state statutory provisions, such judgment being appealable only to the Court of Appeals.

Appeals dismissed. Reported below: 449 F. Supp. 1302.

PER CURIAM.

A three-judge District Court entered a declaratory judgment holding unconstitutional certain sections of the Illinois Abortion Act of 1975, Ill. Rev. Stat., ch. 38, § 81–21 *et seq.* (Supp. 1976). *Wynn* v. *Scott,* 449 F. Supp. 1302 (ND Ill. 1978). The District Court assumed that Illinois prosecutors would recognize and abide by the declaratory judgment and denied plaintiffs' request for injunctive relief. *Id.,* at 1331.

The appeals from the declaratory judgment invalidating certain provisions of the statute are dismissed for want of jurisdiction. Title 28 U. S. C. § 1253, the jurisdictional statute under which these appeals are taken, does not authorize an appeal from the grant or denial of declaratory relief alone. *Gerstein* v. *Coe,* 417 U. S. 279 (1974). The declaratory judgment is appealable to the Court of Appeals, and we are informed that appeals to that court have been taken.

Appeals dismissed.

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

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*Together with No. 78–239, *Diamond* v. *Wynn et al.,* also on appeal from the same court.

NATIONAL LABOR RELATIONS BOARD v. BAYLOR UNIVERSITY MEDICAL CENTER

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

No. 78–80. Decided October 30, 1978

Court of Appeals' judgment refusing to enforce the National Labor Relations Board's order invalidating the operation of respondent hospital's no-solicitation rule in its cafeteria is vacated. The case is remanded solely for reconsideration of the restriction on solicitation in the cafeteria in light of *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483.

Certiorari granted in part; 188 U. S. App. D. C. 109, 578 F. 2d 351, vacated in part and remanded.

PER CURIAM.

Upon a complaint issued by the National Labor Relations Board and on the basis of a substantial record of evidence before a Hearing Examiner, the Board held that respondent's no-solicitation rule with respect to corridors and the cafeteria of the respondent hospital was overly broad and an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act, 29 U. S. C. § 158 (a)(1).

The Court of Appeals for the District of Columbia Circuit refused to enforce the Board's order. 188 U. S. App. D. C. 109, 578 F. 2d 351 (1978). In reaching this conclusion, the Court of Appeals dealt with corridors and the cafeteria separately, assigning different reasons for its holding with respect to each. As to corridors, the court simply concluded that there was no substantial evidence supporting the Board's conclusion that the corridors were not entitled to the same protection accorded other areas devoted essentially to patient care.

The court's holding with respect to the cafeteria was based, however, on a legal judgment that no valid distinction can be made between a hospital cafeteria and cafeterias and restaurants that operate independently or in department stores. In

the latter type of cases, the Board uniformly has held that the presumption in favor of the right to solicit on nonwork time in nonwork areas, established by *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793 (1945), is inapplicable.* The Court of Appeals therefore applied the general rule applicable to commercial cafeterias and restaurants to the hospital cafeteria.

In *Beth Israel Hospital* v. *NLRB,* 437 U. S. 483 (1978), the Court concluded that the *Republic Aviation* presumption did apply to a hospital cafeteria maintained and operated primarily for employees and rarely used by patients or their families. The corridors of the hospital serving patients' rooms, operating and treatment rooms, and other areas used by patients and their families were neither involved nor considered by the Court in *Beth Israel.*

As the Court's decision in *Beth Israel* is relevant to the cafeteria issue in this case, we grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Court of Appeals for reconsideration in light of *Beth Israel* only on that issue. Insofar as the petition for certiorari seeks review of the corridor issue, the petition is denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting in part.

I dissent from the decision to limit the remand in this case to the cafeteria issue.

The NLRB sought enforcement of an order rescinding the operation of Baylor's no-solicitation rule in, *inter alia,* the hospital's cafeteria and corridors. The Board's order rested

*In the present case, the Board had applied the *Republic Aviation* presumption to all areas of the hospital deemed by it not devoted "strictly [to] patient care," in accord with its decision in *St. John's Hospital and School of Nursing, Inc.,* 222 N. L. R. B. 1150 (1976). The Board held that the corridors throughout the hospital and the cafeteria were noncare areas.

on its decision in *St. John's Hospital and School of Nursing, Inc.*, 222 N. L. R. B. 1150 (1976), disapproving "the prohibition [of solicitation] in areas other than immediate patient-care areas . . . absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas," *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 495 (1978). In refusing enforcement, the Court of Appeals determined that *St. John's* was inconsistent with congressional intent to minimize disruption in hospitals, and that because in hospital matters the Board was also acting outside of its area of expertise, its decision was "entitled to little of the deference traditionally accorded to NLRB actions," 188 U. S. App. D. C. 109, 111, 578 F. 2d 351, 353 (1978). These bases for legal determination of the validity of no-solicitation rules, which the Court of Appeals then applied to the specific problems of the cafeteria and corridors, are precisely the bases which *Beth Israel Hospital* v. *NLRB, supra,* rejected as erroneous.

Beth Israel refused to accept petitioner's claim that the Board's *St. John's* opinion constituted an impermissible construction of the NLRB's policies as applied to the health-care industry by the 1974 amendments. Instead, the Court held that

> "the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act." 437 U. S., at 507.

Beth Israel did, of course, recognize the special considerations appropriate to labor disputes in hospital settings, and reminded the NLRB that it bears

> " 'a heavy continuing responsibility to review its policies concerning organizational activities in various parts of

> hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.'" *Id.*, at 508, quoting *NLRB* v. *Beth Israel Hospital*, 554 F. 2d 477, 481 (CA1 1977).

Nonetheless, *Beth Israel* reaffirmed the Court's oft-expressed view that the function of striking the balance between the conflicting interests of employers and employees is a responsibility which Congress committed primarily to the Board, subject to limited judicial review, *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957), and held that in the area of hospital labor relations the decisions of the Board are entitled to the traditional deference. *Beth Israel Hospital*, 437 U. S., at 500–501.

While it is true that the facts of *Beth Israel* involved only a hospital cafeteria, nowhere did the opinion hint that its analysis was to apply only within a cafeteria's four walls.* Indeed, after approving the Board's general principle of requiring hospitals to justify their prohibitions of solicitation, the Court in its very next sentence stated that "with respect to *the application of* that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest . . . ." *Id.*, at 507 (emphasis added). *Beth Israel*, then, is clearly a case of general import, with application to disputes over the validity of rules inhibiting solicitation wherever applied within the hospital.

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*There is one element of *Beth Israel*, identified in the majority opinion in this case, which is only relevant to the cafeteria issue—the holding that the NLRB can validly distinguish between hospital cafeterias and independent restaurants. But the fact that the Court of Appeals' decision runs afoul of this additional aspect of *Beth Israel* hardly makes its other shortcomings, which are equally applicable to both disputed areas of the building, irrelevant.

I, of course, intimate no view upon the merits of the corridors issue. It may well be that on the facts of the case the hospital has justified the prohibition of solicitation as necessary to avoid disruption of health-care operations or disturbance of patients. It is our role, however, to insure that the proper legal standard is applied to the facts. For that reason, I would follow our usual practice of granting the petition, vacating the judgment, and remanding the case without limitation for reconsideration in light of *Beth Israel.*

PRESNELL *v.* GEORGIA

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

No. 77–6885. Decided November 6, 1978

The Georgia Supreme Court's affirmance of petitioner's death sentence for murder imposed under a Georgia statute authorizing such a sentence for a capital offense committed while another capital offense is being committed, and of his conviction of kidnaping with bodily injury, is unconstitutional as violative of due process, where such affirmance was based on an underlying rape charge of which petitioner was not properly tried and convicted. Cf. *Cole* v. *Arkansas,* 333 U. S. 196.

Certiorari granted in part; 241 Ga. 49, 243 S. E. 2d 496, reversed in part and remanded.

PER CURIAM.

Petitioner was indicted and found guilty by a jury of three capital offenses—rape, kidnaping with bodily injury, and murder with malice aforethought. Under Georgia law, a jury may impose the death penalty if it finds that the offender committed a capital felony under at least 1 of 10 statutorily enumerated aggravating circumstances. Ga. Code § 27–2534.1 (b) (1975). The only such circumstance relevant here is that

> "[t]he [capital] offense . . . was committed while the offender was engaged in the commission of another capital felony . . . ." § 27–2534.1 (b)(2).

At the penalty phase of petitioner's trial, the jury was instructed that it could impose the death penalty (1) for rape if that offense was committed while petitioner was engaged in the commission of murder, (2) for kidnaping with bodily injury if that offense was committed while petitioner was engaged in the commission of rape, or (3) for murder if that offense was committed while petitioner was engaged in the commission of "kidnapping with bodily harm, aggravated

sodomy." The jury found that all three offenses were committed during the commission of the specified additional offenses, and it imposed three death sentences on petitioner.

On appeal, the Supreme Court of Georgia held that the first two death sentences imposed by the jury could not stand. 241 Ga. 49, 52, 64, 243 S. E. 2d 496, 501, 508 (1978). Both sentences depended upon petitioner's having committed forcible rape, and the court determined that the jury had not properly convicted petitioner of that offense.[1]

In addition, the Supreme Court of Georgia held that the State could not rely upon sodomy as constituting the bodily injury associated with the kidnaping.[2] Nonetheless, despite the fact that the jury had been instructed that the death penalty for murder depended upon a finding that it was committed while petitioner was engaged in "kidnapping with bodily harm, *aggravated sodomy*" (emphasis added), the Georgia Supreme Court upheld the third death penalty imposed by the jury. It did so on the theory that, despite the

[1] Petitioner was indicted and found guilty by the jury of "rape." Because the jury had been instructed both on forcible and statutory rape, but did not in its verdict specify which offense it had found, the Supreme Court of Georgia interpreted the "rape" conviction as one for statutory rape—an offense that includes no element of bodily harm. Moreover, there was no jury finding of forcible rape at the penalty phase of the trial.

[2] Although the Georgia Supreme Court did not explain this holding, the holding itself is unambiguous. First, the Georgia court unequivocally stated:

"The only evidence of bodily injury, to support the crime of the kidnapping with bodily injury of the older child, is the bodily injury which resulted from the rape of that child." 241 Ga., at 52, 243 S. E. 2d, at 501.

Second, after concluding that the evidence of forcible rape could supply the bodily injury element of the crime of kidnaping, the Georgia court added:

"The state's attempted reliance upon sodomy as constituting the bodily injury associated with the kidnapping of the older child is not ground for retrial." *Ibid.*, 243 S. E. 2d, at 502.

lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the kidnaping a sufficiently aggravating circumstance to justify the death sentence.

In *Cole* v. *Arkansas,* 333 U. S. 196 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . .
>
> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.,* at 201–202.[3]

These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Cf. *Gardner* v. *Florida,* 430 U. S. 349 (1977).

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[3] In the present case, when the Supreme Court of Georgia ruled on petitioner's motion for rehearing it recognized that, prior to its opinion in the case, petitioner had no notice, either in the indictment, in the instructions to the jury, or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnaping:

"On motion for rehearing the defendant urges, among other things, that he was not on notice that evidence as to the older child's injuries which resulted from her being raped would provide the evidence of her bodily injury to convict him of her kidnapping with bodily injury. He was on notice, however, that he was charged with forcible rape as well as kidnapping with bodily injury of the older child.

"*Motion for rehearing denied.*" *Id.,* at 67, 243 S. E. 2d, at 510.

In light of these principles, the death sentence for the crime of murder with malice aforethought cannot stand.

Insofar as the petition for certiorari challenges the conviction for kidnaping with bodily injury [4] and the imposition of the death sentence, it is granted along with petitioner's motion to proceed *in forma pauperis*. The judgment of the Supreme Court of Georgia affirming the conviction for kidnaping with bodily injury and the death sentence for murder is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Insofar as the petition challenges the convictions for murder, kidnaping, and statutory rape, it is denied.

It is so ordered.

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court. For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would in addition hold that the death penalty violates the Eighth and Fourteenth Amendments and that therefore petitioner may not be resentenced to death in any proceedings following remand from this Court.

MR. JUSTICE MARSHALL, concurring.

While I join the opinion of the Court, I again emphasize my opinion that the death penalty in any proceeding is unconstitutional.

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

If, as the *per curiam* opinion for the Court states, the Supreme Court of Georgia had found petitioner guilty of kidnap-

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[4] Because the jury convicted petitioner of the same offense that it relied upon to find the statutory aggravating circumstances necessary to impose the death penalty—kidnaping with bodily injury, to wit, *aggravated sodomy*—the Georgia Supreme Court's affirmance of that conviction on

ing with bodily injury in spite of a failure of the jury to return a proper guilty verdict for that crime, I would join this decision. My review of the record and the opinion of the Georgia court, however, has convinced me that petitioner's conviction for that crime might well have been upheld on the basis of the jury's proper verdict. Because the opinion of the Supreme Court of Georgia is fundamentally ambiguous on this point, I would remand the case for clarification rather than vacating petitioner's sentence of death. Accordingly, I dissent.

Petitioner was indicted for five offenses: murder of Lori Ann Smith; kidnaping of Lori Ann Smith; rape of Andrea Furlong; aggravated sodomy of Andrea Furlong; and the kidnaping of Andrea Furlong "with bodily injury." The aggravated sodomy charge was not submitted to the jury, as the aggravated sodomy of Andrea was alleged to have supplied the bodily injury element of her kidnaping. The jury returned guilty verdicts *on all four counts.* It sentenced petitioner to death on three of the counts: (i) the murder of Lori Ann, with the kidnaping of Andrea with bodily injury as a specified aggravating circumstance; (ii) the rape of Andrea, with the murder of Lori Ann as a specified aggravating circumstance; and (iii) the kidnaping of Andrea with bodily injury, with the rape of Andrea as a specified aggravating circumstance. Petitioner also was sentenced to a term of years for the kidnaping of Lori Ann.

On appeal, the Georgia court vacated the death sentences for the rape of Andrea and the kidnaping of Andrea with bodily injury. With respect to the rape of Andrea, the court noted that the jury was instructed on both forcible and statutory rape and returned a verdict that did not distinguish between the two crimes. As only forcible rape was a capital crime under Georgia law, petitioner had to be resentenced as

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the basis of the bodily injury resulting from the *rape* is also unconstitutional under *Cole* v. *Arkansas,* 333 U. S. 196 (1948). Accordingly, under the dictates of that case, *id.,* at 200, 202, the conviction must be reversed.

if he had been convicted only of statutory rape. With respect to the kidnaping of Andrea, the court did not indicate whether it vacated the sentence because it believed our recent opinion in *Coker* v. *Georgia,* 433 U. S. 584 (1977), so mandated, or because the specified aggravating circumstance for this offense, the rape of Andrea, also was tainted by the jury's failure to distinguish between forcible and statutory rape.[1] The court did not disturb, however, the conviction for the underlying offense of kidnaping with bodily injury.

The Georgia court did affirm the sentence of death for the murder of Lori Ann, the kidnaping of Andrea with bodily injury being the aggravating circumstance. The validity of that kidnaping conviction is the matter in issue here. According to the Court, the court below ruled that even though as a matter of state law the aggravated sodomy of Andrea could not provide the bodily-injury element of the kidnaping, that element was supplied by the evidence of forcible rape. The Court then holds that the Georgia court could not constitutionally rely on evidence of forcible rape as bodily injury, because the jury may have convicted petitioner only of statutory rape, which requires no finding of force. Statutory rape would therefore be insufficient to provide the bodily-injury element associated with the kidnaping, which in turn would render that offense insufficient as an aggravating circumstance for the purpose of imposing the death penalty.[2]

Although the opinion of the Georgia court is not a model of clarity, a careful reading of the decision persuades me that the Court has misconstrued a critical part of what was held below. The Court is correct that the Georgia Supreme Court was not entitled to rely upon the evidence in the record of forcible rape

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[1] As the Court observes, *ante,* at 14, Ga. Code § 27–2534.1 (b) (2) (1975) limits those crimes whose commission in the course of a homicide will sustain a death sentence to certain enumerated felonies. Statutory rape is not such an offense, although forcible rape is.

[2] See n. 1, *supra.*

to supply the bodily-injury component of the kidnaping.[3] But it is incorrect to say that the court below necessarily rejected the jury's unambiguous finding of aggravated sodomy [4]

[3] The court below actually identified two problems with the rape conviction, a state-law double jeopardy violation as well as the ambiguity of the jury verdict discussed in the text. This is made clear by a close reading of the opinion. It begins by observing:

"The only evidence of bodily injury, to support the crime of the kidnapping with bodily injury of the older child, is the bodily injury which resulted from the rape of that child. Thus, the convictions for both kidnapping with bodily injury and forcible rape cannot be upheld." 241 Ga. 49, 52, 243 S. E. 2d 496, 501 (1978).

This Court apparently believes that "both" convictions could not be upheld because of the failure of the jury to distinguish in both instances between forcible and statutory rape. Immediately after this sentence, however, the Georgia court cited its decision in *State* v. *Estevez,* 232 Ga. 316, 206 S. E. 2d 475 (1974). That decision involves the protection against double jeopardy provided by the Georgia Constitution, a protection of substantially broader scope than that provided by the Federal Constitution.

Under the Georgia Constitution, a defendant cannot be convicted and punished for separate crimes arising from the same criminal conduct. *Ibid.* It is plain that the Georgia court was concerned that separate punishments for both the kidnaping of Andrea with bodily harm and the forcible rape would violate this protection in a situation where rape was the only bodily harm involved. It had ruled that double jeopardy applied to similar facts in *Allen* v. *State,* 233 Ga. 200, 203, 210 S. E. 2d 680, 682 (1974). When the Georgia court stated that "both" convictions could not stand, it therefore meant not that each was invalid, but that petitioner could be punished only for one. It is in this context that the court determined that petitioner had not been punished for forcible rape and, "[a]s a consequence of the foregoing, there is evidence of bodily injury, not a part of the crime of statutory rape, to support the crime of kidnapping with bodily injury." 241 Ga., at 52, 243 S. E. 2d, at 502.

[4] The trial court instructed the jury that it could convict petitioner of kidnaping with bodily injury only if it found that petitioner had committed aggravated sodomy upon Andrea's person. To make this finding, the jury was required to find beyond a reasonable doubt that petitioner in the course of kidnaping Andrea "performed a sexual act involving his sexual organ with the mouth of Andrea Furlong, forcibly and against her will." Unlike the charge on forcible rape, the jury was not given the

as establishing the bodily injury that converted simple kidnaping into a capital offense under Georgia law. On this point the opinion of the state court is hopelessly obscure. As the Court observes, portions of the opinion may be read as indicating that aggravated sodomy, a crime that has as an element a forcible assault upon the victim, cannot constitute "bodily injury" with respect to the crime of kidnaping with bodily injury. *Ante,* at 15 n. 2. An equally plausible reading of the opinion, however, is that once the court determined that the evidence of harm inflicted during the rape established bodily injury, it did not think it necessary to decide the question whether aggravated sodomy, considered alone, also could establish that element. Certainly that question was not *necessarily* decided by the court, as it believed that bodily injury was proved, at least in part, by the evidence of forcible rape.[5] Moreover, the trial court expressly held that the sodomy did satisfy the bodily injury requirement, and the Georgia Supreme Court did not reverse that ruling.[6]

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option of convicting petitioner for this offense on the ground that Andrea was under the age of consent. Accordingly, the jury could have convicted petitioner on this count only if it found he had committed an act of force on Andrea's person.

Similarly, during the sentencing stage the jury was instructed that in order to impose death for the murder of Lori Ann, it had to find that petitioner was "engaged in the commission of another capital felony, to-wit: The kidnapping with bodily harm, aggravated sodomy, of Andrea Furlong."

[5] There is no apparent reason why aggravated sodomy should not satisfy the bodily-injury requirement. Both forcible rape and aggravated sodomy require the use of force as elements of the offense. The only distinction between the two crimes under Georgia law relates to the part of the body violated. Compare Ga. Code § 26–2001 with Ga. Code § 26–2002 (1975). As both crimes involve a violent interference with the person, each logically would supply the element of bodily injury required by the kidnaping offense.

[6] Counsel for petitioner moved for acquittal on the kidnaping count, arguing that aggravated sodomy did not constitute bodily injury for

The validity of petitioner's conviction for kidnaping with bodily injury, and the use of that conviction as an aggravating circumstance for the purpose of sentencing, cannot be determined without resolution of this state-law question. If the court below meant to rule that as a matter of Georgia law evidence of forcible sodomy does *not* constitute proof of "bodily injury" for the purposes of the kidnaping offense, although proof of forcible rape would suffice, then the death sentence must be vacated and the conviction for kidnaping with bodily injury must be reversed. A criminal defendant is "entitled to have the validity of [his] convictio[n] appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas,* 333 U. S. 196, 202 (1948). Here, the jury was permitted to find petitioner guilty of kidnaping with bodily injury if he committed aggravated sodomy during the offense. The jury also was allowed to specify this kidnaping as an aggravating circumstance of the murder if it coincided with aggravated sodomy. If it was an error of state law so to instruct the jury, the court may not redeem the mistake by ruling that the jury could have believed other evidence indicating petitioner had injured his victim in other ways. Cf. *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). This is particularly true here, as the Georgia court ruled that

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purposes of the kidnaping offense. The trial court was specific in its ground for rejecting this motion:

"I will give you a precise ruling so that you will have the advantage of your motion. I will hold specifically that the act of aggravated sodomy committed upon her person was such harm that aggravated the kidnapping and made it a higher crime. I hold that it does not require, the law does not require, a physical bruising injury or battery, but that the act of sodomy itself is as vile and as gross as anything can be as an act of harm against a ten year old child, and I don't have any problem with it." Record 990–991.

Nowhere in its opinion does the Georgia court state that this view of the law was incorrect.

the jury cannot be deemed to have returned a guilty verdict on the forcible rape charge itself.

If, however, the aggravated sodomy, accomplished by force, *did* satisfy the bodily-injury element under state law, it would appear that the jury properly convicted petitioner of that crime and was permitted to use that conviction as an aggravating circumstance with respect to the murder conviction. Because the question is substantial and was not resolved by the court below, I would remand the case for clarification.[7]

[7] The Court's opinion, as I read it, does not preclude resentencing of petitioner for the murder and kidnaping-with-bodily-harm convictions, if the court below does determine the jury verdicts with respect to those counts to have been proper.

BOARD OF TRUSTEES OF KEENE STATE COLLEGE ET AL. *v.* SWEENEY

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

No. 77–1792. Decided November 13, 1978

Where the Court of Appeals in respondent's employment discrimination action against petitioners (employer) appears to have imposed a heavier burden on the employer than *Furnco Construction Co.* v. *Waters,* 438 U. S. 567, requires with respect to meeting the employee's prima facie case of discrimination, its judgment is vacated and the case is remanded for reconsideration in light of *Furnco.*

Certiorari granted; 569 F. 2d 169, vacated and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted. In *Furnco Construction Co.* v. *Waters,* 438 U. S. 567 (1978), we stated that "[t]o dispel the adverse inference from a prima facie showing under *McDonnell Douglas,* the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Id.,* at 578, quoting *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973). We stated in *McDonnell Douglas* that the plaintiff "must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." *Id.,* at 804. The Court of Appeals in the present case, however, referring to *McDonnell Douglas,* stated that "in requiring the defendant to *prove absence of discriminatory motive,* the Supreme Court placed the burden squarely on the party with the greater access to such evidence." 569 F. 2d 169, 177 (CA1 1978) (emphasis added).[1]

[1] While the Court of Appeals did make the statement that the dissent quotes, *post,* at 27, it also made the statement quoted in the text above. These statements simply contradict one another. The statement quoted in the text above would make entirely superfluous the third step in the

While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co.* v. *Waters, supra,* we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for reconsideration in the light of *Furnco, supra,* at 578.[2]

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider

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Furnco-McDonnell Douglas analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step. We think our remand is warranted both because we are unable to determine which of the two conflicting standards the Court of Appeals applied in reviewing the decision of the District Court in this case, and because of the implication in its opinion that there is no difference between the two standards. We, of course, intimate no view as to the correct result if the proper test is applied in this case.

[2] We quite agree with the dissent that under *Furnco* and *McDonnell Douglas* the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons." *Post,* at 28, 29. But petitioners clearly did produce evidence to support their legitimate nondiscriminatory explanation for refusing to promote respondent during the years in question. See 569 F. 2d, at 172–173, 178; App. to Pet. for Cert. B–2 to B–24. Nonetheless, the Court of Appeals held that petitioners had not met their burden because the proffered legitimate explanation did not "rebut" or "disprove" respondent's prima facie case

its decision in the light of an intervening decision of this Court, the Court is acting on the merits. Such action always imposes an additional burden on circuit judges who—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation. For that reason, such action should not be taken unless the intervening decision has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result.

In this case, the Court's action implies that the recent opinion in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, made some change in the law as explained in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792. When I joined the *Furnco* opinion, I detected no such change and I am still unable to discern one. In both cases, the Court clearly stated that when the complainant in a Title VII trial establishes a prima facie case of discrimination, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." [1]

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or "prove absence of nondiscriminatory motive." 569 F. 2d, at 177–179; see App. to Pet. for Cert. B–25. This holding by the Court of Appeals is further support for our belief that the court appears to have imposed a heavier burden on the employer than *Furnco,* and the dissent here, require.

[1] This language is quoted from the following paragraph in *Furnco:*

"When the prima facie case is understood in the light of the opinion in *McDonnell Douglas,* it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees. To dispel the adverse inference from a prima facie showing under *McDonnell Douglas,* the employer need

The Court of Appeals' statement of the parties' respective burdens in this case is wholly faithful to this Court's teachings in *McDonnell Douglas*. The Court of Appeals here stated:

> "As we understand those cases [*McDonnell Douglas* and *Teamsters* v. *United States*, 431 U. S. 324], a plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. *The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions.* If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretext for discrimination. *The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination.*" 569 F. 2d 169, 177 (CA1 1978) (emphasis added).

This statement by the Court of Appeals virtually parrots this Court's statements in *McDonnell Douglas* and *Furnco*. Nonetheless, this Court vacates the judgment on the ground that "the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants." *Ante*, at 25. As its sole basis for this conclusion, this Court relies on a distinction drawn for the first time in this case "between merely 'articulat[ing] some legitimate, nondiscriminatory

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only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" 438 U. S., at 577–578 (emphasis in original).

The comparable passage in *McDonnell Douglas* reads as follows:

"The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination." 411 U. S., at 802–803.

reason' and 'prov[ing] absence of discriminatory motive.'" *Ante,* at 25.[2] This novel distinction has two parts, both of which are illusory and were unequivocally rejected in *Furnco* itself.

First is a purported difference between "articulating" and "proving" a legitimate motivation. Second is the difference between affirming a nondiscriminatory motive and negating a discriminatory motive.

With respect to the first point, it must be noted that it was this Court in *Furnco,* not the Court of Appeals in this case, that stated that the employer's burden was to *"prov[e]* that he based his employment decision on a legitimate consideration."[3] Indeed, in the paragraph of this Court's opinion in *Furnco* cited earlier, the words "prove" and "articulate" were used interchangeably,[4] and properly so. For they were descriptive of the defendant's burden in a trial context. In litigation the only way a defendant can "articulate" the reason for his action is by adducing evidence that explains what he has done; when an executive takes the witness stand to "articulate" his reason, the litigant for whom he speaks is

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[2] The Court also suggests that "further support" for its decision is derived from the Court of Appeals' "holding" that "petitioners had not met their burden because the proffered legitimate explanation did not 'rebut' or 'disprove' respondent's prima facie case . . . 569 F. 2d, at 177–179." *Ante,* at 25–26, n. 2. The actual "holding" of the Court of Appeals was that "the trial court's finding that sex discrimination impeded the plaintiff's second promotion was not clearly erroneous." 569 F. 2d 169, 179 (CA1 1978). The Court of Appeals reached this conclusion by considering all of the evidence presented by both parties to determine whether the evidence of discrimination offered by the plaintiff was "sufficient . . . to sustain the district court's findings" in light of the counter evidence offered by the employer. *Ibid.* Such factual determinations by two federal courts are entitled to a strong presumption of validity.

[3] 438 U. S., at 577 (quoted in n. 1, *supra;* emphasis added). It should also be noted that the Court of Appeals did not state that the petitioners' burden here was to "prove" anything; rather, the burden which shifted to them as defendants was to "show" a legitimate reason for their action.

[4] See n. 1, *supra.*

thereby proving those reasons. If the Court intends to authorize a method of articulating a factual defense without proof, surely the Court should explain what it is.

The second part of the Court's imaginative distinction is also rejected by *Furnco*. When an employer shows that a legitimate nondiscriminatory reason accounts for his action, he is simultaneously demonstrating that the action was not motivated by an illegitimate factor such as race. *Furnco* explicitly recognized this equivalence when it defined the burden on the employer as "that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race." [5] Whether the issue is phrased in the affirmative or in the negative, the ultimate question involves an identification of the real reason for the employment decision. On that question—as all of these cases make perfectly clear—it is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer; the burden of persuasion, as the Court of Appeals properly recognized, remains with the plaintiff.

In short, there is no legitimate basis for concluding that the Court of Appeals erred in this case—either with or without the benefit of *Furnco*. The Court's action today therefore needlessly imposes additional work on circuit judges who have already considered and correctly applied the rule the Court directs them to reconsider and reapply.

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[5] 438 U. S., at 577.

UNITED STATES *v.* CALIFORNIA

ON MOTION FOR ENTRY OF THIRD SUPPLEMENTAL DECREE

No. 5, Orig. Decided June 23, 1947, May 17, 1965, and May 15, 1978—Order and decree entered October 27, 1947—Supplemental decree entered January 31, 1966—Second supplemental decree entered June 13, 1977—Third supplemental decree entered November 27, 1978

Third supplemental decree is entered.

Opinions reported: 332 U. S. 19, 381 U. S. 139, 436 U. S. 32; order and decree reported: 332 U. S. 804; supplemental decree reported: 382 U. S. 448; second supplemental decree reported: 432 U. S. 40.

THIRD SUPPLEMENTAL DECREE

To carry into effect this Court's decision of May 15, 1978, 436 U. S. 32, and for the purpose of identifying with greater particularity parts of the boundary line, as defined by the Supplemental Decree herein of January 31, 1966, 382 U. S. 448, and by the Second Supplemental Decree herein of June 13, 1977, 432 U. S. 40, between the submerged lands of the United States and the submerged lands of the State of California, it is ORDERED, ADJUDGED, AND DECREED that this Court's Supplemental Decree be, and the same is hereby, further supplemented as follows:

1. The United States has no right, title, or interest by virtue of the claim-of-right exception of § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313, in the tidelands (that is, lands lying between the lines of mean high water and mean lower low water) and submerged lands (that is, lands lying seaward of the line of mean lower low water) within the Channel Islands National Monument, as said Monument was established by Presidential Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938), and enlarged by Presidential Proclamation No. 2825, 63 Stat. 1258 (Feb. 9, 1949), to encompass "the areas within one nautical mile of the shoreline of Anacapa

and Santa Barbara Islands . . . ." In all other respects, the terms of the Supplemental Decree and of the Second Supplemental Decree apply fully to the tidelands and submerged lands within the Channel Islands National Monument.

2. The land area above the mean high-water line of Anacapa and Santa Barbara Islands, and the land area above the mean high-water line of all islets and rocks within one nautical (geographical) mile of the coastline of Anacapa and Santa Barbara Islands are lands as to which the State of California has no title or property interest.

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

MR. JUSTICE MARSHALL took no part in the formulation of this decree.

DOUGHERTY COUNTY, GEORGIA, BOARD OF EDUCATION ET AL. *v.* WHITE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 77–120. Argued October 2–3, 1978—Decided November 28, 1978

Shortly after appellee, a Negro employee of the Dougherty County Board of Education, announced his candidacy for the Georgia House of Representatives, the Board adopted a requirement (Rule 58) that its employees take unpaid leaves of absence while campaigning for elective political office. As a consequence of Rule 58, appellee, who sought election to the Georgia House on three occasions, was forced to take leave and lost over $11,000 in salary. When compelled to take his third leave of absence, appellee brought this action in District Court, alleging that Rule 58 was unenforceable because it had not been precleared under § 5 of the Voting Rights Act of 1965 (Act). Concluding that Rule 58 had the "potential for discrimination," the District Court enjoined its enforcement pending compliance with § 5. *Held:*

1. Rule 58 is a "standard, practice, or procedure with respect to voting" within the meaning of § 5 of the Act. Pp. 36–43.

(a) Informed by the legislative history and the Attorney General's interpretation of § 5, this Court has consistently given the phrase "standard, practice, or procedure with respect to voting" the "broadest possible scope," and has construed it to encompass any state enactments altering the election law of a covered State "in even a minor way," *Allen* v. *State Board of Elections,* 393 U. S. 544, 566. Pp. 37–40.

(b) Rule 58, like a filing fee, imposes substantial economic disincentives on employees who seek elective public office, and the circumstances surrounding its adoption and its effect on the political process suggest a potential for discrimination. Pp. 40–43.

2. A county school board, although it does not itself conduct elections, is a political subdivision within the purview of the Act when it exercises control over the electoral process. *United States* v. *Board of Comm'rs of Sheffield,* 435 U. S. 110. Pp. 43–47.

431 F. Supp. 919, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring statement, *post,* p. 47. STEWART, J., filed a dissenting statement,

post, p. 47. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 47.

Jesse W. Walters argued the cause and filed a brief for appellants.

John R. Myer argued the cause for appellee. With him on the brief were *Robert A. Murphy, William E. Caldwell,* and *Norman J. Chachkin.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days,* and *Brian K. Landsberg.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under § 5 of the Voting Rights Act of 1965,[1] all States and

[1] 79 Stat. 439, as amended, 42 U. S. C. § 1973c. Section 5 provides in part:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in [§ 4 (a) of the Act] based upon determinations made under the first sentence of [§ 4 (b) of the Act] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. . . ."

political subdivisions covered by § 4 of the Act [2] must submit any proposed change affecting voting, for preclearance by the Attorney General or the District Court for the District of Columbia. At issue in this appeal is whether a county board of education in a covered State must seek approval of a rule requiring its employees to take unpaid leaves of absence while they campaign for elective office. Resolution of this question necessitates two related inquiries: first, whether a rule governing leave for employee candidates is a "standard, practice, or procedure with respect to voting" within the meaning of § 5 of the Voting Rights Act; and second, whether a county school board is a "political subdivision" within the purview of the Act.

I

The facts in this case are not in dispute. Appellee, a Negro, is employed as Assistant Coordinator of Student Personnel Services by appellant Dougherty County Board of Education (Board). In May 1972, he announced his candidacy for the Georgia House of Representatives. Less than a month later, on June 12, 1972, the Board adopted Rule 58 without seeking prior federal approval. Rule 58 provides:

> "POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for such elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto."

Appellee qualified as a candidate for the Democratic primary in June 1972, and was compelled by Rule 58 to take a leave of absence without pay. After his defeat in the

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[2] 79 Stat. 438, as amended, 42 U. S. C. § 1973b. Georgia has been designated a covered jurisdiction pursuant to § 4. 30 Fed. Reg. 9897 (1965).

August primary, appellee was reinstated. Again in June 1974, he qualified as a candidate for the Georgia House and was forced to take leave. He was successful in both the August primary and the November general election. Accordingly, his leave continued through mid-November 1974. Appellee took a third leave of absence in June 1976, when he qualified to run for re-election. When it became clear in September that he would be unopposed in the November 1976 election, appellee was reinstated.[3] As a consequence of those mandatory leaves, appellee lost pay in the amount of $2,810 in 1972, $4,780 in 1974, and $3,750 in 1976.

In June 1976, appellee filed this action in the Middle District of Georgia alleging that Rule 58 was a "standard, practice, or procedure with respect to voting" adopted by a covered entity and therefore subject to the preclearance requirements of § 5 of the Act.[4] Appellee averred that he was the first Negro in recent memory, perhaps since Reconstruction, to run for the Georgia General Assembly from Dougherty County. The Board did not contest this fact, and further acknowledged that it was aware of no individual other than appellee who had run for public office while an employee of the Dougherty County Board of Education.

On cross motions for summary judgment, the three-judge District Court held that Rule 58 should have been submitted for federal approval before implementation. 431 F. Supp. 919

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[3] The Solicitor General and counsel for appellants advise us that appellee was also on unpaid leave during his participation in the annual 2½-month sittings of the Georgia General Assembly in 1975, 1976, 1977, and 1978. Brief for United States as *Amicus Curiae* 4 n. 1; Tr. of Oral Arg. 6. Appellee did not challenge this application of Rule 58 below. We therefore do not consider whether preclearance is required for a policy governing mandatory leaves during the interval in which an employee is actually absent due to legislative responsibilities.

[4] Jurisdiction was predicated on 42 U. S. C. § 1973c, 28 U. S. C. § 2284, and 28 U. S. C. § 1343. See *Allen* v. *State Board of Elections,* 393 U. S. 544, 554–563 (1969).

(1977). In so ruling, the court correctly declined to decide the ultimate question that the Attorney General or the District of Columbia court would face on submission of the Rule for preclearance under § 5—whether the change in fact had a discriminatory purpose or effect. See *Perkins* v. *Matthews,* 400 U. S. 379, 383–385 (1971). Rather, the District Court confined its review to the preliminary issue whether Rule 58 had the "potential" for discrimination and hence was subject to § 5. *Georgia* v. *United States,* 411 U. S. 526, 534 (1973). In concluding that the Rule did have such potential, the District Court interpreted *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), and *Georgia* v. *United States, supra,* to mandate preclearance of any modification by a covered State or political subdivision "which restricts the ability of citizens to run for office." 431 F. Supp., at 922. The court reasoned that Rule 58 was such a modification because:

> "By imposing a financial loss on [Board] employees who choose to become candidates, [the Rule] makes it more difficult for them to participate in the democratic process and, consequently, restricts the field from which the voters may select their representatives." *Ibid.*

The District Court therefore enjoined enforcement of Rule 58 pending compliance with the preclearance requirements of § 5. We noted probable jurisdiction. 435 U. S. 921 (1978). Since we find *Allen* v. *State Board of Elections, supra,* and *United States* v. *Board of Comm'rs of Sheffield,* 435 U. S. 110 (1978), dispositive of the issues presented in this appeal, we affirm.

II

Section 5 provides that whenever a covered State or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or *standard, practice, or procedure* with respect to voting different from that in force

or effect on November 1, 1964," it may not implement that change until it either secures a determination from the District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or submits the change to the Attorney General and he interposes no objection within 60 days. 42 U. S. C. § 1973c (emphasis added). Although § 14 (c)(1) expansively defines the term "voting" to "include all action necessary to make a vote effective," 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(1), the Act itself nowhere amplifies the meaning of the phrase "standard, practice, or procedure with respect to voting." Accordingly, in our previous constructions of § 5, we have sought guidance from the history and purpose of the Act.

A

This Court first considered the scope of the critical language of § 5 in *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), involving consolidated appeals in three cases from Mississippi and one from Virginia. After canvassing the legislative history of the Act, we concluded that Congress meant "to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U. S., at 566.[5] Conceived after "nearly a century of systematic resistance to the Fifteenth Amendment," *South Carolina* v. *Katzenbach,* 383 U. S. 301, 328 (1966),[6] the Voting Rights

[5] For example, we noted that Attorney General Katzenbach, who played a substantial role in drafting the Act, testified that the term "practice" in § 5 "was intended to be all-inclusive . . . ." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 192 (1965), quoted in *Allen* v. *State Board of Elections, supra,* at 566–567, and n. 31.

[6] The protean strategies of racial discrimination that led Congress to adopt the Voting Rights Act have been often discussed by this Court, see *United States* v. *Board of Comm'rs of Sheffield,* 435 U. S. 110, 118–121 (1978); *South Carolina* v. *Katzenbach,* 383 U. S., at 308–315, and need not be reviewed here.

Act was, as *Allen* emphasized, "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." 393 U. S., at 565 (footnote omitted). To effectuate the "articulated purposes of the legislation," *id.*, at 570, the *Allen* Court held that the phrase "standard, practice, or procedure" must be given the "broadest possible scope," *id.*, at 567, and construed it to encompass candidate qualification requirements. *Id.*, at 570 (*Whitley* v. *Williams*, companion case decided with *Allen*, *supra*). The Court concluded that any enactment which burdens an independent candidate by "increasing the difficulty for [him] to gain a position on the general election ballot" is subject to § 5 since such a measure could "undermine the effectiveness" of voters who wish to elect nonaffiliated representatives. 393 U. S., at 565.

In subsequent cases interpreting § 5, we have consistently adhered to the principles of broad construction set forth in *Allen*. In *Hadnott* v. *Amos*, 394 U. S. 358 (1969), this Court held that an Alabama statute requiring independent candidates to declare their intention to seek office two months earlier than under prior procedures imposed "increased barriers" on candidacy and therefore warranted § 5 scrutiny. *Id.*, at 366. Similarly, in contexts other than candidate qualification, we have interpreted § 5 expansively to mandate preclearance for changes in the location of polling places, *Perkins* v. *Matthews*, *supra;* alterations of municipal boundaries, *Richmond* v. *United States*, 422 U. S. 358 (1975); *Petersburg* v. *United States*, 410 U. S. 962 (1973), summarily aff'g 354 F. Supp. 1021 (DC 1972); *Perkins* v. *Matthews*, *supra;* and reapportionment and redistricting plans, *Georgia* v. *United States*, *supra*.

Had Congress disagreed with this broad construction of § 5, it presumably would have clarified its intent when re-enacting the statute in 1970 and 1975. Yet, as this Court observed in *Georgia* v. *United States*, "[a]fter extensive deliberations

in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5." 411 U. S., at 533 (footnote omitted). Again in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the "broad interpretations to the scope of Section 5" in *Allen* and *Perkins* v. *Matthews*. S. Rep. No. 94–295, p. 16 (1975) (hereinafter S. Rep.); H. R. Rep. No. 94–196, p. 9 (1975) (hereinafter H. R. Rep.). Confirming the view of this Court, the Committee Reports stated, without qualification, that "[s]ection 5 of the Act requires review of *all* voting changes prior to implementation by the covered jurisdictions." S. Rep. 15; H. R. Rep. 8 (emphasis added).

The Attorney General's regulations, in force since 1971, reflect an equally inclusive understanding of the reach of § 5. They provide that "[a]ll changes affecting voting, even though the change appears to be minor or indirect," must be submitted for prior approval. 28 CFR § 51.4 (a) (1977). More particularly, the regulations require preclearance of "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders." § 51.4 (c)(4). Pursuant to these regulations, the Attorney General, after being apprised of Rule 58, requested its submission for § 5 clearance.[7] Given the central role of the Attorney General in formulating and implementing § 5, this interpretation of its scope is entitled to particular deference. *United States* v. *Board of Comm'rs of Sheffield,*

[7] Shortly before the commencement of this litigation, counsel for appellee brought Rule 58 to the attention of the Civil Rights Division of the Department of Justice. Two and one-half months after appellee filed his complaint, Assistant Attorney General Pottinger informed the Superintendent of the Dougherty County School System that Rule 58 should be submitted for preclearance. Appellants made no response.

435 U. S., at 131; *Perkins* v. *Matthews*, 400 U. S., at 391. See *Georgia* v. *United States*, 411 U. S., at 536–539.

B

Despite these consistently expansive constructions of § 5, appellants contend that the Attorney General and District Court erred in treating Rule 58 as a "standard, practice, or procedure with respect to voting" rather than as simply "a means of getting a full days work for a full days pay—nothing more and nothing less." Brief for Appellants 20. In appellants' view, Congress did not intend to subject all internal personnel measures affecting political activity to federal superintendence.

The Board mischaracterizes its policy. Rule 58 is not a neutral personnel practice governing all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy for elective office as a disabling activity. Although not in form a filing fee, the Rule operates in precisely the same fashion. By imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters. Given the potential loss of thousands of dollars by employees subject to Rule 58, the Board's policy could operate as a more substantial inhibition on entry into the elective process than many of the filing-fee changes involving only hundreds of dollars to which the Attorney General has successfully interposed objections.[8] That Congress was well aware of these objections is apparent from the Committee Reports supporting extension of the Act in 1975. S. Rep. 16–17; H. R. Rep. 10.[9]

[8] See U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After 134–137 (1975) (*e. g.*, $360 fee for Commissioner in Mobile, Alabama, in 1973; $818 fee for Mayor in Rock Hill, South Carolina, in 1973).

[9] In addition, the Committees relied heavily on findings by the United States Commission on Civil Rights in The Voting Rights Act: Ten Years

In *Georgia* v. *United States,* we observed that "[s]ection 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters." 411 U. S., at 531. The reality here is that Rule 58's impact on elections is no different from that of many of the candidate qualification changes for which we have previously required preclearance. See *Hadnott* v. *Amos,* 394 U. S. 358 (1969); *Allen,* 393 U. S., at 551.[10] Moreover, as a practical matter, Rule 58 implicates the political process to the same extent as do other modifications that this Court and Congress have recognized § 5 to encompass, such as changes in the location of polling places, *Perkins* v. *Matthews,* and alterations in the procedures for casting a write-in vote, *Allen* v. *State Board of Elections, supra.*

We do not, of course, suggest that all constraints on employee political activity affecting voter choice violate § 5. Presumably, most regulation of political involvement by public employees would not be found to have an invidious purpose or effect. Yet the same could be said of almost all changes subject to § 5. According to the most recent figures available, the Voting Rights Section of the Civil Rights Division processes annually some 1,800 submissions involving over 3,100 changes and interposes objections to less than 2%. Attorney General Ann. Rep. 159–160 (1977). Approximately

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After, *supra,* at 131–142, a document which reviewed at some length the barriers to qualification, including filing fees, faced by minority candidates. See S. Rep. 21, 24; H. R. Rep. 12, 16.

[10] As this Court has recognized in its decisions invalidating certain filing-fee schemes under the Fourteenth Amendment, "we would ignore reality" were we not to acknowledge that a financial barrier to candidacy "falls with unequal weight on voters, as well as candidates," since it "tends to deny some voters the opportunity to vote for a candidate of their choosing." *Bullock* v. *Carter,* 405 U. S. 134, 144 (1972) (filing fees of $1,424.60 for County Commissioner, $1,000 for Commissioner of General Land Office, and $6,300 for County Judge). See also *Lubin* v. *Panish,* 415 U. S. 709 (1974) (filing fee of $701.60 for County Supervisor).

91% of these submissions receive clearance without further exchange of correspondence. Tr. of Oral Arg. 53. Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination. See *Georgia* v. *United States, supra,* at 534; *Perkins* v. *Matthews, supra,* at 383–385; *Allen* v. *State Board of Elections, supra,* at 555–556, n. 19, 558–559, 570–571.

Without intimating any views on the substantive question of Rule 58's legitimacy as a nonracial personnel measure, we believe that the circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance. Appellee was the first Negro in recent years to seek election to the General Assembly from Dougherty County, an area with a long history of racial discrimination in voting.[11] Less than a month after appellee announced his candidacy, the Board adopted Rule 58, concededly without any prior experience of absenteeism among employees seeking office. That the Board made its mandatory leave-of-absence requirement contingent on candidacy rather than on absence during working hours underscores the Rule's potential for inhibiting participation in the electoral process.[12]

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[11] For a review of voting rights litigation in the city of Albany, the county seat of Dougherty County containing 80% of its population, see *Paige* v. *Gray,* 399 F. Supp. 459, 461–463 (MD Ga. 1975), vacated in part, 538 F. 2d 1108 (CA5 1976), on remand, 437 F. Supp. 137, 149–158 (MD Ga. 1977).

[12] The dissent suggests, *post,* at 53, that Rule 58 is directed only toward barring "the expenditure of public funds to support the candidacy of an employee whose time and energies may be devoted to campaigning, rather than counseling schoolchildren." Insofar as the Board is concerned about its employees' failure to discharge their contractual obligations while standing for office, it has a variety of means to vindicate its interest. The Board may, for example, prescribe regulations governing absenteeism, or may terminate or suspend the contracts of employees who willfully neglect

Plainly, Rule 58 erects "increased barriers" to candidacy as formidable as the filing date changes at issue in *Hadnott* v. *Amos, supra,* at 366 (2 months), and *Allen* v. *State Board of Elections, supra,* at 551 (20 days). To require preclearance of Rule 58 follows directly from our previous recognition that § 5 must be given "the broadest possible scope," *Allen* v. *State Board of Elections, supra,* at 567, encompassing the "subtle, as well as the obvious," forms of discrimination. 393 U. S., at 565. Informed by similarly expansive legislative and administrative understandings of the perimeters of § 5, we hold that obstacles to candidate qualification such as the Rule involved here are "standard[s], practice[s], or procedure[s] with respect to voting."

III

Section 5 applies to all changes affecting voting made by "political subdivision[s]" of States designated for coverage pursuant to § 4 of the Act. Although acknowledging that the Board is a political subdivision under state law,[13] appellants contend that it does not meet the definition of that term as employed in the Voting Rights Act. They rely on § 14 (c)(2) of the Act, 79 Stat. 445, 42 U. S. C. § 1973*l* (c)(2), which defines "political subdivision" as

> "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

Because the Board is neither a county, parish, nor entity

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their professional responsibilities. See Ga. Code § 32–2101c (1975); *Ransum* v. *Chattooga County Board of Education,* 144 Ga. App. 783, 242 S. E. 2d 374 (1978). What it may not do is adopt a rule that explicitly and directly burdens the electoral process without preclearance.

[13] See Ga. Code §§ 32–901, 23–1716 (1975); *Campbell* v. *Red Bud Consolidated School Dist.,* 186 Ga. 541, 548, 198 S. E. 225, 229 (1938); *Ty Ty Consolidated School Dist.* v. *Colquitt Lumber Co.,* 153 Ga. 426, 427, 112 S. E. 561 (1922).

which conducts voter registration, appellants maintain that it does not come within the purview of § 5.

This contention is squarely foreclosed by our decision last Term in *United States* v. *Board of Comm'rs of Sheffield,* 435 U. S. 110 (1978). There, we expressly rejected the suggestion that the city of Sheffield was beyond the ambit of § 5 because it did not itself register voters and hence was not a political subdivision as the term is defined in § 14 (c)(2) of the Act. Rather, the "language, structure, history, and purposes of the Act persuade[d] us that § 5, like the constitutional provisions it is designed to implement, applies to all entities having power over any aspect of the electoral process within designated jurisdictions . . . ." 435 U. S., at 118. Accordingly, we held that once a State has been designated for coverage, § 14 (c)(2)'s definition of political subdivision has no "operative significance in determining the reach of § 5." 435 U. S., at 126.

Appellants attempt to distinguish *Sheffield* on the ground that the Board, unlike the city of Sheffield, does not itself conduct elections. Since the Board has no direct responsibilities in conjunction with the election of public officials, appellants argue that it does not "exercise control" over the voting process, *id.,* at 127, and is not therefore subject to § 5.

Sheffield provides no support for such a cramped reading of the term "control." Our concern there was that covered jurisdictions could obviate the necessity for preclearance of voting changes by the simple expedient of "allowing local entities that do not conduct voter registration to control critical aspects of the electoral process." 435 U. S., at 125. We thus held that the impact of a change on the elective process, rather than the adopting entity's registration responsibilities, was dispositive of the question of § 5 coverage. Here, as the discussion in Part II, *supra,* indicates, a political unit with no nominal electoral functions can nonetheless exercise power

over the process by attaching a price tag to candidate participation. Appellants' analysis would hence achieve what *Sheffield* sought to avert; it would enable covered jurisdictions to circumvent the Act by delegating power over candidate qualification to local entities that do not conduct elections or voter registration. A State or political subdivision, by *de facto* delegation, "thereby could achieve through its instrumentalities what it could not do itself without preclearance." 435 U. S., at 139 (POWELL, J., concurring in judgment). If only those governmental units with official electoral obligations actuate the preclearance requirements of § 5, the Act would be "nullif[ied] . . . in a large number of its potential applications." 435 U. S., at 125 (footnote omitted).

Nothing in the language or purpose of the Act compels such an anomalous result. By its terms, § 5 requires preclearance whenever a political subdivision within a covered State adopts a change in a standard, practice, or procedure with respect to voting. No requirement that the subdivision itself conduct elections is stated in § 5 and none is fairly implied.[14] As this Court has observed, § 5 of the Voting Rights Act reflects Congress' firm resolve to end "the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach,* 383 U. S., at 308. Whether a subdivision adopting a potentially discriminatory change has some nominal electoral functions bears no relation to the purpose of § 5. That provision directs attention to the impact of a change on the electoral process, not to the duties of the political subdivision

[14] Section 4 (a) makes continued coverage under the Act turn on whether discriminatory tests or devices have been used "anywhere in the territory" of a State or political subdivision for a prescribed number of years. 79 Stat. 438, as amended, 42 U. S. C. § 1973b (a). In *Sheffield,* we concluded that the territorial reach of the substantive requirements of § 5 was meant to be coterminous with the jurisdictional provisions of § 4 (a). 435 U. S., at 120–129.

that adopted it. To make coverage under § 5 turn on whether the State has confided in the Dougherty County Board of Education some formal responsibility for the conduct of elections, when the Board clearly has the power to affect candidate participation in those elections, would serve no purpose consonant with the objectives of the federal statutory scheme.

Nor would appellants' interpretation of § 5 comport with any ascertainable congressional intent. The legislative history of the 1975 extension, the statute which is controlling here, leaves no doubt but that Congress intended all electoral changes by political entities in covered jurisdictions to trigger federal scrutiny. Both the supporters and opponents of the proposed extension appear to have shared the common understanding that under § 5 no covered jurisdiction may enforce a change affecting voting without obtaining prior approval. See Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 75–76 (1975) (testimony of Arthur Flemming, Chairman of the U. S. Commission on Civil Rights) (*e. g.*, § 5 applies "to changes in voting laws, practices, and procedures that affect every stage of the political process"); Hearings on H. R. 939 et al. before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess., 19 (1975) (testimony of Arthur Flemming); 121 Cong. Rec. 23744 (1975) (remarks of Sen. Stennis) ("Any changes, so far as election officials [are] concerned, which [are] made in precincts, county districts, school districts, municipalities, or State legislatures . . . [have] to be submitted"); *id.*, at 24114 (remarks of Sen. Allen). Moreover, both the House and Senate Committees and witnesses at the House and Senate hearings referred to § 5's past and prospective application to school districts. See, *e. g.*, 121 Cong. Rec. 23744 (1975) (remarks of Sen. Stennis); Hearings on S. 407, *supra*, at 467–470 (testimony of George Korbel, EEOC Regional Attorney); Hearings on H. R. 939,

supra, at 387–390 (testimony of George Korbel); S. Rep. 27–28; H. R. Rep. 19–20. Yet none of these discussions suggests that direct supervision of elections by a school board is a prerequisite to its coverage under the Act. To the contrary, a fair reading of the legislative history compels the conclusion that Congress was determined in the 1975 extension of the Act to provide some mechanism for coping with all potentially discriminatory enactments whose source and forms it could not anticipate but whose impact on the electoral process could be significant. Rule 58 is such a change.

Because we conclude that Rule 58 is a standard, practice, or procedure with respect to voting enacted by an entity subject to § 5, the judgment of the District Court is

Affirmed.

MR. JUSTICE STEWART dissents for the reasons expressed in Part I of the dissenting opinion of MR. JUSTICE POWELL.

MR. JUSTICE STEVENS, concurring.

Although I remain convinced that the Court's construction of the statute does not accurately reflect the intent of the Congress that enacted it, see *United States* v. *Board of Comm'rs of Sheffield,* 435 U. S. 110, 140–150 (STEVENS, J., dissenting), MR. JUSTICE MARSHALL has demonstrated that the rationale of the Court's prior decisions compels the result it reaches today. Accordingly, I join his opinion for the Court.

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

Today the Court again expands the reach of the Voting Rights Act of 1965, ruling that a local board of education with no authority over any electoral system must obtain federal clearance of its personnel rule requiring employees to take leaves of absence while campaigning for political office. The Court's ruling is without support in the language or legislative history of the Act. Moreover, although prior decisions

of the Court have taken liberties with this language and history, today's decision is without precedent.

I

Standard, Practice, or Procedure

Section 5 requires federal preclearance before a "political subdivision" of a State covered by § 4 of the Act may enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ." This provision marked a radical departure from traditional notions of constitutional federalism, a departure several Members of this Court have regarded as unconstitutional.[1] Indeed, the Court noted in the first case to come before it under the Act that § 5 represents an "uncommon exercise of congressional power," *South Carolina* v. *Katzenbach,* 383 U. S. 301, 334 (1966), and the Justice Department has conceded in testimony before Congress that it is a "substantial departure . . . from ordinary concepts of our federal system." Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 536 (1975) (testimony of Stanley Pottinger, Asst. Atty. Gen., Civil Rights Division).

Congress tempered the intrusion of the Federal Government into state affairs, however, by limiting the Act's coverage to voting regulations. Indeed, the very title of the Act shows

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[1] Mr. Justice Black believed that the preclearance requirement of § 5 "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." See *South Carolina* v. *Katzenbach,* 383 U. S. 301, 358 (1966) (concurring and dissenting opinion). Other Members of the Court also have expressed misgivings. See *Allen* v. *State Board of Elections,* 393 U. S. 544, 586, and n. 4 (1969) (Harlan, J., concurring and dissenting); *Holt* v. *Richmond,* 406 U. S. 903 (1972) (BURGER, C. J., concurring); *Georgia* v. *United States,* 411 U. S. 526, 545 (1973) (POWELL, J., dissenting). But decisions of the Court have held the Act to be constitutional.

that the Act's thrust is directed to the protection of voting rights. Section 2 forbids the States to use any "*voting* qualification or prerequisite to *voting,* or standard, practice, or procedure" (emphasis added) to deny anyone the right to vote on account of race. Similarly, § 4 sharply curtails the rights of certain States to use "tests or devices" as prerequisites to voting eligibility. "[T]est or device" is defined in § 4 (c), 42 U. S. C. § 1973b (c), as

> "any requirement that a person as a prerequisite for *voting* or registration for *voting* (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." (Emphasis added.)

Finally, § 5 requires preclearance only of "any *voting* qualification or prerequisite to *voting,* or standard, practice, or procedure with respect to *voting*" (emphasis added).[2]

The question under this language, therefore, is whether Rule 58 of the Board pertains to voting. Contrary to the suggestion of the Court's opinion, see *ante,* at 42–43, the answer to this question turns neither on the Board's possible discrimination against the appellee, nor on the potential of enactments such as Rule 58 for use as instruments of racial discrimination. Section 5 by its terms is not limited to enact-

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[2] In § 14 (c) (1) of the Act, 42 U. S. C. § 1973*l* (c) (1), the terms "vote" and "voting" are defined to

"include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

ments that have a potential for discriminatory use; rather, it extends to all regulations with respect to voting, regardless of their purpose or potential uses. The affected party's race was conceded by counsel to be irrelevant in determining whether Rule 58 pertains to voting, see Tr. of Oral Arg. 25–27; nor is the timing of the adoption of Rule 58 of any significance. Indeed, in stating his cause of action under the Act, the appellee does not allege any discrimination on the basis of race.[3] Yet the Court, in holding that Rule 58 is subject to the preclearance requirements of § 5, relies on a perceived potential for discrimination. In so doing, the Court simply disregards the explicit scope of § 5 and relies upon factors that the parties have conceded to be irrelevant.[4]

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[3] Appellee's first cause of action alleged only:

"The actions of the defendants complained of herein are in violation of the Voting Rights Act of 1965, 42 U. S. C. Sec. 1971, *et seq.*, in that defendants have instituted a 'voting qualification or prerequisite to vote, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964' without submitting or obtaining the required approval of either the United States Attorney General or the United States District Court for the District of Columbia, as required by Section Five of the Voting Rights Act of 1965. Defendants are a 'covered jurisdiction' within the meaning of the Voting Rights Act."

The appellee also set forth claims under the Fourteenth and Fifteenth Amendments and under 42 U. S. C. § 1983. Under these causes of action, the appellee alleged discrimination on the basis of race. The appellee's race and the timing of Rule 58's adoption by the Board may be probative in establishing whether the Board acted unconstitutionally in enacting Rule 58. But these causes of action were not addressed by the District Court and are not before us.

[4] To be sure, the purpose of the Voting Rights Act was to "banish the blight of racial discrimination in voting" in selected States. See *South Carolina* v. *Katzenbach, supra,* at 308. To this end, Congress imposed an unlimited proscription on activities affecting the voting rights of others by making it a crime under § 11 of the Act for anyone to "intimidate, threaten, or coerce any person for voting . . . or for urging . . . any person to vote." 42 U. S. C. § 1973i (b). Unlike § 5, § 11 is not

Separated from all mistaken references to racial discrimination, the Court's holding that Rule 58 is a "standard, practice, or procedure with respect to voting" is difficult to understand. It tortures the language of the Act to conclude that this personnel regulation, having nothing to do with the conduct of elections as such, is state action "with respect to voting." No one is denied the right to vote; nor is anyone's exercise of the franchise impaired.

To support its interpretation of § 5, the Court has constructed a tenuous theory, reasoning that, because the right to vote includes the right to vote for whoever may wish to run for office, any discouragement given any potential candidate may deprive someone of the right to vote. In constructing this theory, *ante,* at 41, the Court relies upon *Bullock* v. *Carter,* 405 U. S. 134 (1972); *Hadnott* v. *Amos,* 394 U. S. 358 (1969); and *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969)—cases that involved explicit barriers to candidacy, such as the filing fees held to violate the Fourteenth Amendment in *Bullock.* The Court states that the "reality here is that Rule 58's impact on elections is no different from that of many of the candidate qualification changes for which we have previously required preclearance." *Ante,* at 41. But the notion that a State or locality imposes a "qualification" on candidates by refusing to support their campaigns with public funds is without support in reason or precedent.

As no prior § 5 decision arguably governs the resolution of this case, the Court draws upon broad dictum that, taken from

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limited to devices identifiable as voting regulations. On the other hand, § 2 does not deal with every voting standard, practice, or procedure, but rather is limited to voting procedures that deny someone the right to vote. Thus, although Congress had but one purpose, it used different methods to reach its ends. Under § 5, Congress required preclearance of *all* changes in voting laws—irrespective of their intent, effect, or potential use.

its context, is meaningless.[5] For example, in *Allen* v. *State Board of Elections, supra,* at 566, the Court suggested that § 5 would require clearance of "any state enactment which alter[s] the election law of a covered State in even a minor way." Even if the language in *Allen* were viewed as necessary to the Court's holding in that case, it would not support today's decision. In *Allen,* as in each of the cases relied upon today,[6]

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[5] The Court also relies upon the Attorney General's interpretation of the Act for its holding today. See *ante,* at 39–40. Thus, the Court quotes language in the Attorney General's regulations that "[a]ny alteration affecting the eligibility of persons to become or remain candidates . . ." must be precleared. *Ante,* at 39. Nothing in Rule 58, however, affected the appellee's *eligibility* to become or remain a candidate for the Georgia House of Representatives. As the Attorney General's regulations do not state with specificity whether a personnel rule concerning wages paid to candidates is a regulation "with respect to voting" under § 5, these regulations are of no assistance in the case at hand. Although the Attorney General now demands that Rule 58 be cleared, there is no indication that this action accords with a longstanding policy of the Justice Department. Indeed, the Solicitor General admits that "the Attorney General has had little experience with provisions such as [the] appellant[s'] . . . Rule 58." See Brief for United States as *Amicus Curiae* 14. Under these circumstances, the Court's purported deference to the Attorney General's position—apparently voiced for the first time in this case—is a makeweight.

[6] The actions presented to the Court in *Allen* were a decision to change from district to at-large elections, an enactment to make the Superintendent of Schools an appointive position, and a stiffening of the qualifications required of independent candidates. See *Allen* v. *State Board of Elections,* 393 U. S., at 550–552. Similarly, the other cases to which the Court alludes involved voting regulations: *Richmond* v. *United States,* 422 U. S. 358 (1975) (annexation); *Georgia* v. *United States,* 411 U. S. 526 (1973) (reapportionment); *Petersburg* v. *United States,* 410 U. S. 962 (1973) (annexations); *Perkins* v. *Matthews,* 400 U. S. 379 (1971) (annexation and redistricting); *Hadnott* v. *Amos,* 394 U. S. 358 (1969) (requirements for independent candidates). Because *Allen* and its progeny involved only enactments directly pertaining to voting regulation, the implicit ratification of these decisions by Congress in 1970 and 1975 has no bearing on the case at hand.

the Court was considering an enactment relating directly to the way in which elections are conducted: either by structuring the method of balloting, setting forth the qualifications for candidates, or determining who shall be permitted to vote. These enactments could be said to be "with respect to voting" in elections. Rule 58, on the other hand, effects no change in an election law or in a law regulating who may vote or when and where they may do so. It is a personnel rule directed to the resolution of a personnel problem: the expenditure of public funds to support the candidacy of an employee whose time and energies may be devoted to campaigning, rather than to counseling schoolchildren.

After extending the scope of § 5 beyond anything indicated in the statutory language or in precedent, the Court attempts to limit its holding by suggesting that Rule 58 somehow differs from a "neutral personnel practice governing all forms of absenteeism," as it "specifically addresses the electoral process." See *ante,* at 40. Thus, the Court intimates that it would not require Rule 58 to be precleared if the rule required Board employees to take unpaid leaves of absence whenever an extracurricular responsibility required them frequently to be absent from their duties—whether that responsibility derived from candidacy for office, campaigning for a friend who is running for office, fulfilling civic duties, or entering into gainful employment with a second employer. The Court goes on, however, to give as the principal reason for extension of § 5 to Rule 58 the effect of such rules on potential candidates for office. What the Court fails to note is that the effect on a potential candidate of a "neutral personnel practice governing all forms of absenteeism" is no less than the effect of Rule 58 as enacted by the Dougherty County School Board. Thus, under a general absenteeism provision the appellee would go without pay just as he did under Rule 58; the only difference would be that Board employees absent for reasons other than their candidacy would join the appellee on leave.

Under the Court's rationale, therefore, even those enactments making no explicit reference to the electoral process would have to be cleared through the Attorney General or the District Court for the District of Columbia. Indeed, if the Court truly means that any incidental impact on elections is sufficient to trigger the preclearance requirement of § 5, then it is difficult to imagine what sorts of state or local enactments would *not* fall within the scope of that section.[7]

II

Political Subdivision

Section 5 requires federal preclearance only of those voting changes that are adopted either by a State covered under § 4 or by a "political subdivision" of such a State. Although § 14 (c)(2) of the Act restricts the term "political subdivision" to state institutions that "conduc[t] registration for voting," last Term the Court ruled that the preclearance requirement of § 5 applied to the city of Sheffield, Ala., which is without authority to register voters. See *United States* v. *Board of*

[7] Little imagination is required to anticipate one possible result of today's decision: In States covered by the Act, public employees at every level of state government may "declare their candidacy" for elective office, thereby avoiding their duties while drawing their pay. It will be answered, of course, that personnel regulations adopted to close this "loophole" can be submitted to the Attorney General for his approval. Indeed, the Government's *amicus* brief in this case appears to foreclose the possibility that the Department of Justice would rule these trivialities to be proscribed by the Act. There are thousands of local governmental bodies, however: school boards, planning commissions, sanitary district commissions, zoning boards, and the like. Many of these may choose the easier course of allowing employees this privilege at the taxpayers' expense, rather than going through the unwelcome and often frustrating experience of clearing each personnel regulation through the federal bureaucracy. Even if most of these bodies eventually will prevail in implementing their regulations, the fact that they may do so only at sufferance of the Federal Government runs counter to our most basic notions of local self-government. See n. 1, *supra*.

Commissioners of Sheffield, 435 U. S. 110 (1978). Sheffield had been given authority, however, to undertake a substantial restructuring of the method by which its government officials would be selected.[8] Thus, pursuant to a voter referendum, Sheffield had changed from a commission to a mayor-council form of government. Councilmen were to be elected at large, but would run for numbered seats corresponding to the two council seats given each of the city's four wards.

The Court held that Sheffield was a political subdivision, in spite of its lack of authority to register voters. Today the Court states that appellants' "contention is squarely foreclosed by our decision last Term" in *Sheffield. Ante,* at 44. The contention that this local school board is not a political subdivision under the Act is foreclosed only because the Court now declares it to be so, as neither the holding nor the rationale of *Sheffield* applies to this case. The *Sheffield* decision was based on two grounds, neither of which is present here. First, the *Sheffield* Court relied upon "congressional intent" as derived from "the Act's structure," "the language of the Act," "the legislative history of . . . enactment and re-enactments," and "the Attorney General's consistent interpretations of § 5." 435 U. S., at 117–118. Second, the Court based its decision on the frustration of the Act's basic policy that would result if a State could circumvent the Act's provisions by simply withdrawing the power to register voters from all or selected cities, counties, parishes, or other political subdivisions.[9]

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[8] See Ala. Code, Tit. 11, §§ 44–150 to 44–162 (1975).

[9] I joined in the judgment of the Court in *Sheffield* for similar reasons: "I believe today's decision to be correct under this Court's precedents and necessary in order to effectuate the purposes of the Act, as construed in *Allen* and *Perkins.* In view of these purposes it does not make sense to limit the preclearance requirement to political units charged with voter registration. . . . [S]uch a construction of the statute would enable covered States or political subdivisions to allow local entities that do not

There is nothing in the language, structure, or legislative history of the Act that suggests it was Congress' intent that local entities such as the Board were to fall within the reach of § 5; nor has the Court cited any "consistent interpretation" of § 5 by the Attorney General that supports the Court's holding.[10] Looking to the structure of the Act, the Court argues that whether a subdivision has electoral responsibilities is of no consequence in determining whether § 5 is applicable. *Ante,* at 45–46. Rather, it is said that this provision "directs attention to the impact of a change on the electoral process, not to the duties of the political subdivision that adopted it." *Ibid.* Neither *Sheffield* nor any other decision of the Court suggests that § 5 applies to the actions of every local entity however remote its powers may be with respect to elections and voting. Indeed, the Court indicated the importance of direct power over elections in *Sheffield* when it repeatedly emphasized Sheffield's "power over the electoral process." [11]

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conduct voter registration to assume responsibility for changing the electoral process. A covered State or political subdivision thereby could achieve through its instrumentalities what it could not do itself without preclearance." 435 U. S., at 139.

[10] Indeed, in discussing whether the Dougherty County Board of Education is a "political subdivision" covered by § 5, the Court makes no reference whatsoever to any interpretation of the Act by the Attorney General. Thus, what the Court found to be a "compelling argument" for extending the preclearance requirement to the city of Sheffield, see *Sheffield,* 435 U. S., at 131, is wholly absent here.

[11] In relying upon the Act's structure for its interpretation of § 5, the Court in *Sheffield* made much of the scope of § 4 (a) and the need to read § 5 "in lock-step with § 4." See 435 U. S., at 122 (quoting *Allen* v. *State Board of Elections,* 393 U. S., at 584 (Harlan, J., concurring and dissenting)). Thus, the Court concluded that § 5 must apply to any entity with control over the electoral system, because § 4 (a) proscribes the use of literacy tests and similar devices, and any entity with control over the electoral system could use such devices. Under this analysis, the Board should not come within the scope of § 5, as it has no power to use a test or device to deprive anyone of the right to vote.

See, *e. g.*, 435 U. S., at 118, 120, 122, 127. A rational application of *Sheffield* would require consideration of whether the entity enacting a change had a substantial measure of authority over the way in which elections were held or over the right to vote. The city of Sheffield had such authority; the Dougherty County School Board does not.

Although professing to find support in the legislative history of the Act, the Court cites no committee report or statement by any supporter of the Act that suggests a congressional intention to require federal preclearance of actions by local entities that are powerless to exercise any control over elections or voting. The Court does try to connect § 5 to school boards by references to legislative history that are entirely irrelevant. The Court neglects to make clear that each of these references pertained to a school board enacting changes in the way its members were elected, something the Dougherty County School Board is without authority to do.[12] See 121 Cong. Rec. 23744 (1975) (remarks of Sen. Stennis) ("Any changes, so far as election officials were concerned, which were made in precincts, county districts, school districts, municipalities, or State legislatures . . . had to be submitted"); Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 467–470 (1975) (school board enacting changes from ward to at-large elections for its members); S. Rep. No. 94–295, p. 27 (1975) (school boards in Texas adopting "[e]lection law changes" to avoid election of minority groups to school boards).

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[12] The Dougherty County Board of Education has no authority over any aspect of an electoral system. The Georgia State Constitution charges the Board with administering the public school system within Dougherty County, Georgia. See Ga. Code § 2–5302 (Supp. 1977). The five members of the Board are appointed by the County Grand Jury for terms of five years, and have powers limited to establishing and maintaining a public school system.

Furthermore, the *Sheffield* Court's concern over the possible circumvention of the Act is inapposite here, as the Board (unlike the city of Sheffield) has no authority to regulate the electoral process. There can be no danger, therefore, that substantial restructuring of the electoral system will take place in Dougherty County without the scrutiny of either the Attorney General or the District Court for the District of Columbia.

Thus, none of the factors relied upon in *Sheffield* is present in this case: There is no relevant "language of the Act," nothing in the "Act's structure," nothing in its "legislative history," and no "consistent interpretation of § 5" by the Attorney General to support the extension of § 5 to the Board's enactments. Nor is it possible that a local school board that is without authority over the electoral process will be used to circumvent the Act's basic policy. There simply is no parallel in fact or governmental theory between a city like Sheffield and the Dougherty County School Board.

Finding no support for its decision in the rationale of *Sheffield,* the Court falls back upon language in that opinion that "all entities having power over any aspect of the electoral process" are subject to § 5—language merely expressing a conclusion drawn from a consideration of the factors present in *Sheffield,* but absent here.[13] The Board has no "power over any aspect of the electoral process" in the normal sense of these words. It did not purport by Rule 58 to regulate the appellee's election to the Georgia House of Representatives;

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[13] Today the Court concludes that any state entity empowered to adopt "potentially discriminatory enactments" with an effect on elections is a "political subdivision" for purposes of the Act. The Court also construes every such potentially discriminatory enactment to be a "standard, practice, or procedure" under § 5. Thus, although the Court professes to be deciding two different questions, it telescopes them into one: Every entity empowered to enact a standard, practice, or procedure with respect to voting (that is, a regulation that may be viewed as potentially discriminatory) by definition is a political subdivision subject to § 5.

it has been given no authority under Georgia law to do so. Rather, the Board merely has said to its employees that, if they choose to run for any elective office, the Board will not affirmatively support their campaign by paying their wages despite the neglect of their duties that inevitably will occur. Such neutral action designed to protect the public fisc hardly rises to the level of "power over . . . the election process."

In sum, I would reverse the judgment below on either or both of two grounds. The Dougherty County School Board is not a "political subdivision" within the meaning of the Act. Even if it were deemed to be such, the personnel rule at issue is not a standard, practice, or procedure "with respect to voting." As respectful as I am of my Brothers' opinions, I view the Court's decision as simply a judicial revision of the Act, unsupported by its purpose, statutory language, structure, or history.

HOLT CIVIC CLUB ET AL. *v.* CITY OF TUSCALOOSA ET AL.

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

No. 77–515. Argued October 11, 1978—Decided November 28, 1978

Appellants, a civic association and certain individual residents of Holt, Ala., a small unincorporated community outside the corporate limits of Tuscaloosa but within three miles thereof, brought this statewide class action challenging the constitutionality of "police jurisdiction" statutes that extend municipal police, sanitary, and business-licensing powers over those residing within three miles of certain corporate boundaries without permitting such residents to vote in municipal elections. A three-judge District Court granted appellees' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. *Held:*

1. The convening of a three-judge court under then-applicable 28 U. S. C. § 2281 (1970 ed.) was proper since appellants challenged the constitutionality of state statutes that created a statewide system under which Alabama cities exercise extraterritorial powers. *Moody* v. *Flowers*, 387 U. S. 97, distinguished. Pp. 63–65.

2. Alabama's police jurisdiction statutes do not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 66–75.

(a) A government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders. Various voting qualification decisions on which appellants rely in support of their contention that the denial of the franchise to them can stand only if justified by a compelling state interest are inapposite. In those cases, unlike the situation here, the challenged statutes disfranchised individuals who physically resided within the geographical boundaries of the governmental entity concerned. Pp. 66–70.

(b) Alabama's police jurisdiction statutory scheme is a rational legislative response to the problems faced by the State's burgeoning cities, and the legislature has a legitimate interest in ensuring that residents of areas adjoining city borders be provided such basic municipal services as police, fire, and health protection. Nor is it unreasonable for the legislature to require police jurisdiction residents to contribute through license fees, as they do here on a reduced scale, to the expense of such services. Pp. 70–75.

3. The challenged statutes do not violate due process since appellants have no constitutional right to vote in Tuscaloosa elections. P. 75.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 75. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post,* p. 79.

Edward Still argued the cause for appellants. With him on the briefs were *Neil Bradley, Laughlin McDonald, Christopher Coates,* and *Bruce Ennis.*

J. Wagner Finnell argued the cause and filed a brief for appellees.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Holt is a small, largely rural, unincorporated community located on the northeastern outskirts of Tuscaloosa, the fifth largest city in Alabama. Because the community is within the three-mile police jurisdiction circumscribing Tuscaloosa's corporate limits, its residents are subject to the city's "police [and] sanitary regulations." Ala. Code § 11–40–10 (1975).[1] Holt residents are also subject to the criminal jurisdiction of the city's court, Ala. Code § 12–14–1 (1975),[2] and to the city's

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[1] The full text of § 11–40–10 provides:

"The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town.

"Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect in the limits of the city or town and in the police jurisdiction thereof and on any property or rights-of-way belonging to the city or town."

[2] "The municipal court shall have jurisdiction of all prosecutions for

power to license businesses, trades, and professions, Ala. Code § 11–51–91 (1975).[3] Tuscaloosa, however, may collect from businesses in the police jurisdiction only one-half of the license fee chargeable to similar businesses conducted within the corporate limits. *Ibid.*

In 1973 appellants, an unincorporated civic association and seven individual residents of Holt, brought this statewide class action in the United States District Court for the Northern District of Alabama,[4] challenging the constitutionality of these Alabama statutes. They claimed that the city's extraterritorial exercise of police powers over Holt residents, without a concomitant extension of the franchise on an equal footing with those residing within the corporate limits, denies resi-

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the breach of the ordinances of the municipality within its police jurisdiction." Ala. Code § 12–14–1 (b) (1975).

[3] In pertinent part § 11–51–91 provides:

"Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, that the amount of such licenses shall not be more than one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded . . . ."

Although not at issue here, Ala. Code § 11–52–8 (1975) imposes a duty on the municipal planning commission "to make and adopt a master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment, bear relation to the planning of such municipality." Under Ala. Code §§ 11–52–30 and 11–52–31 (1975), also not contested here, the municipal planning commission is required to adopt regulations governing the subdivision of land within its jurisdiction, which includes all land lying within five miles of the municipality's corporate limits and not located within the corporate limits of any other municipality.

[4] This suit was instituted prior to the 1975 recompilation of the Alabama Code. Other than minor stylistic changes, § 11–40–10 and § 11–51–91 are identical to their predecessors, Ala. Code, Tit. 37, §§ 9 and 733 (1958) respectively. Section 12–14–1 abolished the recorder's courts created under is predecessor, Ala. Code, Tit. 37, § 585 (1958), and replaced them with municipal courts having similar extraterritorial jurisdiction.

dents of the police jurisdiction rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court denied appellants' request to convene a three-judge court pursuant to 28 U. S. C. § 2281 (1970 ed.) and dismissed the complaint for failure to state a claim upon which relief could be granted. Characterizing the Alabama statutes as enabling Acts, the District Court held that the statutes lack the requisite statewide application necessary to convene a three-judge District Court. On appeal the Court of Appeals for the Fifth Circuit ordered the convening of a three-judge court, finding that the police jurisdiction statute embodies "'a policy of statewide concern.'" *Holt Civic Club* v. *Tuscaloosa,* 525 F. 2d 653, 655 (1975), quoting *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 94 (1935).

A three-judge District Court was convened, but appellants' constitutional claims fared no better on the merits. Noting that appellants sought a declaration that extraterritorial regulation is unconstitutional *per se* rather than an extension of the franchise to police jurisdiction residents, the District Court held simply that "[e]qual protection has not been extended to cover such contention." App. to Juris. Statement 2a. The court rejected appellants' due process claim without comment. Accordingly, appellees' motion to dismiss was granted.

Unsure whether appellants' constitutional attack on the Alabama statutes satisfied the requirements of 28 U. S. C. § 2281 (1970 ed.) for convening a three-judge district court, we postponed consideration of the jurisdictional issue until the hearing of the case on the merits. 435 U. S. 914 (1978). We now conclude that the three-judge court was properly convened and that appellants' constitutional claims were properly rejected.

I

Before its repeal,[5] 28 U. S. C. § 2281 (1970 ed.) required that a three-judge district court be convened in any case in

[5] Pub. L. 94–381, § 1, Aug. 12, 1976, 90 Stat. 1119.

which a preliminary or permanent injunction was sought to restrain "the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . ." Our decisions have interpreted § 2281 to require the convening of a three-judge district court "where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy." *Board of Regents* v. *New Left Education Project,* 404 U. S. 541, 542 (1972). Relying on *Moody* v. *Flowers,* 387 U. S. 97 (1967), appellees contend, and the original single-judge District Court held, that Alabama's police jurisdiction statutes lack statewide impact.

A three-judge court was improperly convened in *Moody* because the challenged state statutes had "limited application, concerning only a particular county involved in the litigation . . . ." *Id.,* at 104. In contrast, appellants' constitutional attack focuses upon a state statute that creates the statewide system under which Alabama cities exercise extraterritorial powers. In mandatory terms, the statute provides that municipal police and sanitary ordinances "*shall* have force and effect in the limits of the city or town *and in the police jurisdiction thereof* and on any property or rights-of-way belonging to the city or town." [6] Clearly, Alabama's police

[6] Ala. Code § 11–40–10 (1975) (emphasis added). The Alabama Supreme Court has recognized the mandatory nature of § 11–40–10. In *City of Leeds* v. *Town of Moody,* 294 Ala. 496, 319 So. 2d 242 (1975), the court rejected the contention that the city of Leeds had, by discontinuing police and fire protection in its police jurisdiction, "waived and relinquished its police jurisdiction over the area." *Id.,* at 502, 319 So. 2d, at 246. "Since a municipality cannot barter away a governmental power specifically delegated to it by the legislature, . . . it follows that it also cannot waive or relinquish such power." *Ibid.* See also *Trailway Oil Co.* v. *Mobile,* 271 Ala. 218, 224, 122 So. 2d 757, 762 (1960) ("[Section] 9 of Title 37 [now § 11–40–10], describing the territorial extent of the municipal police jurisdiction and the incidents thereof, and § 733 of Title 37 [now § 11–51–91],

jurisdiction statutes have statewide application. See, *e. g., Sailors* v. *Board of Education,* 387 U. S. 105, 107 (1967). That the named defendants are local officials is irrelevant where, as here, those officials are "functioning pursuant to a statewide policy and performing a state function." *Moody* v. *Flowers, supra,* at 102; *Spielman Motor Sales Co.* v. *Dodge, supra,* at 94–95. The convening of a three-judge District Court was proper.

II

Appellants' amended complaint requested the District Court to declare the Alabama statutes unconstitutional and to enjoin their enforcement insofar as they authorize the extraterritorial exercise of municipal powers. Seizing on the District Court's observation that "[appellants] do not seek extension of the franchise to themselves," appellants suggest that their complaint was dismissed because they sought the wrong remedy.

The unconstitutional predicament in which appellants assertedly found themselves could be remedied in only two ways: (1) the city's extraterritorial power could be negated by invalidating the State's authorizing statutes or (2) the right to vote in municipal elections could be extended to residents of the police jurisdiction. We agree with appellants that a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one. Under the Federal Rules of Civil Procedure "every final judgment shall grant the relief

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as amended, authorizing and regulating the fixing and collecting of licenses within the police jurisdiction of cities and towns, are general laws, and, as such, they are considered part of every municipal charter"); *Coursey* v. *City of Andalusia,* 24 Ala. App. 247, 247–248, 134 So. 671 (1931) ("Under the statute [§ 11–40–10] the police jurisdiction extends to all the adjoining territory within a mile and a half of the corporate limits of said city, and . . . ordinances of the city enforcing police or sanitary regulations . . . have force and effect not only in the limits of the city, but also in the police jurisdiction thereof").

to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54 (c). Thus, although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to redress of a meritorious claim. See, *e. g.*, 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice ¶ 54.62, pp. 1261–1265 (2d ed. 1976). But while a meritorious claim will not be rejected for want of a prayer for appropriate relief, a claim lacking substantive merit obviously should be rejected. We think it is clear from the pleadings in this case that appellants have alleged no claim cognizable under the United States Constitution.

A

Appellants focus their equal protection attack on § 11–40–10, the statute fixing the limits of municipal police jurisdiction and giving extraterritorial effect to municipal police and sanitary ordinances. Citing *Kramer* v. *Union Free School Dist.*, 395 U. S. 621 (1969), and cases following in its wake, appellants argue that the section creates a classification infringing on their right to participate in municipal elections. The State's denial of the franchise to police jurisdiction residents, appellants urge, can stand only if justified by a compelling state interest.

At issue in *Kramer* was a New York voter qualification statute that limited the vote in school district elections to otherwise qualified district residents who (1) either owned or leased taxable real property located within the district, (2) were married to persons owning or leasing qualifying property, or (3) were parents or guardians of children enrolled in a local district school for a specified time during the preceding year. Without deciding whether or not a State may in some circumstances limit the franchise to residents primarily interested in or primarily affected by the activities of a

given governmental unit, the Court held that the statute was not sufficiently tailored to meet that state interest since its classifications excluded many bona fide residents of the school district who had distinct and direct interests in school board decisions and included many residents whose interests in school affairs were, at best, remote and indirect.

On the same day, in *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), the Court upheld an equal protection challenge to a Louisiana law providing that only "property taxpayers" could vote in elections called to approve the issuance of revenue bonds by a municipal utility system. Operation of the utility system affected virtually every resident of the city, not just property owners, and the bonds were in no way financed by property tax revenue. Thus, since the benefits and burdens of the bond issue fell indiscriminately on property owner and nonproperty owner alike, the challenged classification impermissibly excluded otherwise qualified residents who were substantially affected by and directly interested in the matter put to a referendum. The rationale of *Cipriano* was subsequently called upon to invalidate an Arizona law restricting the franchise to property taxpayers in elections to approve the issuance of general obligation municipal bonds. *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970).

Appellants also place heavy reliance on *Evans* v. *Cornman,* 398 U. S. 419 (1970). In *Evans* the Permanent Board of Registry of Montgomery County, Md., ruled that persons living on the grounds of the National Institutes of Health (NIH), a federal enclave located within the geographical boundaries of the State, did not meet the residency requirement of the Maryland Constitution. Accordingly, NIH residents were denied the right to vote in Maryland elections. This Court rejected the notion that persons living on NIH grounds were not residents of Maryland:

> "Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state

> residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that 'fiction of a state within a state' was specifically rejected by this Court in *Howard* v. *Commissioners of Louisville,* 344 U. S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote." *Id.,* at 421–422.

Thus, because inhabitants of the NIH enclave were residents of Maryland and were "just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as their neighbors who live off the enclave," *id.,* at 426, the State could not deny them the equal right to vote in Maryland elections.

From these and our other voting qualifications cases a common characteristic emerges: The challenged statute in each case denied the franchise to individuals who were physically resident within the geographic boundaries of the governmental entity concerned. See, *e. g., Hill* v. *Stone,* 421 U. S. 289 (1975) (invalidating provision of the Texas Constitution restricting franchise on general obligation bond issue to *residents* who had "rendered" or listed real, mixed, or personal property for taxation in the election district); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966) (invalidating Virginia statute conditioning the right to vote of otherwise qualified *residents* on payment of a poll tax); cf. *Turner* v. *Fouche,* 396 U. S. 346 (1970) (invalidating Georgia statute restricting county school board membership to *residents* owning real property in the county). No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its

borders. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 343–344 (1972); *Evans* v. *Cornman, supra,* at 422; *Kramer* v. *Union Free School Dist.,* 395 U. S., at 625; *Carrington* v. *Rash,* 380 U. S. 89, 91 (1965); *Pope* v. *Williams,* 193 U. S. 621 (1904). Bona fide residence alone, however, does not automatically confer the right to vote on all matters, for at least in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election. See *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.,* 410 U. S. 719 (1973); *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement Dist.,* 410 U. S. 743 (1973).

Appellants' argument that extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the franchise proves too much. The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders. The granting of building permits for high rise apartments, industrial plants, and the like on the city's fringe unavoidably contributes to problems of traffic congestion, school districting, and law enforcement immediately outside the city. A rate change in the city's sales or ad valorem tax could well have a significant impact on retailers and property values in areas bordering the city. The condemnation of real property on the city's edge for construction of a municipal garbage dump or waste treatment plant would have obvious implications for neighboring nonresidents. Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by Alabama's police jurisdiction statutes. Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about. And unless one adopts the idea that the

Austinian notion of sovereignty, which is presumably embodied to some extent in the authority of a city over a police jurisdiction, distinguishes the direct effects of limited municipal powers over police jurisdiction residents from the indirect though equally dramatic extraterritorial effects of purely internal municipal actions, it makes little sense to say that one requires extension of the franchise while the other does not.

Given this country's tradition of popular sovereignty, appellants' claimed right to vote in Tuscaloosa elections is not without some logical appeal. We are mindful, however, of Mr. Justice Holmes' observation in *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908):

> "All rights tend to declare themselve absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."

The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants' case, like their homes, falls on the farther side.

B

Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose. *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1 (1973). "The Fourteenth Amendment does not prohibit legislation merely be-

cause it is special, or limited in its application to a particular geographical or political subdivision of the state." *Fort Smith Light Co.* v. *Paving Dist.*, 274 U. S. 387, 391 (1927). Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

Government, observed Mr. Justice Johnson, "is the science of experiment," *Anderson* v. *Dunn*, 6 Wheat. 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State "as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178 (1907). See also, *e. g.*, *Sailors* v. *Board of Education*, 387 U. S., at 108; *Reynolds* v. *Sims*, 377 U. S. 533, 575 (1964). In *Hunter* v. *Pittsburgh*, the Court discussed at length the relationship between a State and its political subdivisions, remarking: "The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." 207 U. S., at 178. While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer* v. *Union Free School Dist.*, *supra*, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.[7]

[7] In this case residents of the police jurisdiction are excluded only from participation in municipal elections since they reside outside of Tuscaloosa's corporate limits. This "denial of the franchise," as appellants put it, does not have anything like the far-reaching consequences of the denial

The extraterritorial exercise of municipal powers is a governmental technique neither recent in origin nor unique to the State of Alabama. See R. Maddox, Extraterritorial Powers of Municipalities in the United States (1955). In this country 35 States authorize their municipal subdivisions to exercise governmental powers beyond their corporate limits. Comment, The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities, 45 U. Chi. L. Rev. 151 (1977). Although the extraterritorial municipal powers granted by these States vary widely, several States grant their cities more extensive or intrusive powers over bordering areas than those granted under the Alabama statutes.[8]

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of the franchise in *Evans* v. *Cornman*, 398 U. S. 419 (1970). There the Court pointed out that "[i]n nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents." *Id.*, at 426. Treatment of the plaintiffs in *Evans* as nonresidents of Maryland had repercussions not merely with respect to their right to vote in city elections, but with respect to their right to vote in national, state, school board, and referendum elections.

[8] Municipalities in some States have almost unrestricted governmental powers over surrounding unincorporated territories. For example, South Dakota cities

"have power to exercise jurisdiction for all authorized purposes over all territory within the corporate limits . . . and in and over all places, except within the corporate limits of another municipality, within one mile of the corporate limits or of any public ground or park belonging to the municipality outside the corporate limits, for the purpose of promoting the health, safety, morals, and general welfare of the community, and of enforcing its ordinances and resolutions relating thereto." S. D. Comp. Laws Ann. § 9–29–1 (1967).

North Dakota's statutory grant of extraterritorial municipal powers is similarly broad:

"Except as otherwise provided by law, a governing body of a municipality shall have jurisdiction:

. . . . . .

"2. In and over all places within one-half mile of the municipal limits for the purpose of enforcing health and quarantine ordinances and regulations and police regulations and ordinances adopted to promote the peace,

In support of their equal protection claim, appellants suggest a number of "constitutionally preferable" governmental alternatives to Alabama's system of municipal police jurisdictions. For example, exclusive management of the police jurisdiction by county officials, appellants maintain, would be more "practical." From a political science standpoint, appellants' suggestions may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or

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order, safety, and general welfare of the municipality." N. D. Cent. Code § 40–06–01 (2) (1968).

Cities in many States are statutorily authorized to zone extraterritorially, see, *e. g.*, Ariz. Rev. Stat. Ann. § 9–240–B–21 (c) (1977); Mich. Comp. Laws § 125.36 (1970); N. D. Cent. Code § 11–35–02 (1976), a power not afforded Alabama municipalities. See *Roberson* v. *City of Montgomery*, 285 Ala. 421, 233 So. 2d 69 (1970).

By setting forth these various state provisions respecting extraterritorial powers of cities, we do not mean to imply that every one of them would pass constitutional muster. We do not have before us, of course, a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits. See *Little Thunder* v. *South Dakota*, 518 F. 2d 1253 (CA8 1975). Nor do we have here a case like *Evans* v. *Cornman*, *supra*, where NIH residents were subject to such "important aspects of state powers" as Maryland's authority "to levy and collect [its] income, gasoline, sales, and use taxes" and were "just as interested in and connected with electoral decisions as . . . their neighbors who live[d] off the enclave." 398 U. S., at 423, 424, 426.

Appellants have made neither an allegation nor a showing that the authority exercised by the city of Tuscaloosa within the police jurisdiction is no less than that exercised by the city within its corporate limits. The minute catalog of ordinances of the city of Tuscaloosa which have extraterritorial effect set forth by our dissenting Brethren, *post*, at 82–84, n. 10, is as notable for what it does not include as for what it does. While the burden was on appellants to establish a difference in treatment violative of the Equal Protection Clause, we are bound to observe that among the powers *not* included in the "addendum" to appellants' brief referred to by the dissent are the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses.

most practical form of internal government possible. Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body. See, *e. g., Hunter* v. *Pittsburgh,* 207 U. S., at 179. Our inquiry is limited to the question whether "any state of facts reasonably may be conceived to justify" Alabama's system of police jurisdictions, *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.,* 410 U. S., at 732, and in this case it takes but momentary reflection to arrive at an affirmative answer.

The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. Urbanization of any area brings with it a number of individuals who long both for the quiet of suburban or country living and for the career opportunities offered by the city's working environment. Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection. Established cities are experienced in the delivery of such services, and the incremental cost of extending the city's responsibility in these areas to surrounding environs may be substantially less than the expense of establishing wholly new service organizations in each community.

Nor was it unreasonable for the Alabama Legislature to require police jurisdiction residents to contribute through license fees to the expense of services provided them by the city. The statutory limitation on license fees to half the amount exacted within the city assures that police jurisdiction residents will not be victimized by the city government.

"Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Sailors* v. *Board of Education,* 387 U. S., at 110–111. This observation in *Sailors* was doubtless as true at the turn of this century, when urban areas throughout the country were temporally closer to the effects of the industrial revolution. Alabama's police jurisdiction statute, enacted in 1907, was a rational legislative response to the problems faced by the State's burgeoning cities. Alabama is apparently content with the results of its experiment, and nothing in the Equal Protection Clause of the Fourteenth Amendment requires that it try something new.

C

Appellants also argue that "governance without the franchise is a fundamental violation of the due process clause." Brief for Appellants 28. Support for this proposition is alleged to come from *United States* v. *Texas,* 252 F. Supp. 234 (WD Tex.) (three-judge District Court), summarily aff'd, 384 U. S. 155 (1966), which held that conditioning the franchise of *otherwise qualified voters* on payment of a poll tax denied due process to many Texas voters. Appellants' argument proceeds from the assumption, earlier shown to be erroneous, *supra,* at 66–70, that they have a right to vote in Tuscaloosa elections. Their conclusion falls with their premise.

III

In sum, we conclude that Alabama's police jurisdiction statutes violate neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment. Accordingly, the judgment of the District Court is

Affirmed.

MR. JUSTICE STEVENS, concurring.

The Court today holds that the Alabama statutes providing for the extraterritorial exercise of certain limited powers by

municipalities are not unconstitutional. While I join the opinion of the Court, I write separately to emphasize that this holding does not make all exercises of extraterritorial authority by a municipality immune from attack under the Equal Protection Clause of the Fourteenth Amendment.

The Alabama Legislature, which is elected by all of the citizens of the State including the individual appellants, has prescribed a statewide program pursuant to which residents of police jurisdictions are subject to limited regulation by, and receive certain services from, adjacent cities. In return, those residents who are engaged in business are charged license fees equal to one-half those charged to city businesses. In my view, there is nothing necessarily unconstitutional about such a system. Certainly there is nothing in the Federal Constitution to prevent a suburb from contracting with a nearby city to provide municipal services for its residents, even though those residents have no voice in the election of the city's officials or in the formulation of the city's rules. That is essentially what Alabama has accomplished here, through the elected representatives of all its citizens in the state legislature.[1]

Of course, in structuring a system, neither a contracting suburb nor an enacting legislature can consent to a waiver of the constitutional rights of its constituents in the election process. For "when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process." *Avery* v. *Midland County,* 390 U. S. 474, 480.

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[1] I recognize that there is a difference between a suburb's decision to contract with a nearby city and a decision by the state legislature requiring all suburbs to do so. In some situations that difference might justify a holding that a particular extraterritorial delegation of power is unconstitutional. It does not, however, justify the view that all such delegations are invalid.

But the fact that these appellants are subject to certain regulations of the municipality does not itself establish that they are "qualified to vote." Unlike the residents of the National Institutes of Health enclave at issue in *Evans* v. *Cornman,* 398 U. S. 419, appellants are not without any voice in the election of the officials who govern their affairs. They do vote for the county, state, and federal officials who exercise primary control over their day-to-day lives. And even as to their interaction with the government of the city, appellants are not completely without a voice: through their state representatives, they participate directly in the process which has created their governmental relationship with the city. The question then is whether by virtue of that relationship created by state law, the residents of Holt and all other police jurisdictions in the State are entitled to a voice "equally effective" with the residents of the municipalities themselves in the election of the officials responsible for governing the municipalities.

In my judgment, they are not. A State or city is free under the Constitution to require that "all applicants for the vote actually fulfill the requirements of bona fide residence." *Carrington* v. *Rash,* 380 U. S. 89, 96. While it is not free to draw residency lines which deny the franchise to individuals who "are just as interested in and connected with electoral decisions . . . as are their neighbors" who are entitled to vote, *Evans* v. *Cornman, supra,* at 426, the Alabama statutes, at least on their face, do not do so. The powers of extraterritorial jurisdiction granted by the challenged statutes are limited. Tuscaloosa, for example, does not tax the residents of Holt, nor does it control the zoning of their property or the operation of their schools. Indeed, many of the powers traditionally exercised by municipalities—the provision of parks, hospitals, schools, and libraries and the construction and repair of bridges and highways—are entrusted here to the county government, which is fully representative of Holt. Nor is

there any claim that residency lines have generally been drawn invidiously or that residents of the police jurisdictions have been charged unreasonable costs for the services they receive. In sum, appellants have shown no more than that they and all residents of police jurisdictions in Alabama are subject to some—but by no means all—of the regulations and services afforded by the cities to their residents, in return for which they pay license fees half as great as those paid by city residents. Such a showing is plainly insufficient to justify a holding that the Alabama statutes are unconstitutional and cannot be applied anywhere in the State.

This is all that the Court decides today. For this suit was brought under the then-applicable three-judge-court jurisdiction as a challenge to the constitutionality of the Alabama statutes.[2] Appellants did not merely challenge the statutes as applied in the Tuscaloosa police jurisdiction. Rather, they sought to represent all Alabama residents living in contiguous zones, and to have the statutes at issue here declared unconstitutional in all their applications throughout the State. It was for this very reason that the Court of Appeals for the Fifth Circuit concluded that three-judge-court jurisdiction was proper in this case. See *Holt Civic Club* v. *Tuscaloosa,* 525 F. 2d 653, 655 (1975). And it is for this reason that our holding is necessarily a limited one. The statutory scheme created by the Alabama Legislature is not unconstitutional by its terms, but it may well be, as the opinion of the Court recognizes, *ante,* at 72–73, n. 8, that that scheme or another much like it might sometimes operate to deny the franchise to individuals who share the interests of their voting neighbors. No such question, however, is presented by this appeal from the decision of the three-judge District Court. See *Moody* v.

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[2] 28 U. S. C. § 2281 (1970 ed.), repealed by Pub. L. 94–381, § 1, Aug. 12, 1976, 90 Stat. 1119.

Flowers, 387 U. S. 97; *Rorick* v. *Board of Comm'rs,* 307 U. S. 208.

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

Alabama creates by statute an area of "police jurisdiction" encompassing all adjoining territory within three miles of the corporate limits of cities with a population of 6,000 or more. Within this police jurisdiction Alabama law provides that "[o]rdinances of a city . . . enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect . . . ." Ala. Code § 11–40–10 (1975).[1] Alabama law provides in addition that a city "may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city . . . provided, that the amount of such licenses shall not be more than one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city . . . ." Ala. Code § 11–51–91 (1975).[2] At the time this lawsuit commenced on August 7, 1973, Alabama vested jurisdiction of the prosecution of breaches of municipal ordinances occurring within a police jurisdiction in a recorder's court,[3] the recorder being elected by a city's board of commissioners. Ala. Code, Tit. 37, § 584 (1958).[4]

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[1] At the time this lawsuit commenced, this statute was codified at Ala. Code, Tit. 37, § 9 (1958).

[2] At the time appellants filed their complaint, this statute was found at Ala. Code, Tit. 37, § 733 (1958). Minor changes in wording were effected during recodification.

[3] Alabama Code, Tit. 37, § 585 (1958) provided:

"It shall be the duty of the recorder to keep an office in the city, and hear and determine all cases for the breach of the ordinances and by-laws of the city that may be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested

[*Footnote 4 is on p. 80*]

Appellants are the Holt Civic Club and seven residents of the unincorporated community of Holt, which lies within the police jurisdiction of the city of Tuscaloosa, Ala.[5] Although appellants are thus subject to Tuscaloosa's police and sanitary ordinances, to the jurisdiction of its municipal court,[6] and to the requirements of its licensing fees, appellants are not permitted to vote in Tuscaloosa's municipal elections, or to participate in or to initiate Tuscaloosa's referenda or recall elections. Appellants claim that this disparity "infringes on their constitutional right (under the due process and equal protection clauses) to a voice in their government." Complaint ¶ 11. The three-judge District Court below dismissed appellants' equal protection and due process claims.[7] Without reaching the due process issue, I would reverse the judgment of the District Court and hold that appellants' equal protection claim should have been sustained.

It is, of course, established that once a "franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 665 (1966). Because "statutes distributing the franchise

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with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. . . ."

[4] On December 27, 1973, recorder's courts were abolished in Alabama and replaced by municipal courts having virtually identical jurisdiction. See Ala. Code § 12–14–1 (1975). Municipal judges "shall be appointed and vacancies filled by the governing body of the municipality . . . ." Ala. Const., Amdt. No. 328, § 6.065.

[5] Tuscaloosa contains 65,773 residents, while the police jurisdiction surrounding the city contains between 16,000 and 17,000 residents. See App. 17–19.

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

[7] The court granted appellants leave "to further amend within 45 days to specify particular ordinances of the City of Tuscaloosa which are claimed to deprive plaintiffs of liberty or property."

constitute the foundation of our representative society," *Kramer* v. *Union Free School Dist.*, 395 U. S. 621, 626 (1969), we have subjected such statutes to "exacting judicial scrutiny." *Id.*, at 628.[8] Indeed, "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' [*Kramer* v. *Union Free School Dist.*, 395 U. S.,] at 627 (emphasis added)." *Dunn* v. *Blumstein*, 405 U. S. 330, 337 (1972). The general rule is that "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ." *Hadley* v. *Junior College Dist.*, 397 U. S. 50, 56 (1970).

Our decisions before today have held that bona fide residency requirements are an acceptable means of distinguishing qualified from unqualified voters. *Dunn* v. *Blumstein, supra,* at 343. The Court holds today, however, that the restriction of the franchise to those residing within the corporate limits of the city of Tuscaloosa is such a bona fide residency requirement. The Court rests this holding on the conclusion that "a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Ante,* at 68–69. The Court thus insulates the Alabama statutes challenged in this case from the strict judicial scrutiny ordinarily applied to state laws distributing the franchise. In so doing, the Court cedes to geography a talismanic significance contrary to the theory and meaning of our past voting-rights cases.

We have previously held that when statutes distributing the franchise depend upon residency requirements, state-law

[8] "[S]tatutes structuring local government units receive no less exacting an examination merely because the state legislature is fairly elected. See *Avery* v. *Midland County*, 390 U. S. 474, 481 n. 6 (1968)." *Kramer* v. *Union Free School Dist.*, 395 U. S., at 628 n. 10.

characterizations of residency are not controlling for purposes of the Fourteenth Amendment. See, *e. g., Evans* v. *Cornman,* 398 U. S. 419 (1970); *Carrington* v. *Rash,* 380 U. S. 89 (1965). Indeed, *Dunn* v. *Blumstein, supra,* was careful to exempt from strict judicial scrutiny only bona fide residency requirements that were "appropriately defined and uniformly applied." 405 U. S., at 343. The touchstone for determining whether a residency requirement is "appropriately defined" derives from the purpose of such requirements, which, as stated in *Dunn,* is "to preserve the basic conception of a political community." *Id.,* at 344. At the heart of our basic conception of a "political community," however, is the notion of a reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application.[9] Cf. *Avery* v. *Midland County,* 390 U. S. 474, 485 (1968). Statutes such as those challenged in this case, which fracture this relationship by severing the connection between the process of government and those who are governed in the places of their residency, thus undermine the very purposes which have led this Court in the past to approve the application of bona fide residency requirements.

There is no question but that the residents of Tuscaloosa's police jurisdiction are governed by the city.[10] Under Ala-

[9] The Court apparently accepts this proposition by strongly implying, *ante,* at 73 n. 8, that "a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits" would not "pass constitutional muster."

[10] Appellants have included in their brief an unchallenged addendum listing the ordinances of the city of Tuscaloosa, Code of Tuscaloosa (1962, Supplemented 1975), that have application in its police jurisdiction:

"*Licenses:*

4–1 ambulance

9–4, 9–18, 9–33 bottle dealers

[*Footnote 10 is continued on p. 83*]

bama law, a municipality exercises "governing" and "law-making" power over its police jurisdiction. *City of Homewood* v. *Wofford Oil Co.*, 232 Ala. 634, 637, 169 So. 288, 290 (1936). Residents of Tuscaloosa's police jurisdiction are sub-

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19–1 junk dealers
20–5 general business license ordinance
20–67 florists
20–102 hotels, motels, etc.
20–163 industry
"*Buildings:*
10–1 inspection service enforces codes
10–10 regulation of dams
10–21 Southern Standard Building Code adopted
10–25 building permits
13–3 National Electrical Code adopted
14–23 Fire Prevention Code adopted
14–65 regulation of incinerators
14–81 discharge of cinders
Chapter 21A mobile home parks
25–1 Southern Standard Plumbing Code adopted
33–79 disposal of human wastes
33–114, 118 regulation of wells
"*Public Health:*
5–4 certain birds protected
5–4C, 42, 55 dogs running at large and bitches in heat prohibited
14–4 no smoking on buses
14–15 no self-service gas stations
15–2 regulation of sale of produce from trucks
15–4 food establishments to use public water supply
15–16 food, meat, milk inspectors
15–37 thru 40 regulates boardinghouses
15–52 milk code adopted
17–5 mosquito control
"*Traffic Regulations:*
22–2 stop & yield signs may be erected by chief of police
22–3 mufflers required
22–4 brakes required
22–5 inspection of vehicle by police
22–6 operation of vehicle

[*Footnote 10 is continued on p. 84*]

ject to license fees exacted by the city, as well as to the city's police and sanitary regulations, which can be enforced through penal sanctions effective in the city's municipal court. See *Birmingham* v. *Lake*, 243 Ala. 367, 372, 10 So. 2d 24, 28 (1942). The Court seems to imply, however, that residents of the police jurisdiction are not governed enough to be included within the political community of Tuscaloosa, since they are not subject to Tuscaloosa's powers of eminent domain, zoning,

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22–9 hitchhiking in roadway prohibited
22–9.1 permit to solicit funds on roadway
22–11 impounding cars
22–14 load limit on bridges
22–15 police damage stickers required after accident
22–25 driving while intoxicated
22–26 reckless driving
22–27 driving without consent of owner
22–33 stop sign
22–34 yield sign
22–38 driving across median
22–40 yield to emergency vehicle
22–42 cutting across private property
22–54 general speed limit
22–72 thru 78 truck routes
"*Criminal Ordinances:*
23–1 adopts all state misdemeanors
23–7.1 no wrecked cars on premises
23–15 nuisances
23–17 obscene literature
23–20 destruction of plants
23–37 swimming in nude
23–38 trespass to boats
26–51 no shooting galleries in the police jurisdiction or outside fire limits (downtown area)
28–31 thru 39 obscene films
"*Miscellaneous:*
20–120 thru 122 cigarette tax
24–31 public parks and recreation
26–18 admission tax
Chapter 29 regulates public streets
30–23 taxis must have meters."

or ad valorem taxation. *Ante,* at 73 n. 8. But this position is sharply contrary to our previous holdings. In *Kramer* v. *Union Free School Dist.,* 395 U. S. 621 (1969), for example, we held that residents of a school district who neither owned nor leased taxable real property located within the district, or were not married to someone who did, or were not parents or guardians of children enrolled in a local district school, nevertheless were sufficiently affected by the decisions of the local school board to make the denial of their franchise in local school board elections a violation of the Equal Protection Clause. Similarly, we held in *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), that a Louisiana statute limiting the franchise in municipal utility system revenue bond referenda to those who were "property taxpayers" was unconstitutional because all residents of the municipality were affected by the operation of the utility system. See *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970).

The residents of Tuscaloosa's police jurisdiction are vastly more affected by Tuscaloosa's decisionmaking processes than were the plaintiffs in either *Kramer* or *Cipriano* affected by the decisionmaking processes from which they had been unconstitutionally excluded. Indeed, under Alabama law Tuscaloosa's authority to create and enforce police and sanitary regulations represents an extensive reservoir of power "to prevent, an anticipation of danger to come, . . . and in so doing to curb and restrain the individual tendency." *Gilchrist Drug Co.* v. *Birmingham,* 234 Ala. 204, 208, 174 So. 609, 612 (1937). See *Cooper* v. *Town of Valley Head,* 212 Ala. 125, 126, 101 So. 874, 875 (1924). A municipality, for example, may use its police powers to regulate, or even to ban, common professions and businesses. "In the exertion and application of the police power there is to be observed the sound distinction as to useful and harmless trades, occupations and businesses and as to businesses, occupations and trades recognized as hurtful to public morals, public safety,

productive of disorder or injurious to public good. In applying it to the class last mentioned it may be exerted to destroy." *Chappell* v. *Birmingham,* 236 Ala. 363, 365, 181 So. 906, 907 (1938). The Court today does not explain why being subjected to the authority to exercise such extensive power does not suffice to bring the residents of Tuscaloosa's police jurisdiction within the political community of the city. Nor does the Court in fact provide any standards for determining when those subjected to extraterritorial municipal legislation will have been "governed enough" to trigger the protections of the Equal Protection Clause.

The criterion of geographical residency relied upon by the Court is of no assistance in this analysis. Just as a State may not fracture the integrity of a political community by restricting the franchise to property taxpayers, so it may not use geographical restrictions on the franchise to accomplish the same end. This is the teaching of *Evans* v. *Cornman. Evans* held, contrary to the conclusion of the Maryland Court of Appeals, that those who lived on the grounds of the National Institutes of Health (NIH) enclave within Montgomery County were residents of Maryland for purposes of the franchise. Our decision rested on the grounds that inhabitants of the enclave were "treated as state residents in the census and in determining congressional apportionment," 398 U. S., at 421, and that "residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave." *Id.,* at 426. Residents of Tuscaloosa's police jurisdiction are assuredly as "interested in and connected with" the electoral decisions of the city as were the inhabitants of the NIH enclave in the electoral decisions of Maryland. True, inhabitants of the enclave lived "within the geographical boundaries of the State of Maryland," but appellants in this case similarly reside within the geographical boundaries of Tus-

caloosa's police jurisdiction. They live within the perimeters of the city's "legislative powers." *City of Leeds* v. *Town of Moody,* 294 Ala. 496, 501, 319 So. 2d 242, 246 (1975).

The criterion of geographical residency is thus entirely arbitrary when applied to this case. It fails to explain why, consistently with the Equal Protection Clause, the "government unit" which may exclude from the franchise those who reside outside of its geographical boundaries should be composed of the city of Tuscaloosa rather than of the city together with its police jurisdiction. It irrationally distinguishes between two classes of citizens, each with equal claim to residency (insofar as that can be determined by domicile or intention or other similar criteria), and each governed by the city of Tuscaloosa in the place of their residency.

The Court argues, however, that if the franchise were extended to residents of the city's police jurisdiction, the franchise must similarly be extended to all those indirectly affected by the city's actions. This is a simple non sequitur. There is a crystal-clear distinction between those who reside in Tuscaloosa's police jurisdiction, and who are therefore subject to that city's police and sanitary ordinances, licensing fees, and the jurisdiction of its municipal court, and those who reside in neither the city nor its police jurisdiction, and who are thus merely affected by the indirect impact of the city's decisions. This distinction is recognized in Alabama law, cf. *Roberson* v. *City of Montgomery,* 285 Ala. 421, 233 So. 2d 69 (1970), and is consistent with, if not mandated by, the very conception of a political community underlying constitutional recognition of bona fide residency requirements.

Appellants' equal protection claim can be simply expressed: The State cannot extend the franchise to some citizens who are governed by municipal government in the places of their residency, and withhold the franchise from others similarly situated, unless this distinction is necessary to promote a compelling state interest. No such interest has been articu-

lated in this case. Neither Tuscaloosa's interest in regulating "activities carried on just beyond [its] 'city limit' signs," *ante,* at 74, nor Alabama's interest in providing municipal services to the unincorporated communities surrounding its cities, *ibid.,* are in any way inconsistent with the extension of the franchise to residents of Tuscaloosa's police jurisdiction. Although a great many States may presently authorize the exercise of extraterritorial lawmaking powers by a municipality,[11] and although the Alabama statutes involved in this case may be of venerable age, neither of these factors, as *Reynolds* v. *Sims,* 377 U. S. 533 (1964), made clear, can serve to justify practices otherwise impermissible under the Equal Protection Clause of the Fourteenth Amendment.

Therefore, since the statutes challenged by appellants distinguish among otherwise qualified voters without a compelling justification, I would reverse the judgment of the District Court and hold the challenged statutes to be in violation of the Equal Protection Clause.

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[11] See Comment, The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities, 45 U. Chi. L. Rev. 151 (1977).

UNION PACIFIC RAILROAD CO. *v.* SHEEHAN

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

No. 78–344. Decided December 4, 1978

The National Railroad Adjustment Board's determination that respondent railroad employee had not filed his appeal to the Board from his allegedly wrongful discharge by petitioner within the time prescribed by the governing collective-bargaining agreement was final and binding upon the parties under § 3 First (q) of the Railway Labor Act, and neither the District Court nor the Court of Appeals had authority to disturb such decision.

Certiorari granted; 576 F. 2d 854, reversed.

PER CURIAM.

Petitioner, the Union Pacific Railroad Co., discharged respondent for violating one of its employee work rules. Respondent thereupon began an action in state court alleging wrongful discharge and denial of a fair hearing. While that claim was pending in state court, we decided *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S. 320 (1972), overruling *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 (1941). *Andrews* held that a railroad employee alleging a violation of a collective-bargaining agreement must submit such a dispute to the National Railroad Adjustment Board for resolution in accordance with the provisions of the Railway Labor Act, 44 Stat. (part 2) 577, as amended, 45 U. S. C. §§ 151–188. Following our decision in *Andrews*, respondent and Union Pacific stipulated to dismissal of the state-court suit and the case was dismissed without prejudice. Respondent then instituted a proceeding before the Adjustment Board. After full written submissions by both parties and two hearings, the Adjustment Board dismissed respondent's claim because he had failed to file his appeal to the Adjustment Board within the time limits prescribed by the collective-bargaining agreement.

After the Adjustment Board dismissed his claim, respondent filed a complaint in the United States District Court for the District of Utah, seeking an order directing the Adjustment Board to hear the merits of his case, or, in the alternative, for reinstatement and a money judgment. Jurisdiction in the District Court was based upon § 3 First (q) of the Act, 45 U. S. C. § 153 First (q).[1] Respondent claimed that the time requirements of the collective-bargaining agreement were tolled during the pendency of his state-court action and that the Adjustment Board should be required to hear and decide his claim on the merits. While admitting that respondent had "persuasively argued for tolling the time limits," the District Court nonetheless affirmed the Adjustment Board's order and awarded summary judgment to petitioner. The court held that respondent had failed to demonstrate the existence of any of the grounds for reversal of an Adjustment Board decision set forth in § 153 First (q), and that there was no

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[1] Section 153 First (q) provides, in pertinent part:

"If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28."

"legal principle under which it [could] grant [respondent] relief without violating the provisions of the Railway Labor Act." 423 F. Supp. 324, 329 (1976).

The Court of Appeals for the Tenth Circuit reversed the District Court and remanded the case to the Adjustment Board. 576 F. 2d 854 (1978). At the beginning of its opinion, the court stated:

> "The real issue here is whether the Board's determination that it lacked jurisdiction because of non-compliance with the limitations in the modified collective bargaining agreement deprived Sheehan of his due process rights.
>
> "We conclude the Board's failure to address the merits of plaintiff Sheehan's claim denied him due process. . . ." *Id.*, at 855–856.

The court then canvassed prior decisions concerning the Railway Labor Act, and recognized that these cases had established that the scope of judicial review of Adjustment Board decisions is "among the narrowest known to the law." Nonetheless, the court believed it "possible" that the extent of judicial review of *"purely legal issues"* decided by the Adjustment Board should be re-examined in light of the "implications arising from, and the developments since" our decision in *Andrews*. 576 F. 2d, at 856. The court then concluded as follows:

> "As the district court noted, a persuasive argument can be made for the tolling of time limits. The court in *Andrews* expressed the view that an agreement under the Railway Labor Act was a federal contract governed and enforceable by federal law in the federal courts. . . . The applicability of equitable tolling to the agreement in question is not in doubt. While we do not pass on the merits of the tolling issue, we hold the failure of the Board to consider tolling under these circumstances de-

prived Sheehan of an opportunity to be heard in violation of his right to due process." *Id.*, at 857.[2]

If the Court of Appeals' remand was based on its view that the Adjustment Board had failed to consider respondent's equitable tolling argument, the court was simply mistaken. The record shows that respondent tendered the tolling claim to the Adjustment Board, which considered it and explicitly rejected it. App. to Pet. for Cert. 22.[3] If, on the other hand,

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[2] The Court of Appeals rejected respondent's request for attorney's fees because 45 U. S. C. § 153 First (q), the section on which jurisdiction in the District Court was premised, does not provide for an award of attorney's fees. 576 F. 2d, at 857–858. In his brief in opposition to the petition for a writ of certiorari, respondent urges this Court to reverse the decision of the Court of Appeals on the issue of attorney's fees and to award him attorney's fees incurred in this Court and the courts below. The question whether the Court of Appeals correctly rejected respondent's claim for attorney's fees is not properly before the Court since respondent did not file a cross-petition for certiorari. *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976); see *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 n. 4 (1970). And we reject respondent's request for attorney's fees in this Court. He bases his claim for fees in this Court upon 45 U. S. C. § 153 First (p). Without passing upon the propriety of respondent's reliance on subsection (p), it is sufficient to state that this subsection authorizes an award of attorney's fees only if the "petitioner shall finally prevail" and that in view of our holding today, respondent has failed to triumph.

[3] In support of its dismissal of respondent's appeal, the Adjustment Board stated:

"Nor do we agree with [respondent] that the time limits did not commence running until the Utah court dismissed claimant's breach of contract suit in November, 1972. Filing of the civil suit did not have the effect of obviating the time limits in the [collective-bargaining] Agreement. When claimant decided to pursue his remedies with this Board he was obligated to do so in the manner prescribed in the applicable Agreement in effect on the property. Since he failed to comply with the time limits of the Agreement, we have no standing to decide the merits of the claim and we are constrained to dismiss the claim for non compliance [*sic*] with the applicable time limits." App. to Pet. for Cert. 22.

the Court of Appeals intended to reverse the Adjustment Board's rejection of respondent's equitable tolling argument, the court exceeded the scope of its jurisdiction to review decisions of the Adjustment Board.

Judicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U. S. C. § 153 First (q). Only upon one or more of these bases may a court set aside an order of the Adjustment Board. See *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S., at 325; *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U. S. 33, 38 (1963). There is no suggestion of fraud or corruption here. And the Adjustment Board certainly was acting within its jurisdiction and in conformity with the requirements of the Act by determining the question of whether the time limitation of the governing collective-bargaining agreement was tolled by the filing of respondent's state-court action. Respondent does not contend otherwise. Accordingly, we agree with the District Court that respondent simply failed to demonstrate the existence of any of the grounds for review set forth in § 153 First (q).

Characterizing the issue presented as one of law, as the Court of Appeals seemed to do here, does not alter the availability or scope of judicial review: The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) unequivocally states that the "findings and order of the [Adjustment Board] shall be conclusive on the parties" and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. See, *e. g.*, *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257, 263 (1965);

Locomotive Engineers v. *Louisville & Nashville R. Co., supra,* at 38; *Union Pacific R. Co.* v. *Price,* 360 U. S. 601, 616 (1959). And nothing in our opinion in *Andrews* suggests otherwise. The determination by the Adjustment Board that respondent had failed to file his appeal within the time limits prescribed by the governing collective-bargaining agreement is one which falls within the above-quoted language precluding judicial review.

A contrary conclusion would ignore the terms, purposes and legislative history of the Railway Labor Act. In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. See *Gunther* v. *San Diego & A. E. R. Co., supra; Union Pacific R. Co.* v. *Price, supra; Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239 (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co.* v. *Price, supra,* at 611; *Elgin J. & E. R. Co.* v *Burley,* 327 U S. 661, 664 (1946). Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. *Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U. S. 30, 40 (1957). The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. *Union Pacific R. Co.* v. *Price, supra,* at 613–614. Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.

The Adjustment Board determined that respondent had not filed his appeal within the time requirements of the collective-bargaining agreement. That decision is final and binding upon the parties, and neither the District Court nor the Court of Appeals had authority to disturb it. The motion of the respondent for leave to proceed *in forma pauperis* and the petition for certiorari are therefore granted, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur in the result.

NEW MOTOR VEHICLE BOARD OF CALIFORNIA ET AL. *v.* ORRIN W. FOX CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 77–837. Argued October 3–4, 1978—Decided December 5, 1978*

The California Automobile Franchise Act (Act) requires an automobile manufacturer to obtain approval of the California New Motor Vehicle Board (Board) before opening or relocating a retail dealership within the market area of an existing franchisee if the latter protests, and the Act also directs the Board to notify the manufacturer of such requirement upon the existing franchisee's filing of a protest. The Board is not required to hold a hearing on the merits of the protest before sending the notice to the manufacturer. Appellee manufacturer and proposed new and relocated franchisees, after being notified pursuant to the Act of protests from existing franchisees and before any hearings were held, brought suit challenging the constitutionality of the statutory scheme on due process grounds. A three-judge District Court held that the absence of a prior hearing requirement denied manufacturers and their proposed franchisees the procedural due process mandated by the Fourteenth Amendment. *Held:*

1. The statutory scheme does not violate due process. Pp. 104–108.

(a) The Act does not have the effect of affording a protesting dealership a summary administrative adjudication in the form of a notice tantamount to a temporary injunction restraining the manufacturer's exercise of its right to franchise at will. The Board's notice has none of the attributes of an injunction but serves only to inform the manufacturer of the statutory scheme and of the status, pending the Board's determination, of its franchise permit application. Pp. 104–105.

(b) Nor can the Board's notice be characterized as an administrative order, since it did not involve any exercise of discretion, did not find or assume any adjudicative facts, and did not terminate or suspend any right or interest that the manufacturer was then enjoying. *Fuentes* v. *Shevin,* 407 U. S. 67; *Bell* v. *Burson,* 402 U. S. 535, distinguished. P. 105.

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*Together with No. 77–849, *Northern California Motor Car Dealers Assn. et al.* v. *Orrin W. Fox Co. et al.,* also on appeal from the same court.

(c) Even if the right to franchise constituted an interest protected by due process when the Act was enacted, the California Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. In particular, the legislature was empowered to subordinate manufacturers' franchise rights to their franchisees' conflicting rights where necessary to prevent unfair or oppressive trade practices, and also to protect franchisees' conflicting rights through customary and reasonable procedural safeguards, *i. e.,* by providing existing dealers with notice and an opportunity to be heard by an impartial tribunal (the Board) before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. Pp. 106–108.

(d) Once having enacted a reasonable general scheme of business regulation, California was not required to provide for a prior individualized hearing each time the Act's provisions had the effect of delaying consummation of the business plans of particular individuals. P. 108.

2. The statutory scheme does not constitute an impermissible delegation of state power to private citizens by requiring the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest. An otherwise valid regulation is not rendered invalid simply because those whom it is designed to safeguard may elect to forgo its protection. Pp. 108–109.

3. The Act does not conflict with the Sherman Act. Pp. 109–111.

(a) The statutory scheme is a system of regulation designed to displace unfettered business freedom in establishing and relocating automobile dealerships and hence is outside the reach of the antitrust laws under the "state action" exemption. This exemption is not lost simply because the Act accords existing dealers notice and an opportunity to be heard before their franchisor is permitted to locate a dealership likely to subject them to injurious and possible illegal competition. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, distinguished. Pp. 109–110.

(b) To the extent that there is a conflict with the Sherman Act because the Act permits dealers to invoke state power for the purpose of restraining intrabrand competition, such a conflict "cannot itself constitute a sufficient reason for invalidating the . . . statute," for "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation

would be effectively destroyed." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133. Pp. 110–111.

440 F. Supp. 436, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 111. BLACKMUN, J., filed an opinion concurring in the result, in which POWELL, J., joined, *post*, p. 113. STEVENS, J., filed a dissenting opinion, *post*, p. 114.

Robert L. Mukai, Deputy Attorney General of California, argued the cause for appellants in No. 77–837. With him on the briefs were *Evelle J. Younger*, Attorney General, and *Stephen J. Egan*, Deputy Attorney General. *James R. McCall* argued the cause and filed briefs for appellants in No. 77–849.

William T. Coleman, Jr., argued the cause for appellees in both cases. With him on the brief were *Girard E. Boudreau, Jr., George R. Baffa, Norin T. Grancell, Otis M. Smith*, and *Robert W. Culver*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if and only if that existing franchisee protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchisee. The Board is not required to hold a hearing on the merits of the dealer protest before sending the manufacturer the notice of the requirement.[1]

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[1] The pertinent provisions of the Automobile Franchise Act are as follows:

"3062. Establishing or relocating dealerships

"(a) Except as otherwise provided in subdivision (b), in the event that

A three-judge District Court for the Central District of California entered a judgment declaring that the absence of such a prior-hearing requirement denied manufacturers and

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a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or relocating an existing motor vehicle dealership the franchisor shall in writing first notify the Board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

"For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

. . . . .

"3063. Good cause

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would in-

their proposed franchisees the procedural due process mandated by the Fourteenth Amendment, 440 F. Supp. 436 (1977). We noted probable jurisdiction of the appeals in both No. 77–837 and No. 77–849,[2] 434 U. S. 1060 (1978). We now reverse.[3]

I

The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress [4] and some

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crease competition and therefore be in the public interest." Cal. Veh. Code Ann. §§ 3062, 3063 (West Supp. 1978).

[2] Appellants in No. 77–849 were made defendants in intervention by uncontested order of the District Court.

[3] On application of appellants in No. 77–837, MR. JUSTICE REHNQUIST stayed the District Court judgment, 434 U. S. 1345, (1977) (in chambers).

Appellants in No. 77–837 argue that the District Court should have abstained under the rule of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), arguing that the state courts might have construed the Automobile Franchise Act so as to limit or avoid the federal constitutional question. The District Court correctly refused to abstain. Abstention may appropriately be denied where, as here, there is no ambiguity in the challenged state statute. See *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971).

[4] A congressional Committee reported in 1956:

"Automobile production is one of the most highly concentrated industries in the United States, a matter of grave concern to officers of the Government charged with enforcement of the antitrust laws. Today there exist only 5 passenger-car manufacturers, 3 of which produce in excess of 95 percent of all passenger cars sold in the United States. There are approximately 40,000 franchised automobile dealers distributing to the public cars produced by these manufacturers. Dealers have an average investment of about $100,000. This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature.

"Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the

25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.[5] California's version is its Automobile Franchise Act.[6] Among

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economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer." S. Rep. No. 2073, 84th Cong., 2d Sess., 2 (1956). See also S. Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers (1966).

[5] See Automobile Dealers' Day in Court Act, 15 U. S. C. §§ 1221–1225; Ariz. Rev. Stat. Ann. § 28–1304.02 (1976); Cal. Veh. Code Ann. § 3060 *et seq.* (West Supp. 1978); Colo. Rev. Stat. § 12–6–120 (1973); Fla. Stat. § 320.641 (1977); Ga. Code § 84–6610 (f) (Supp. 1977); Haw. Rev. Stat. § 437–33 (1976); Idaho Code § 49–1901 *et seq.* (1967); Iowa Code § 322A.2 (1977); Md. Transp. Code Ann. § 15–207 (1977); Mass. Gen. Laws Ann., ch. 93B, § 4 (3) (West Supp. 1978–1979); Neb. Rev. Stat. § 60–1422 (1974); N. H. Rev. Stat. Ann. § 357–B:4 III (c) (Supp. 1977); N. M. Stat. Ann. § 64–37–5 (Supp. 1975); N. C. Gen. Stat. § 20–305 (5) (1978); N. D. Cent. Code § 51–07–01.1 (Supp. 1977); Ohio Rev. Code Ann. § 4517.41 (Supp. 1977); Okla. Stat., Tit. 47, § 565 (j) (Supp. 1978); Pa. Stat. Ann., Tit. 63, § 805 (Purdon Supp. 1978–1979); R. I. Gen. Laws § 31–5.1–4 (Supp. 1977); S. C. Code § 56–15–40 (3)(c) (1977); S. D. Comp. Laws Ann. § 32–6A–5 (1976); Tenn. Code Ann. § 59–1714 (c) (Supp. 1978); Vt. Stat. Ann., Tit. 9, § 4074 (Supp. 1977–1978); Va. Code § 46.1–547 (Supp. 1978); W. Va. Code § 47–17–5 (Supp. 1978); Wis. Stat. Ann. § 218.01 (1957 and Supp. 1978–1979).

[6] California first adopted special regulations applicable to dealers and manufacturers of automobiles in 1923. 1923 Cal. Stats., ch. 266, §§ 46 (a), (b). These required dealers and manufacturers to apply for certification and special identifying license plates as a condition of exemption from generally applicable registration requirements. In 1957 the former certification procedure became a licensing provision, and all automobile dealers were required to apply for licenses to qualify for and continue to hold the registration exemption. 1957 Cal. Stats., ch. 1319, § 7. In

its other safeguards, the Act protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest.[7]

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addition, it became unlawful on and after October 1, 1957, to act as a dealer without having procured a license. *Ibid.* The prohibition on unlicensed activity was extended to manufacturers and motor vehicle transporters by 1967 Cal. Stats., ch. 557, § 1. That statute made it unlawful for any person to act as a dealer, manufacturer, or transporter of motor vehicles without a valid license and certificate issued by the Department of Motor Vehicles. § 2. The 1967 statute also created the New Motor Vehicle Board, originally empowered to handle licensing of new automobile retail dealerships and to review decisions of the Department of Motor Vehicles disciplining dealers. Its powers were expanded in 1973 by the Automobile Franchise Act to empower the Board to deal with the establishment of new franchises and the relocation of existing franchises. The California Legislature expressly stated that this Act was passed "in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." 1973 Cal. Stats., ch. 996, § 1. The Act also sets forth rules and procedures governing franchise cancellations, delivery and preparation obligations and warranty reimbursement. See Cal. Veh. Code Ann. §§ 3060, 3061, 3064, and 3065 (West Supp. 1978).

[7] For a helpful discussion of the purpose served by such laws—the promotion of fair dealing and the protection of small business—see *Forest Home Dodge, Inc.* v. *Karns*, 29 Wis. 2d 78, 138 N. W. 2d 214 (1965). This concern has prompted at least 18 other States to enact statutes which, like the Automobile Franchise Act, prescribe conditions under which new or additional dealerships may be permitted in the territory of the existing dealership. See Ariz. Rev. Stat. Ann. § 28–1304.02 (1976); Colo. Rev. Stat. § 12–6–120 (1973); Fla. Stat. § 320.642 (1977); Ga. Code §§ 84–6610 (f)(8), (10) (Supp. 1977); Haw. Rev. Stat. §§ 437–28 (a), (b)(22) (1976); Iowa Code § 322A.4 (1977); Mass. Gen. Laws Ann., ch. 93B, § 4 (3)(e)(1) (West Supp. 1978–1979); Neb. Rev. Stat. § 60–1422 (1974); N. H. Rev. Stat. Ann. § 357–B:4 III (c) (Supp. 1977); N. M. Stat. Ann. § 64–37–5 (Supp. 1975); N. C. Gen. Stat. § 20–305 (5) (1978); R. I. Gen. Laws § 31–5.1–4 (C)(11) (Supp. 1977); S. D. Comp. Laws

To enforce this prohibition, the Act requires an automobile manufacturer who proposes to establish a new retail automobile dealership in the State, or to relocate an existing one, first to give notice of such intention to the California New Motor Vehicle Board and to each of its existing franchisees in the same "line-make" of automobile located within the "relevant market area," defined as "any area within a radius of 10 miles from the site of [the] potential new dealership." [8] If any existing franchisee within the market area protests to the Board within 15 days, the Board is required to convene a hearing within 60 days to determine whether there is good cause for refusing to permit the establishment or relocation of the dealership.[9] The Board is also required to inform the franchisor, upon the filing of a timely protest,

> "that a timely protest has been filed, that a hearing is required . . . , and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing . . . , nor thereafter, if the board has determined that there is good cause for not permitting such dealership." [10]

Violation of the statutory requirements by a franchisor is a misdemeanor and ground for suspension or revocation of a license to do business.[11]

Ann. §§ 32–6A–3 to 32–6A–4 (1976); Tenn. Code Ann. § 59–1714 (Supp. 1978); Vt. Stat. Ann., Tit. 9, § 4074 (c)(9) (Supp. 1977–1978); Va. Code § 46.1–547 (d) (Supp. 1978); W. Va. Code § 47–17–5 (i) (Supp. 1978); Wis. Stat. Ann. §§ 218.01 (3), (8) (1957 and Supp. 1978–1979).

[8] See Cal. Veh. Code Ann. § 507 (West Supp. 1978).

[9] Within 30 days after the hearing, or of a decision of a hearing officer, the Board must render its decision, or the establishment or relocation of the proposed franchise is deemed approved. See Cal. Veh. Code Ann. § 3067 (West Supp. 1978).

[10] See n. 1, *supra*.

[11] California Veh. Code Ann. § 11713.2 (West Supp. 1978) provides:

"It shall be unlawful and a violation of this code for any manufacturer,

Appellee General Motors Corp. manufactures, among other makes, Buick and Chevrolet cars. Appellee Orrin W. Fox Co. signed a franchise agreement with appellee General Motors in May 1975 to establish a new Buick dealership in Pasadena. Appellee Muller Chevrolet agreed with appellee General Motors to transfer its existing Chevrolet franchise from Glendale to La Canada, Cal., in December 1975. The proposed establishment of Fox and relocation of Muller were protested respectively by existing Buick and Chevrolet dealers. The New Motor Vehicle Board responded, as required by the Act, by notifying appellees that the protests had been filed and that therefore they were not to establish or relocate the dealerships until the Board had held the hearings required by the Act, nor thereafter if the Board determined that there was good cause for not permitting such dealerships. Before either protest proceeded to a Board hearing, however, appellees General Motors, Fox, and Muller brought the instant action.

II

At the outset it is important to clarify the nature of the due process challenge before us. Appellees and the dissent characterize the statute as entitling a protesting dealership to a summary administrative adjudication in the form of a notice having the effect of a temporary injunction restraining appellee General Motors' exercise of its right to franchise at will. We disagree.

The Board's notice has none of the attributes of an injunction. It creates no duty, violation of which would constitute contempt. Nor does it restrain appellee General Motors from

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manufacturer branch, distributor, or distributor branch licensed under this code:

. . . . .

"(*l*) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2."

exercising any right that it had previously enjoyed; General Motors had no interest in franchising that was immune from state regulation. It was the Act, not the Board's notice, that curtailed General Motors' right to franchise at will. The California Vehicle Code explicitly conditions a motor vehicle manufacturer's right to terminate, open, or relocate a dealership upon the manufacturer's compliance with the procedural requirements enacted in the Automobile Franchise Act and, if necessary, upon the approval of the New Motor Vehicle Board.[12] The Board's notice served only to inform appellee General Motors of this statutory scheme and to advise it of the status, pending the Board's determination, of its franchise permit applications.

Moreover, the Board's notice can hardly be characterized as an administrative order. Issuance of the notice did not involve the exercise of discretion. The notice neither found nor assumed the existence of any adjudicative facts. The notice did not terminate or suspend any right or interest that General Motors was then enjoying. The notice did not deprive General Motors of any personal property, or terminate any of the incidents of its license to do business.

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[12] The California Legislature expressly identified the state interests being served by the Franchise Act as "the general economy of the state and the public welfare . . ." which made it "necessary to regulate and to license vehicle dealers [and] manufacturers . . . ." The statute states:

"[T]he distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and . . . in order to promote the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." 1973 Cal. Stats., ch. 996, § 1.

Thus, this is not a case like *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), and *Bell* v. *Burson,* 402 U. S. 535 (1971), relied upon by appellees, in which a state official summarily finds or assumes the existence of certain adjudicative facts and based thereon suspends the enjoyment of an entitlement. There has not yet been either the determination of adjudicative facts, the exercise of discretion, or a suspension.

Notwithstanding all this, appellees argue that the state scheme deprives them of their liberty to pursue their lawful occupation without due process of law. Appellees contend that absent a prior individualized trial-type hearing they are constitutionally entitled to establish or relocate franchises while their applications for approval of such proposals are awaiting Board determination. Appellees' argument rests on the assumption that General Motors has a due process protected interest right to franchise at will—which asserted right survived the passage of the California Automobile Franchise Act.

The narrow question before us, then, is whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers. Or stated conversely, the issue is whether, as the District Court held and the dissent argues, the right to franchise without delay is the sort of interest that may be suspended only on a case-by-case basis through prior individualized trial-type hearings.

We disagree with the District Court and the dissent. Even if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Zemel* v. *Rusk,* 381 U. S. 1, 14 (1965). At least since

the demise of the concept of "substantive due process" in the area of economic regulation, this Court has recognized that, "[l]egislative bodies have broad scope to experiment with economic problems . . . ." *Ferguson* v. *Skrupa,* 372 U. S. 726, 730 (1963). States may, through general ordinances, restrict the commercial use of property, see *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926), and the geographical location of commercial enterprises, see *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 491 (1955). Moreover, "[c]ertain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . [S]tatutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency." *Nebbia* v. *New York,* 291 U. S. 502, 528 (1934).

In particular, the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices. "[S]tates have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525, 536–537 (1949). See also *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U. S. 156 (1973); *Ferguson* v. *Skrupa, supra; Williamson* v. *Lee Optical Co., supra.*

Further, the California Legislature had the authority to protect the conflicting rights of the motor vehicle franchisees through customary and reasonable procedural safeguards, *i. e.,* by providing existing dealers with notice and an opportunity

to be heard by an impartial tribunal—the New Motor Vehicle Board—before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. States may, as California has done here, require businesses to secure regulatory approval *before* engaging in specified practices. See, *e. g., North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, supra* (pharmacy-operating permit); *St. Louis Poster Adv. Co.* v. *St. Louis,* 249 U. S. 269 (1919) (billboard permits); *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539 (1917) (securities registration); *Adams* v. *Milwaukee,* 228 U. S. 572 (1913) (milk inspection); *Gundling* v. *Chicago,* 177 U. S. 183 (1900) (cigarette sales license).

These precedents compel the conclusion that the District Court erred in holding that the California Legislature was powerless temporarily to delay appellees' exercise of the right to grant or undertake a Buick or Chevrolet dealership and the right to move one's business facilities from one location to another without providing a prior individualized trial-type hearing. Once having enacted a reasonable general scheme of business regulation, California was not required to provide for a prior individualized hearing each and every time the provisions of the Act had the effect of delaying consummation of the business plans of particular individuals. In the area of business regulation "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co.* v. *Colorado,* 239 U. S. 441, 445 (1915).

III

Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to

private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest.

The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection. Court approval of an eviction, for example, becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest. An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection. See *Cusack Co.* v. *Chicago,* 242 U. S. 526 (1917).

IV

Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U. S. C. § 1 *et seq.*[13] They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and thus is invalid under *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951).

The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. *Parker* v. *Brown,* 317 U. S. 341 (1943); *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977). See also *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389 (1978).

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[13] The District Court did not pass upon this contention. We choose to address it because the underlying facts are undisputed and the question presented is purely one of law.

The Act does not lose this exemption simply because, as part of its regulatory framework, it accords existing dealers notice and an opportunity to be heard before their franchisor is permitted to locate a dealership likely to subject them to injurious and possibly illegal competition. Protests serve only to trigger Board action.[14] They do not mandate significant delay. On the contrary, the Board has the authority to order an immediate hearing on a dealer protest if it concludes that the public interest so requires. The duration of interim restraint is subject to ongoing regulatory supervision.

Appellees' reliance upon *Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* is misplaced. In *Schwegmann,* the State attempted to authorize and immunize private conduct violative of the antitrust laws. California has not done that here. Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), and *Mine Workers* v. *Pennington,* 381 U. S. 657, 670 (1965)[15]

Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. "This is merely another way of stating that the . . .

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[14] Appellees state, without challenge by appellants: "117 protests have been filed under § 3062 since the Act became effective (July 1, 1974). Of these, only 42 have gone to a hearing on the merits, and only one has been sustained by the Board . . . . Thus, of 117 automatic temporary injunctions issued by the Board, only one ever matured into a permanent injunction." Brief for Appellees 10 n. 13.

[15] Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws. See *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972).

statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty.' . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp.* v. *Governor of Maryland,* 437 U. S. 117, 133 (1978).

Reversed.

MR. JUSTICE MARSHALL, concurring.

Although I join the opinion of the Court, I write separately to emphasize why, in my view, the California Automobile Franchise Act is not violative of the Due Process Clause. As the Court observes, *ante,* at 100–103, the California statute, like its state and federal counterparts, seeks to redress the disparity in economic power between automobile manufacturers and their franchisees. By empowering the New Motor Vehicle Board to superintend the establishment or relocation of a franchise, the statute makes it more difficult for a manufacturer to force its franchisees to accept unfair conditions of trade by threatening to overload their markets with intrabrand competitors.[1]

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[1] Although there is little legislative history on the California Act, the need for statutory constraints on manufacturers' ability to coerce their dealers is reflected in a variety of state and federal enactments. See, *e. g.,* statutes cited *ante,* at 101 n. 5; H. R. Rep. No. 2850, 84th Cong., 2d Sess., 4–5 (1956); S. Rep. No. 2073, 84th Cong., 2d Sess., 2–4 (1956); *Forest Home Dodge, Inc.* v. *Karns,* 29 Wis. 2d 78, 138 N. W. 2d 214 (1965). See generally S. Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers 139 (1966).

The dissenting opinion, *post,* at 121, suggests that the right of existing franchisees to protest the entry of a new competitor is of "little value," since less than 1% of the protests were successful and two-thirds were

This litigation arises because of the delay necessarily incident to the Board's inquiry. Given the unavoidable time lag between the filing of protests and the Board's hearing, the State had to elect whether to permit the establishment or relocation of dealerships pending the Board's determination of their legality. To enjoin temporarily the proposed transactions would deprive new dealers and their franchisors of legitimate profits in cases where the dealership was eventually approved. On the other hand, allowing the transactions to go forward would force existing franchisees to bear the burden of illegal competition in cases where the Board ultimately disapproved the new dealership. Perhaps because the policy of redressing the economic imbalance between franchisees and manufacturers would be thwarted if existing franchisees were left unprotected until the Board made its decision, the California Legislature chose the former option.[2]

Assuming appellees' interest in immediately opening or relocating a franchise implicates the Due Process Clause, I do not believe it outweighs the interest of the State in protecting existing franchisees from unfair competition and economic coercion pending completion of the Board's inquiry. See *Goldberg* v. *Kelly,* 397 U. S. 254, 262–263 (1970); *Board of Regents* v. *Roth,* 408 U. S. 564, 570–571 (1972). The state legislature has decided to impose the burdens of delay on appellees rather than on existing franchisees. In view of the substantial public interest at stake and the short lapse of

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abandoned in advance of any hearing. These figures, however, may indicate merely that the California statute has successfully served a deterrent function. In any event, the California Legislature could legitimately conclude that the "right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes* v. *Shevin,* 407 U. S. 67, 87 (1972).

[2] See n. 1, *supra.* The State may also have sought to protect aspiring franchisees from the economic loss they would incur if the Board disapproved their applications after they had commenced operations.

time between notice and hearing, the Due Process Clause does not dictate a contrary legislative decision.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring in the result.

I agree with the Court when it concludes (a) that the District Court rightly refused to abstain under the rule of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941); (b) that the appellees' delegation-of-power argument is unmeritorious; and (c) that the appellees' antitrust claims are also without merit.

We are concerned here, basically, only with the issue of the facial constitutionality of certain provisions of the California Automobile Franchise Act, Cal. Veh. Code Ann. §§ 3062, 3063 (West Supp. 1978); we are not confronted with any issue of constitutionality of the Act as applied.

It seems to me that we should recognize forthrightly the fact that California, under its Act, accords the manufacturer and the would-be franchisee *no* process at all prior to telling them not to franchise at will. This utter absence of process would indicate that the State's action is free from attack on procedural due process grounds only if the manufacturer and the franchisee possess no liberty or property interest protected under the Fourteenth Amendment. Indeed, that is the way I would analyze the case.

Meyer v. *Nebraska*, 262 U. S. 390, 399 (1923), of course, defined "liberty" to include "the right . . . to engage in any of the common occupations of life." The California statute, however, does not deprive anyone of any realistic freedom to become an automobile dealer or to grant a franchise; it simply regulates the location of franchises to sell certain makes of cars in certain geographical areas. The absence of regulation by California prior to the Act's adoption in 1973 surely in itself created no liberty interest susceptible of later deprivation. And the abstract expectation of a new franchise does not qualify as a property interest.

I regard this litigation as not focusing on procedural due process at all. Instead, it centers essentially on a claim of substantive due process. Appellees have conceded that California may legitimately regulate automobile franchises and that the State may legitimately provide a hearing as part of its regulatory scheme. The only issue, then, is whether California may declare that the status quo is to be maintained *pending a hearing.* In my view, California's declaration to this effect is no more than a necessary incident of its power to regulate at all. Maintenance of the status quo pending final agency action is common in many regulatory contexts. The situation here, for example, is not dissimilar to the widely adopted routine of withholding the effectiveness of announced increases in utility rates until specified conditions have been fulfilled. In asserting a right to franchise at will and a right to franchise without delay, appellees are essentially asserting a right to be free from state economic regulation. But any claim the appellees may have to be free from state economic regulation is foreclosed by the substantive due process cases, such as *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963), which the Court cites.

To summarize: For me, the appellees have demonstrated the presence of no liberty or property interest; having none, they have no claim to procedural safeguards; and their claim to be free from state economic regulation is foreclosed by the substantive due process cases. Perhaps this is what the Court is saying in its opinion. I am, however, somewhat unsure of that. I prefer to recognize the facts head on; when one does, the answer, it seems to me, is inevitable and immediately forthcoming.

MR. JUSTICE STEVENS, dissenting.

This case does not involve the constitutionality of any of the substantive rules adopted by California to govern the operation of motor vehicle dealerships and the conditions that

must be satisfied to engage in that business. The case involves the validity of a procedure that grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or is about to be violated.

In order to demonstrate that this is a fair characterization of this procedure, it is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision. It will then be apparent that there is no precedent for the Court's approval of this unique and arbitrary process and that the three-judge District Court was correct in concluding that it deprived appellees of their liberty and property without the due process of law guaranteed by the Fourteenth Amendment.

I

As the Court recognizes, California's Automobile Franchise Act is a member of the family of state statutes that were enacted to protect retailers from some of the risks associated with unrestrained competition. Like the retail grocers and retail druggists who convinced so many legislatures to authorize resale price maintenance,[1] and the retail gasoline dealers who convinced the Maryland Legislature to prohibit oil company ownership of service stations,[2] the retail automobile dealers have been successful in persuading Congress and various state legislatures that unrestrained competition in the car business is not an unmixed blessing.[3] Many States have

[1] These efforts were also reflected in the Miller-Tydings Fair Trade Act, which was enacted by Congress in 1937 as an amendment to § 1 of the Sherman Act. 50 Stat. 693, 15 U. S. C. § 1. See generally *Schwegmann Bros.* v. *Calvert Distillers, Corp.*, 341 U. S. 384, 390–395.

[2] See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978).

[3] The statutes currently in force are collected in the opinion of the Court. *Ante*, at 101 n. 5. These statutes were passed essentially in three waves, the first in the late 1930's, the second in the mid-1950's, and the

enacted automobile dealer franchise statutes that regulate and limit competition in this business. Unquestionably, as the Court holds, the mere fact that statutory rules inhibit competition is not a reason for invalidating them.[4]

The general rules contained in the California Automobile Franchise Act are of two kinds. First, they establish standards that a dealer must satisfy in order to engage in the business in California. These standards are enforced through licensing regulations.[5] Because the dealer appellees in this case are properly licensed, and because they do not question the validity of any of these rules, these standards are not relevant here. Second, there are rules regulating the contractual relationships between manufacturers and their dealers, covering such matters as franchise terminations.[6] Again, these rules are not relevant because this case involves neither a termination nor any question concerning the contract between a manufacturer and an existing dealer. In sum, the substantive rules in the California statute have nothing to do with this case.

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third in the late 1960's and early 1970's. The first two waves resulted in statutes regulating the contractual relationships between dealers and manufacturers, and were primarily designed to equalize the bargaining power of the two groups. The third wave not only extended this well-established type of statute into additional States but also resulted in the passage of provisions, such as the one involved in this case, relating to the opening of new franchises. See generally C. Hewitt, Automobile Franchise Agreements 165–167 (1955); Macaulay, Law and Society—Changing a Continuing Relationship Between a Large Corporation and those who Deal with it: Automobile Manufacturers, their Dealers, and the Legal System, 1965 Wis. L. Rev. 483, 513–521; Note, 70 Harv. L. Rev. 1239, 1243–1246 (1957); Comment, 56 Iowa L. Rev. 1060 (1971).

[4] By the same token, the legislative judgment that manufacturers have greater bargaining power than dealers and may have sometimes used it abusively by threatening to overload dealers' markets with intrabrand competitors does not provide a justification for a statutory procedure that deprives all manufacturers and all new dealers of their liberty and property without due process.

[5] Cal. Veh. Code Ann. § 11700 (West Supp. 1978).

[6] §§ 3060, 3061, 3064, and 3065 (Supp. 1978).

This case concerns only the procedure that must be followed after a licensed manufacturer and a licensed dealer have decided either to establish a new dealership or to relocate an existing dealership. The statute contains no substantive rules pertaining to the location of dealerships or the number of dealers that may operate in any given area. It includes no limitations on the manufacturer's use of the new franchise as a means of increasing its power to bargain with existing franchisees.[7] Nor does it impose any burden on the manufacturer or the new dealer to obtain a license or an approval from a public agency before the new operation may commence business.[8] It does not even authorize a public agency,

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[7] Cf. Haw. Rev. Stat. § 437–28 (b)(22)(B) (1976); W. Va. Code § 47–17–5 (i)(2) (Supp. 1978).

[8] Cf. Fla. Stat. § 320.642 (1977); Ga. Code § 84–6610 (f)(8) (Supp. 1977); Iowa Code § 322A.4 (1977); S. D. Comp. Laws Ann. §§ 32–6A–3, 32–6A–4 (1976); Tenn. Code Ann. § 59–1714 (c)(20) (Supp. 1978); Wis. Stat. Ann. § 218.01 (3)(f) (1957).

The Court cites *Forest Home Dodge, Inc.* v. *Karns*, 29 Wis. 2d 78, 138 N. W. 2d 214 (1965), as reflective of the purposes served by statutes such as the one at issue here. *Ante*, at 102 n. 7. However, the Wisconsin statute involved in the *Forest Home* decision is considerably different from the California statute and the purposes of the former should not be uncritically imported into the latter. The Court is similarly mistaken in its characterization of the California statute as one, like Wisconsin's, that "require[s] businesses to secure regulatory approval *before* engaging in specified practices." *Ante*, at 108 (emphasis in original). As the Court itself recognizes at an earlier point, the California statute requires approval only in certain limited circumstances, *i. e.*, "if necessary" because of a competitor's protest. *Ante*, at 105. As such, the statute clearly does allow competitors to "restrain appellee[s] from exercising [a] right that [they] had previously enjoyed." *Ante*, at 104–105.

The Court also mischaracterizes the California statute when it describes it as "prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest." *Ante*, at 102. There is no such express prohibition in the

acting on its own motion, to conduct a hearing to determine whether the new operation is desirable or undesirable.[9] In short, although I assume that California is entirely free to adopt a state policy against the establishment or relocation of motor vehicle franchises, no such policy is reflected in this statute.[10]

On the contrary, the statute actually embodies a presumption in favor of new locations. That presumption, while consistent with the fact that knowledgeable businessmen do not normally make the large capital commitments associated with a new dealership unless the market will welcome the change,[11] does not rest on that economic predicate. It rests on the language of the statute and its interpretation by the New Motor Vehicle Board.

The statute grants a curiously defined group of potential protestants—competitors within the 314-square-mile area surrounding the new location who handle the same line and make of cars—the right to demand a hearing to determine whether

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California statute. Cf. Colo. Rev. Stat. § 12–6–120 (1973); Iowa Code § 322A.4 (1977); N. M. Stat. Ann. § 64–37–5 (P) (Supp. 1975); S. D. Comp. Laws Ann. §§ 32–6A–3, 32–6A–4 (1976).

[9] Cf. Fla. Stat. § 320.642 (1977); Ga. Code § 84–6610 (f)(8) (Supp. 1977); Iowa Code § 322A.4 (1977); S. D. Comp. Laws Ann. § 32–6A–4 (1976); Tenn. Code Ann. § 59–1714 (c)(20) (Supp. 1978); Wis. Stat. Ann. § 218.01 (3)(f) (1957).

[10] The statutory statement of purpose quoted by the Court, *ante*, at 105 n. 12, includes no reference to a policy against new or relocated dealerships. By comparison, such statutes as Fla. Stat. § 320.642 (1977); Ga. Code § 84–6610 (f)(8) (Supp. 1977); Tenn. Code Ann. § 59–1714 (c)(20) (Supp. 1978); and Wis. Stat. Ann. § 218.01 (3)(f) (1957), authorize public officials to deny applications for approval of new dealerships in all cases where existing dealers in the area are providing "adequate representation" of the relevant line and make of cars.

[11] B. Pashigian, The Distribution of Automobiles, An Economic Analysis of the Franchise System 151 (1961); Comment, *supra* n. 3, at 1065–1067.

"there is good cause for not permitting such dealership." [12] This language is repeated in two separate sections of the California statute.[13] Notably, the statute does not place the burden of establishing that there is good cause to permit the dealership to go forward on the new dealer or the manufacturer; [14] it places the burden of demonstrating that there is good cause *not* to permit the new opening to take place on the

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[12] California Veh. Code Ann. § 3062 (West Supp. 1978) provides, in part:

"When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, *if the board has determined that there is good cause for not permitting such dealership.*" (Emphasis added.)

Section 507 defines the 314-square-mile area that encompasses competitors with standing to challenge new dealerships.

[13] In addition to the portion of § 3062 quoted in n. 12, *supra*, § 3063 provides:

"*In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make,* the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise *would increase competition and therefore be in the public interest.*" (Emphasis added.)

[14] Cf. Iowa Code § 322A.4 (1977); S. D. Comp. Laws Ann. §§ 32–6A–3, 32–6A–4 (1976). See generally Comment, *supra* n. 3, at 1062–1063.

objecting dealer.[15] If the scales are evenly balanced, the presumption will prevail.

The California Board's actual administration of the statute confirms this analysis. Of the first 117 protests filed under the law, only 1 was sustained by the Board.[16] In other words, over 99% of the contested new dealerships or relocations were found to be consistent with the policy of the statute.

The conclusion that there is no state policy against new dealerships is further confirmed by the statutory limitation on the persons who have standing to object to a proposed new opening. Most significantly, no public agency has any independent right to initiate an objection, to schedule a hearing, or to prohibit such a change.[17] Nor does any member of the consuming public have standing to complain.[18] Indeed, even neighboring dealers who might be severely affected by new competition are without standing unless they handle the same line of cars as the new dealer. Finally, if a manufacturer is able—by whatever means—to persuade its dealers in the relevant area not to protest, the statutory policy will have been wholly vindicated without any action on the part of responsible state officials.

Properly analyzed, the statute merely confers a special benefit on a limited group of private persons who are likely to oppose the establishment or relocation of a new car dealership. Because those persons may suffer economic injury as a consequence of new competition, they are given two quite different rights. One is relatively meaningless, the other is

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[15] Cal. Veh. Code Ann. § 3066 (b) (West Supp. 1978) ("The [existing] franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership").

[16] See *ante,* at 110 n. 14; Brief for Appellees 10 n. 13.

[17] Cf. statutes cited in n. 10, *supra.*

[18] Cf. Iowa Code § 322A.7 (1977).

significant. The first is an administrative right of action to try to persuade the Board that there is good cause for not permitting the new competitor to enter the market. It is obvious that this right is of little value, since less than 1% of the protests are successful. Indeed, since about two-thirds of the protests were abandoned in advance of any hearing,[19] it is fair to infer that an opportunity to prevail at the hearing itself is not the primary object of the protest.

The second right that the statute gives to a complaining dealer is the unqualified entitlement to an order that is tantamount to a preliminary injunction absolutely prohibiting the opening of the new dealership until after the relatively meaningless hearing has been completed.[20] The "injunction" issues without any showing of probable success on the merits, without any proof of irreparable harm, and without provision for a bond or other compensation to indemnify the new dealer against loss caused by the delay. The entirely uninformative words "I protest" are enough to entitle one private party to obtain an order restraining the activities of a potential competitor.[21] Violation of that order subjects the manufac-

[19] See Brief for Appellees 10 n. 13.

[20] Cal. Veh. Code Ann. §§ 3062, 3066 (West Supp. 1978).

[21] California's statutory scheme may be contrasted with another approach that also affords existing dealers a cause of action to block new dealerships, but does so with considerably more process. Under N. M. Stat. Ann. § 64–37–5 (P) (Supp. 1975), it is unlawful for a manufacturer to establish an additional franchise in a community where the same line-make is currently represented "if such addition would be inequitable to the existing dealer." The statute makes "the sales and service needs of the public" relevant "in determining the equities of the existing dealer." Existing dealers are given a private cause of action in state courts to enforce this prohibition and are expressly afforded the right to seek either an injunction, damages, or both. §§ 64–37–11, 64–37–13 (Supp. 1975). It is apparent from the statute that the normal incidents of civil practice—for example, the requirement of an adequate complaint, and judicial consideration of the merits before any relief is afforded—apply in these authorized suits. See also Colo. Rev. Stat. §§ 12–6–120 (1)(h), 12–6–122

turer and franchisee to criminal penalties and revocation of their licenses.[22]

In sum, new franchisees and their franchisors are not merely identified by the statute as in essence a new class of parties defendant in a new class of lawsuits designed in extremely rare instances to block the franchise; rather, without assuring these "defendants" that they will receive notice of the claims against them, a probable-cause finding, or a hearing of any kind,[23] the statute subjects them to an immediate injunction against the pursuit of their right to establish or relocate a car dealership upon the filing of a protest by a competitor-"plaintiff." [24]

The duration of the injunctive relief is not precisely defined by the statute,[25] but the facts of these cases demonstrate that

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(3) (1973); Mass. Gen. Laws Ann., ch. 93B, § 4 (3) (*l*) (West. Supp. 1978–1979).

[22] Cal. Veh. Code Ann. §§ 11705 (a) (3), 11705 (a) (10), 11713.2 (*l*), 40000.11 (West. Supp. 1978).

[23] In addition, the statute gives the "defendants" the burden in every case of informing the "plaintiffs" when their cause of action arises.

[24] Put in the more traditional language of due process analysis, the California scheme recognizes a right on the part of manufacturers and prospective dealers to establish or relocate automobile dealerships. It allows the State permanently to deprive those persons of that right upon a hearing and demonstration of cause. Finally, and what is at issue here, it allows private persons to invoke the power of the State to deprive manufacturers and prospective dealers of their rights temporarily without any process at all.

[25] Once a protest is filed, and an injunction has automatically been granted, Cal. Veh. Code Ann. § 3066 (a) (West. Supp. 1978) requires the Board to set a hearing. Although the hearing must be held within 60 days under that provision, this time limit is usually avoided when the Board refers the protest to a hearing officer, upon whom no statutory time limit is imposed. Moreover, after the hearing officer reaches a decision, the Board may either take another 30 days in adopting that decision, or an indefinite period of time in reaching an independent decision. The Board may also refer the decision back to the hearing officer with directions to take additional evidence and reach a new decision.

the relief may last for many months.[26] In a dynamic, competitive business such delays may entirely frustrate the plans for the new dealership—as happened in one of these cases—

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[26] "The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that 'you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership.' The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

"However, as the result of requests for continuance by the protesters and by stipulation, and protracted litigation in the courts concerning the right to take prehearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

"The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

"Plaintiff Muller Chevrolet took over an existing dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physical facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves.

or at least cause the new dealer to lose the opportunity to participate in a favorable market for new models. That the statutory deprivation is a temporary delay rather than a permanent denial does not avoid the serious character of the harm suffered by the new dealer while the status quo is being preserved.[27]

II

Apart from some substantive due process cases which have nothing to do with the procedural question presented by this

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After a year of complex and time-consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than 'I protest,' and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board 'tentatively' set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

"It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the injunction finally lifted (Vehicle Code § 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon 'gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business." 440 F. Supp. 436, 439–440 (CD Cal. 1977) (three-judge court).

[27] *Fuentes* v. *Shevin*, 407 U. S. 67, 84–85 ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment").

case [28] the Court cites no authority for its novel interpretation of the Fourteenth Amendment. This is hardly surprising because this summary procedure for resolving conflicts between private parties flagrantly violates the precepts embodied in the Court's prior cases.

Whenever one private party seeks relief against another, it is fundamental that some attention to the merits of the request must precede the granting of relief. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313. The challenged statute provides for no such consideration of the merits nor even any notice to the losing party of what the merits of the claim against him involve.[29]

It is equally fundamental that the State's power to deprive any person of liberty or property may not be exercised except at the behest of an official decisionmaker. In a somewhat different context, the Court correctly observed:

> "[I]n the very nature of things, one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute

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[28] See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 536–537; *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483.

Although the Court has distinguished between economic and other rights in giving scope to the substantive requirements of the Due Process Clause, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4, it has carefully and explicitly avoided that distinction in applying the procedural requirements of the Clause. *E. g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 608; *Fuentes* v. *Shevin*, *supra*, at 89–90. Accordingly, I assume that, despite its curious citation of the cases that establish a low level of substantive protection for economic rights, the Court is not implying that those rights do not merit the procedural protection afforded by the Fourteenth Amendment.

[29] Although the Court has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide parties defendant with "fair notice" of the claims against them. *Conley* v. *Gibson*, 355 U. S. 41, 48.

> which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311.

More recently, the Court has applied these principles in procedural due process contexts similar to the one at issue here. For example, in *Fuentes* v. *Shevin*, 407 U. S. 67, 93, the Court had this to say in invalidating a statute that enabled private parties unconditionally to exercise the State's power:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, 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. The State acts largely in the dark." [30]

Because the New Motor Vehicle Board is given no control over a competitor's power temporarily to enjoin the establishment or relocation of a dealership, that body's authority in this respect is also wielded in the dark. The result is the unconstitutional exercise of uncontrolled government power.

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[30] See also *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 615–617; *Gibson* v. *Berryhill*, 411 U. S. 564, 578–579; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121–122; *Eubank* v. *City of Richmond*, 226 U. S. 137, 143–144.

The Court places great store in the fact that the California Legislature, rather than some administrative or adjudicative body, stands behind the deprivation at issue in this case. *Ante*, at 105. But, as *Fuentes* indicates, a legislative abdication of power to private citizens who are prone to act arbitrarily is no less unconstitutional than the arbitrary exercise of that power by the state officials themselves.

There is no blinking the fact that the California statute gives private parties, serving their own private advantage, the unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competitors. Such a statute blatantly offends the principles of fair notice, attention to the merits, and neutral dispute resolution that inform the Due Process Clause of the Fourteenth Amendment. This statute simply cannot bear the Court's creative recharacterization as a general—and substantively constitutional—rule governing when and how dealerships may be established and relocated.[31] Accordingly, I respectfully dissent.

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[31] Although the Court reads my opinion differently, see *ante*, at 106, I do not imply that there would be any constitutional defect in a statute imposing a general requirement that no dealer may open or relocate until after he has obtained an approval from a public agency. Nor do I imply that the appellees have an interest that may not be suspended except on a case-by-case basis. If, however, a State mandates a case-by-case determination of one private party's rights, the State may not confer arbitrary power to make that determination on another private party.

RAKAS ET AL. *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DIVISION

No. 77–5781. Argued October 3, 1978—Decided December 5, 1978

After receiving a robbery report, police stopped the suspected getaway car, which the owner was driving and in which petitioners were passengers. Upon searching the car, the police found a box of rifle shells in the glove compartment and a sawed-off rifle under the front passenger seat and arrested petitioners. Subsequently, petitioners were convicted in an Illinois court of armed robbery at a trial in which the rifle and shells were admitted as evidence. Before trial petitioners had moved to suppress the rifle and shells on Fourth Amendment grounds, but the trial court denied the motion on the ground that petitioners lacked standing to object to the lawfulness of the search of the car because they concededly did not own either the car or the rifle and shells. The Illinois Appellate Court affirmed. *Held:*

1. "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *Alderman* v. *United States,* 394 U. S. 165, 174, and a person aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. The rule of standing to raise vicarious Fourth Amendment claims should not be extended by a so-called "target" theory whereby any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Pp. 133–138.

2. In any event, the better analysis of the principle that Fourth Amendment rights are personal rights that may not be asserted vicariously should focus on the extent of a particular defendant's rights under that Amendment, rather than on any theoretically separate but invariably intertwined concept of standing. Pp. 138–140.

3. The phrase "legitimately on premises" coined in *Jones* v. *United States,* 362 U. S. 257, creates "too broad a gauge" for measurement of Fourth Amendment rights. The holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment. Pp. 140–148.

4. Petitioners, who asserted neither a property nor a possessory interest in the automobile searched nor an interest in the property seized and who failed to show that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers, were not entitled to challenge a search of those areas. *Jones* v. *United States, supra; Katz* v. *United States,* 389 U. S. 347, distinguished. Pp. 148–149.

46 Ill. App. 3d 569, 360 N. E. 2d 1252, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and BLACKMUN, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post,* p. 150. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 156.

G. Joseph Weller argued the cause for petitioners. With him on the briefs were *Robert Agostinelli* and *Mark W. Burkhalter.*

Donald B. Mackay, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *Melbourne A. Noel, Jr.,* and *Michael B. Weinstein,* Assistant Attorneys General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of armed robbery in the Circuit Court of Kankakee County, Ill., and their convictions were affirmed on appeal. At their trial, the prosecution offered into evidence a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner is the owner of the automobile and neither has ever asserted that he owned the rifle or shells seized. The Illinois Appellate Court held that petitioners lacked standing to object to the allegedly

**Fred Inbau, Frank Carrington, Wayne W. Schmidt, Robert Smith,* and *James P. Costello* filed a brief for Effective Law Enforcement, Inc., as *amicus curiae* urging affirmance.

unlawful search and seizure and denied their motion to suppress the evidence. We granted certiorari in light of the obvious importance of the issues raised to the administration of criminal justice, 435 U. S. 922 (1978), and now affirm.

I

Because we are not here concerned with the issue of probable cause, a brief description of the events leading to the search of the automobile will suffice. A police officer on a routine patrol received a radio call notifying him of a robbery of a clothing store in Bourbonnais, Ill., and describing the getaway car. Shortly thereafter, the officer spotted an automobile which he thought might be the getaway car. After following the car for some time and after the arrival of assistance, he and several other officers stopped the vehicle. The occupants of the automobile, petitioners and two female companions, were ordered out of the car and, after the occupants had left the car, two officers searched the interior of the vehicle. They discovered a box of rifle shells in the glove compartment, which had been locked, and a sawed-off rifle under the front passenger seat. App. 10–11. After discovering the rifle and the shells, the officers took petitioners to the station and placed them under arrest.

Before trial petitioners moved to suppress the rifle and shells seized from the car on the ground that the search violated the Fourth and Fourteenth Amendments. They conceded that they did not own the automobile and were simply passengers; the owner of the car had been the driver of the vehicle at the time of the search. Nor did they assert that they owned the rifle or the shells seized.[1] The prose-

[1] Petitioners claim that they were never asked whether they owned the rifle or shells seized during the search and, citing *Combs* v. *United States*, 408 U. S. 224 (1972), argue that if the Court determines that a property interest in the items seized is an adequate ground for standing to object to their seizure, the Court should remand the case for further

cutor challenged petitioners' standing to object to the lawfulness of the search of the car because neither the car, the shells nor the rifle belonged to them. The trial court agreed that petitioners lacked standing and denied the motion to suppress the evidence. App. 23–24. In view of this holding, the court did not determine whether there was probable cause for the search and seizure. On appeal after petitioners' conviction, the Appellate Court of Illinois, Third Judicial District, affirmed the trial court's denial of petitioners' motion to suppress because it held that "without a proprietary or other similar interest in an automobile, a mere passenger therein lacks standing to challenge the legality of the search of the vehicle."

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proceedings on the question whether petitioners owned the seized rifle or shells. Reply Brief for Petitioners 4 n. 2. Petitioners do not now assert that they own the rifle or the shells.

We reject petitioners' suggestion. The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. See *Simmons* v. *United States,* 390 U. S. 377, 389–390 (1968); *Jones* v. *United States,* 362 U. S. 257, 261 (1960). The prosecutor argued that petitioners lacked standing to challenge the search because they did not own the rifle, the shells or the automobile. Petitioners did not contest the factual predicates of the prosecutor's argument and instead, simply stated that they were not required to prove ownership to object to the search. App. 23. The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells. *Combs* v. *United States, supra,* was quite different. In *Combs,* the Government had not challenged Combs' standing at the suppression hearing and the issue of standing was not raised until the appellate level, where the Government conceded that its warrant was not based on probable cause. Because the record was "virtually barren of the facts necessary to determine" Combs' right to contest the search and seizure, the Court remanded the case for further proceedings. 408 U. S., at 227. The Government had requested the Court to remand for further proceedings on this issue. Brief for United States in *Combs* v. *United States,* O. T. 1971, No. 71–517, pp. 40–41.

46 Ill. App. 3d 569, 571, 360 N. E. 2d 1252, 1253 (1977). The court stated:

> "We believe that defendants failed to establish any prejudice to their own constitutional rights because they were not persons aggrieved by the unlawful search and seizure. . . . They wrongly seek to establish prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else and fail to prove an invasion of their own privacy. *Alderman* v. *United States* (1969), 394 U. S. 165 . . . ." *Id.*, at 571–572, 360 N. E. 2d, at 1254.

The Illinois Supreme Court denied petitioners leave to appeal.

II

Petitioners first urge us to relax or broaden the rule of standing enunciated in *Jones* v. *United States*, 362 U. S. 257 (1960), so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively, petitioners argue that they have standing to object to the search under *Jones* because they were "legitimately on [the] premises" at the time of the search.

The concept of standing discussed in *Jones* focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the "victim" of the search or seizure. *Id.*, at 261.[2] Adoption of

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[2] Although *Jones* v. *United States* was based upon an interpretation of Fed. Rule Crim. Proc. 41 (e), the Court stated in *Alderman* v. *United States*, 394 U. S. 165, 173 n. 6 (1969), that Rule 41 (e) conforms to the general standard and is no broader than the constitutional rule. See *United States* v. *Calandra*, 414 U. S. 338, 348–349, n. 6 (1974).

There is an aspect of traditional standing doctrine that was not considered in *Jones* and which we do not question. It is the proposition that a party seeking relief must allege such a personal stake or interest in

the so-called "target" theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial. If we reject petitioners' request for a broadened rule of standing such as this, and reaffirm the holding of *Jones* and other cases that Fourth Amendment rights are personal rights that may not be asserted vicariously, we will have occasion to re-examine the "standing" terminology emphasized in *Jones*. For we are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry identified in *Jones* as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge. We shall therefore consider in turn petitioners' target theory, the necessity for continued adherence to the notion of standing discussed in *Jones* as a concept that is theoretically distinct from the merits of a defendant's Fourth Amendment claim, and, finally, the proper disposition of petitioners' ultimate claim in this case.

A

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. As we stated in *Alderman* v. *United States*, 394 U. S. 165, 174 (1969), "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously

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the outcome of the controversy as to assure the concrete adverseness which Art. III requires. See, *e. g.*, *O'Shea* v. *Littleton*, 414 U. S. 488, 493 (1974); *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Thus, a person whose Fourth Amendment rights were violated by a search or seizure, but who is not a defendant in a criminal action in which the illegally seized evidence is sought to be introduced, would not have standing to invoke the exclusionary rule to prevent use of that evidence in that action. See *Calandra*, *supra*, at 352 n. 8.

asserted." See *Brown* v. *United States,* 411 U. S. 223, 230 (1973); *Simmons* v. *United States,* 390 U. S. 377, 389 (1968); *Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963); cf. *Silverman* v. *United States,* 365 U. S. 505, 511 (1961); *Gouled* v. *United States,* 255 U. S. 298, 304 (1921). A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman, supra,* at 174. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, *United States* v. *Calandra,* 414 U. S. 338, 347 (1974), it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.[3] See *Simmons* v. *United States, supra,* at 389. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. *Alderman, supra,* at 174. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, see *Monroe* v. *Pape,* 365 U. S. 167 (1961), or seek redress under state law for invasion of privacy or trespass.

In support of their target theory, petitioners rely on the following quotation from *Jones:*

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was*

[3] The necessity for a showing of a violation of personal rights is not obviated by recognizing the deterrent purpose of the exclusionary rule, *Alderman* v. *United States, supra,* at 174. Despite the deterrent aim of the exclusionary rule, we never have held that unlawfully seized evidence is inadmissible in all proceedings or against all persons. See, *e. g., United States* v. *Ceccolini,* 435 U. S. 268, 275 (1978); *Stone* v. *Powell,* 428 U. S. 465, 486 (1976); *United States* v. *Calandra,* 414 U. S., at 348. "[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Ibid.*

> *directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U. S., at 261 (emphasis added).

They also rely on *Bumper* v. *North Carolina,* 391 U. S. 543, 548 n. 11 (1968), and *United States* v. *Jeffers,* 342 U. S. 48 (1951).

The above-quoted statement from *Jones* suggests that the italicized language was meant merely as a parenthetical equivalent of the previous phrase "a victim of a search or seizure." To the extent that the language might be read more broadly, it is dictum which was impliedly repudiated in *Alderman* v. *United States, supra,* and which we now expressly reject. In *Jones,* the Court set forth two alternative holdings: It established a rule of "automatic" standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged;[4] and second, it stated that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress." 362 U. S., at 264, 267. See *Combs* v. *United States,* 408 U. S. 224, 227 n. 4 (1972); *Mancusi* v. *DeForte,* 392 U. S. 364, 368 n. 5 (1968); *Simmons* v. *United States, supra,* at 390. Had the Court intended to adopt the target theory now put forth by petitioners, neither of the above two holdings would have been necessary since Jones was the "target" of the police search in that case.[5] Nor does *United States* v. *Jeffers, supra,* or

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[4] We have not yet had occasion to decide whether the automatic-standing rule of *Jones* survives our decision in *Simmons* v. *United States,* 390 U. S. 377 (1968). See *Brown* v. *United States,* 411 U. S. 223, 228–229 (1973). Such a rule is, of course, one which may allow a defendant to assert the Fourth Amendment rights of another.

[5] The search of the apartment in *Jones* was pursuant to a search warrant naming Jones and another woman as occupants of the apartment. The affidavit submitted in support of the search warrant alleged that Jones and

Bumper v. *North Carolina, supra,* support the target theory. Standing in *Jeffers* was based on Jeffers' possessory interest in both the premises searched and the property seized. 342 U. S., at 49–50, 54; see *Mancusi* v. *DeForte, supra,* at 367–368; *Hoffa* v. *United States,* 385 U. S. 293, 301 (1966); *Lanza* v. *New York,* 370 U. S. 139, 143, and n. 10 (1962). Similarly, in *Bumper,* the defendant had a substantial possessory interest in both the house searched and the rifle seized. 391 U. S., at 548 n. 11.

In Alderman v. *United States,* Mr. Justice Fortas, in a concurring and dissenting opinion, argued that the Court should "include within the category of those who may object to the introduction of illegal evidence 'one against whom the search was directed.'" 394 U. S., at 206–209. The Court did not directly comment on Mr. Justice Fortas' suggestion, but it left no doubt that it rejected this theory by holding that persons who were not parties to unlawfully overheard conversations or who did not own the premises on which such conversations took place did not have standing to contest the legality of the surveillance, regardless of whether or not they were the "targets" of the surveillance. *Id.,* at 176. Mr. Justice Harlan, concurring and dissenting, did squarely address Mr. Justice Fortas' arguments and declined to accept them. *Id.,* at 188–189, n. 1. He identified administrative problems posed by the target theory:

> "[T]he [target] rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was

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the woman were involved in illicit narcotics traffic and kept a supply of heroin and narcotics paraphernalia in the apartment. 362 U. S., at 267–269, and n. 2; App. in *Jones* v. *United States,* O. T. 1959, No. 69, p. 1.

> planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual. I do not believe that this administrative burden is justified in any substantial degree by the hypothesized marginal increase in Fourth Amendment protection." *Ibid.*

When we are urged to grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's, we cannot but give weight to practical difficulties such as those foreseen by Mr. Justice Harlan in the quoted language.

Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials. The Court's opinion in *Alderman* counseled against such an extension of the exclusionary rule:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would 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 174–175.

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. See *United States* v. *Ceccolini*, 435 U. S. 268, 275 (1978); *Stone* v. *Powell*, 428 U. S. 465, 489–490 (1976); *United States* v. *Calandra*, 414 U. S., at 348–352. Since our cases generally

have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.[6]

B

Had we accepted petitioners' request to allow persons other than those whose own Fourth Amendment rights were violated by a challenged search and seizure to suppress evidence obtained in the course of such police activity, it would be appropriate to retain *Jones*' use of standing in Fourth Amendment analysis. Under petitioners' target theory, a court could determine that a defendant had standing to invoke the exclusionary rule without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant. However, having rejected petitioners' target theory and reaffirmed the principle that the "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," *Simmons* v. *United States,* 390 U. S., at 389, the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth

[6] For these same prudential reasons, the Court in *Alderman* v. *United States* rejected the argument that *any* defendant should be enabled to apprise the court of unconstitutional searches and seizures and to exclude all such unlawfully seized evidence from trial, regardless of whether his Fourth Amendment rights were violated by the search *or* whether he was the "target" of the search. This expansive reading of the Fourth Amendment also was advanced by the petitioner in *Jones* v. *United States* and implicitly rejected by the Court. Brief for Petitioner in *Jones* v. *United States,* O. T. 1959, No. 69, pp. 21–25.

Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same.[7] But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing. The Court in *Jones* also may have been aware that there was a certain artificiality in analyzing this question in terms of standing because in at least three separate places in its opinion the Court placed that term within quotation marks. 362 U. S., at 261, 263, 265.

It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties. See, *e. g.*, *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*,

[7] So, for example, in *Katz* v. *United States*, 389 U. S. 347, 352 (1967), the Court focused on substantive Fourth Amendment law, concluded that a person in a telephone booth "may rely upon the protection of the Fourth Amendment," and then proceeded to determine whether the search was "unreasonable." In *Mancusi* v. *DeForte*, 392 U. S. 364 (1968), on the other hand, the Court concentrated on the issue of standing, decided that the defendant possessed it, and with barely any mention of the threshold substantive question of whether the search violated DeForte's own Fourth Amendment rights, went on to decide whether the search was "unreasonable." In both cases, however, the first inquiry was much the same.

422 U. S. 490, 499 (1975); *Data Processing Service* v. *Camp*, 397 U. S. 150, 152–153 (1970). But this Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing. Cf. *id.*, at 153, and n. 1; *Barrows* v. *Jackson*, 346 U. S. 249, 256 n. 4 (1953); *Hale* v. *Henkel*, 201 U. S. 43, 69–70 (1906).[8]

Analyzed in these terms, the question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.

C

Here petitioners, who were passengers occupying a car which they neither owned nor leased, seek to analogize their position to that of the defendant in *Jones* v. *United States*.

[8] This approach is consonant with that which the Court already has taken with respect to the Fifth Amendment privilege against self-incrimination, which also is a purely personal right. See, *e. g.*, *Bellis* v. *United States*, 417 U. S. 85, 89–90 (1974); *Couch* v. *United States*, 409 U. S. 322, 327–328 (1973); *United States* v. *White*, 322 U. S. 694, 698–699 (1944).

In *Jones,* petitioner was present at the time of the search of an apartment which was owned by a friend. The friend had given Jones permission to use the apartment and a key to it, with which Jones had admitted himself on the day of the search. He had a suit and shirt at the apartment and had slept there "maybe a night," but his home was elsewhere. At the time of the search, Jones was the only occupant of the apartment because the lessee was away for a period of several days. 362 U. S., at 259. Under these circumstances, this Court stated that while one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them,[9] "anyone legitimately on premises where a search occurs may challenge its legality." *Id.,* at 267. Petitioners argue that their occupancy of the automobile in question was comparable to that of Jones in the apartment and that they therefore have standing to contest the legality of the search—or as we have rephrased the inquiry, that they, like Jones, had their Fourth Amendment rights violated by the search.

We do not question the conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful.

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[9] The Court in *Jones* was quite careful to note that "wrongful" presence at the scene of a search would not enable a defendant to object to the legality of the search. 362 U. S., at 267. The Court stated: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. *This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." Ibid.* (emphasis added). Despite this clear statement in *Jones,* several lower courts inexplicably have held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile. See, *e. g., Cotton* v. *United States,* 371 F. 2d 385 (CA9 1967); *Simpson* v. *United States,* 346 F. 2d 291 (CA10 1965).

Nonetheless, we believe that the phrase "legitimately on premises" coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights.[10] For example, applied literally, this statement would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose served by the Fourth Amendment to permit either of them to object to the lawfulness of the search.[11]

We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. See 362 U. S., at 263,

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[10] The Court in *Mancusi* v. *DeForte, supra,* also must have been unsatisfied with the "legitimately on premises" statement in *Jones*. DeForte was legitimately in his office at the time of the search and if the *Mancusi* Court had literally applied the statement from *Jones,* DeForte's standing to object to the search should have been obvious. Instead, to determine whether DeForte possessed standing to object to the search, the Court inquired into whether DeForte's office was an area "in which there was a reasonable expectation of freedom from governmental intrusion." 392 U. S., at 368; see *id.*, at 376 (Black, J., dissenting).

Unfortunately, with few exceptions, lower courts have literally applied this language from *Jones* and have held that anyone legitimately on premises at the time of the search may contest its legality. See, *e. g., Garza-Fuentes* v. *United States,* 400 F. 2d 219 (CA5 1968); *State* v. *Bresolin,* 13 Wash. App. 386, 534 P. 2d 1394 (1975).

[11] This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search.

265. In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control. *Id.*, at 266; see *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967); *Silverman* v. *United States,* 365 U. S. 505 (1961). But the *Jones* statement that a person need only be "legitimately on premises" in order to challenge the validity of the search of a dwelling place cannot be taken in its full sweep beyond the facts of that case.

Katz v. *United States,* 389 U. S. 347 (1967), provides guidance in defining the scope of the interest protected by the Fourth Amendment. In the course of repudiating the doctrine derived from *Olmstead* v. *United States,* 277 U. S. 438 (1928), and *Goldman* v. *United States,* 316 U. S. 129 (1942), that if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. 389 U. S., at 353; see *United States* v. *Chadwick,* 433 U. S. 1, 7 (1977); *United States* v. *White,* 401 U. S. 745, 752 (1971). Viewed in this manner, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.[12] See *Jones* v. *United States,* 362 U. S., at 261.

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[12] Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may

Our Brother WHITE in dissent expresses the view that by rejecting the phrase "legitimately on [the] premises" as the appropriate measure of Fourth Amendment rights, we are abandoning a thoroughly workable, "bright line" test in favor of a less certain analysis of whether the facts of a particular case give rise to a legitimate expectation of privacy. *Post,*

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have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of *Jones,* 362 U. S., at 267, is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States,* 389 U. S., at 361 (Harlan, J., concurring). And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones, supra,* and *Katz, supra.* But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment. No better demonstration of this proposition exists than the decision in *Alderman* v. *United States,* 394 U. S. 165 (1969), where the Court held that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversations. On the other hand, even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon. See *Katz, supra,* at 351; *Lewis* v. *United States,* 385 U. S. 206, 210 (1966); *United States* v. *Lee,* 274 U. S. 559, 563 (1927); *Hester* v. *United States,* 265 U. S. 57, 58–59 (1924).

at 168. If "legitimately on premises" were the successful litmus test of Fourth Amendment rights that he assumes it is, his approach would have at least the merit of easy application, whatever it lacked in fidelity to the history and purposes of the Fourth Amendment. But a reading of lower court cases that have applied the phrase "legitimately on premises," and of the dissent itself, reveals that this expression is not a shorthand summary for a bright-line rule which somehow encapsulates the "core" of the Fourth Amendment's protections.[13]

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[13] An examination of lower court decisions shows that use of this purported "bright line" test has led to widely varying results. For example, compare *United States* v. *Westerbann-Martinez,* 435 F. Supp. 690 (EDNY 1977) (defendant has standing to object to search of co-defendant's *person* at airport because defendant was lawfully present at time of search), with *Sumrall* v. *United States,* 382 F. 2d 651 (CA10 1967), cert. denied, 389 U. S. 1055 (1968) (defendant did not have standing to object to search of codefendant's purse even though defendant present at time of search). Compare *Holloway* v. *Wolff,* 482 F. 2d 110 (CA8 1973) (defendant has standing to object to search of bedroom in house of third person because lawfully in house at time of search even though no showing that defendant had ever been given permission to use, or had ever been in, bedroom), with *Northern* v. *United States,* 455 F. 2d 427 (CA9 1972) (defendant lacked standing to object to search of apartment-mate's bedroom even though present in apartment at time of search since no showing that defendant had permission to enter or use roommate's bedroom), and *United States* v. *Miller,* 145 U. S. App. D. C. 312, 449 F. 2d 974 (1971) (defendant lawfully present in third person's office has standing to object to police entry into office since lawfully present but lacks standing to object to search of drawer of third person's desk since no showing that he had permission to open or use drawer). Compare *United States* v. *Tussell,* 441 F. Supp. 1092 (MD Pa. 1977) (lessee does not have standing because not present at time of search), with *United States* v. *Potter,* 419 F. Supp. 1151 (ND Ill. 1976) (lessee has standing even though not present when premises searched). Compare *United States* v. *Fernandez,* 430 F. Supp. 794 (ND Cal. 1976) (defendant with authorized access to apartment has standing even though not present at time of search), with *United States* v. *Potter, supra* (defendants with authorized access to premises lack standing because not present at the time of the search). Compare *United States* v. *Delguyd,* 542 F. 2d 346 (CA6 1976)

The dissent itself shows that the facile consistency it is striving for is illusory. The dissenters concede that "there comes a point when use of an area is shared with so many that one simply cannot reasonably expect seclusion." *Post,* at 164. But surely the "point" referred to is not one demarcating a line which is black on one side and white on another; it is inevitably a point which separates one shade of gray from another. We are likewise told by the dissent that a person "legitimately on *private* premises . . . , though his privacy is *not absolute,* is entitled to expect that he is sharing it only with those persons [allowed there] and that governmental officials will intrude only with *consent* or by complying with the Fourth Amendment." *Ibid.* (emphasis added). This single sentence describing the contours of the supposedly easily applied rule virtually abounds with unanswered questions: What are "private" premises? Indeed, what are the "premises?" It may be easy to describe the "premises" when one is confronted with a 1-room apartment, but what of the case of a 10-room house, or of a house with an attached garage that is searched? Also, if one's privacy is not absolute, how is it bounded? If he risks governmental intrusion "with consent," who may give that consent?

Again, we are told by the dissent that the Fourth Amendment assures that "*some* expectations of privacy are justified and will be protected from official intrusion." *Post,* at 166 (emphasis added). But we are not told which of many possible expectations of privacy are embraced within this sentence. And our dissenting Brethren concede that "perhaps the Constitution provides some degree less protection for the

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(defendant stopped by police in parking lot of apartment house which he intended to visit lacks standing to object to subsequent search of apartment since not present in apartment at time of search), with *United States* v. *Fay,* 225 F. Supp. 677 (SDNY 1963), rev'd on other grounds, 333 F. 2d 28 (CA2 1964) (defendant-invitee stopped in hallway of apartment building has standing to object to search of apartment he intended to visit).

personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place." *Ibid.* But how much "less" protection is available when one does not have such a possessory interest?

Our disagreement with the dissent is not that it leaves these questions unanswered, or that the questions are necessarily irrelevant in the context of the analysis contained in this opinion. Our disagreement is rather with the dissent's bland and self-refuting assumption that there will not be fine lines to be drawn in Fourth Amendment cases as in other areas of the law, and that its rubric, rather than a meaningful exegesis of Fourth Amendment doctrine, is more desirable or more easily resolves Fourth Amendment cases.[14] In abandoning "legitimately on premises" for the doctrine that we announce today, we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment. Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so. See *United States* v. *Robinson,* 414 U. S. 218, 235 (1973). But the phrase "legiti-

[14] Commentators have expressed similar dissatisfaction with reliance on "legitimate presence" to resolve Fourth Amendment questions. Trager & Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 Brooklyn L. Rev. 421, 448 (1975); White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333, 344–345 (1970). And, as we earlier noted, *supra,* at 142 n. 10, the Court in *Mancusi* v. *DeForte,* 392 U. S. 364 (1968), also implicitly recognized that the phrase "legitimately on premises" simply does not answer the question whether the search violated a defendant's "reasonable expectation of freedom from governmental intrusion." See *id.,* at 368.

mately on premises" has not been shown to be an easily applicable measure of Fourth Amendment rights so much as it has proved to be simply a label placed by the courts on results which have not been subjected to careful analysis. We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling.

D

Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes. See *United States* v. *Chadwick,* 433 U. S., at 12; *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 561 (1976); *Cardwell* v. *Lewis,* 417 U. S. 583, 590 (1974) (plurality opinion).[15] But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a

[15] As we noted in *Martinez-Fuerte,* "[o]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." 428 U. S., at 561.

passenger *qua* passenger simply would not normally have a legitimate expectation of privacy. *Supra,* at 142.

Jones v. *United States,* 362 U. S. 257 (1960) and *Katz* v. *United States,* 389 U. S. 347 (1967), involved significantly different factual circumstances. Jones not only had permission to use the apartment of his friend, but had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it. Likewise in *Katz,* the defendant occupied the telephone booth, shut the door behind him to exclude all others and paid the toll, which "entitled [him] to assume that the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." *Id.,* at 352.[16] Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest. No such showing was made by these petitioners with respect to those portions of the automobile which were searched and from which incriminating evidence was seized.[17]

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[16] The dissent states that *Katz* v. *United States* expressly recognized protection for passengers of taxicabs and asks why that protection should not also extend to these petitioners. *Katz* relied on *Rios* v. *United States,* 364 U. S. 253 (1960), as support for that proposition. The question of Rios' right to contest the search was not presented to or addressed by the Court and the property seized appears to have belonged to Rios. See *United States* v. *Jeffers,* 342 U. S. 48 (1951). Additionally, the facts of that case are quite different from those of the present case. Rios had hired the cab and occupied the rear passenger section. When police stopped the cab, he placed a package he had been holding on the floor of the rear section. The police saw the package and seized it after defendant was removed from the cab.

[17] For reasons which they do not explain, our dissenting Brethren repeatedly criticize our "holding" that unless one has a common-law property interest in the premises searched, one cannot object to the search. We have rendered no such "holding," however. To the contrary, we have taken pains to reaffirm the statements in *Jones* and *Katz* that "arcane

III

The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution. Since it did not violate any rights of these petitioners, their judgment of conviction is

Affirmed.

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

I concur in the opinion of the Court, and add these thoughts. I do not believe my dissenting Brethren correctly characterize the rationale of the Court's opinion when they assert that it ties "the application of the Fourth Amendment . . . to property law concepts." *Post*, at 156–157. On the contrary, I read the Court's opinion as focusing on whether there was a *legitimate* expectation of privacy protected by the Fourth Amendment.

The petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they

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distinctions developed in property . . . law . . . ought not to control." *Supra*, at 143, and n. 12. In a similar vein, the dissenters repeatedly state or imply that we now "hold" that a passenger lawfully in an automobile "may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it." *Post*, at 156, 158–159, 163, 165, 166, 168, 168–169. It is not without significance that these statements of today's "holding" come from the dissenting opinion, and not from the Court's opinion. The case before us involves the search of and seizure of property from the glove compartment and area under the seat of a car in which petitioners were riding as passengers. Petitioners claimed only that they were "legitimately on [the] premises" and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched. We cannot, therefore, agree with the dissenters' insistence that our decision will encourage the police to violate the Fourth Amendment. *Post*, at 168–169.

were riding; nor do they complain of being made to get out of the vehicle. Rather, petitioners assert that their constitutionally protected interest in privacy was violated when the police, after stopping the automobile and making them get out, searched the vehicle's interior, where they discovered a sawed-off rifle under the front seat and rifle shells in the locked glove compartment. The question before the Court, therefore, is a narrow one: Did the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?

The dissenting opinion urges the Court to answer this question by considering only the talisman of legitimate presence on the premises. To be sure, one of the two alternative reasons given by the Court for its ruling in *Jones* v. *United States*, 362 U. S. 257 (1960), was that the defendant had been legitimately on the premises searched. Since *Jones*, however, the view that mere legitimate presence is enough to create a Fourth Amendment right has been questioned. See *ante*, at 147 n. 14. There also has been a signal absence of uniformity in the application of this theory. See *ante*, at 145–146 n. 13.

This Court's decisions since *Jones* have emphasized a sounder standard for determining the scope of a person's Fourth Amendment rights: Only legitimate expectations of privacy are protected by the Constitution. In *Katz* v. *United States*, 389 U. S. 347 (1967), the Court rejected the notion that the Fourth Amendment protects places or property, ruling that the scope of the Amendment must be determined by the scope of privacy that a free people legitimately may expect. See *id.*, at 353. As Mr. Justice Harlan pointed out in his concurrence, however, it is not enough that an individual desired or anticipated that he would be free from governmental intrusion. Rather, for an expectation to deserve the protection of the Fourth Amendment, it must "be one that society is prepared to recognize as 'reasonable.'" See *id.*, at 361.

The ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances. As the dissenting opinion states, this standard "will not provide law enforcement officials with a bright line between the protected and the unprotected." See *post,* at 168. Whatever the application of this standard may lack in ready administration, it is more faithful to the purposes of the Fourth Amendment than a test focusing solely or primarily on whether the defendant was legitimately present during the search.[1]

In considering the reasonableness of asserted privacy expectations, the Court has recognized that no single factor invariably will be determinative. Thus, the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy. See, *e. g., United States* v. *Chadwick,* 433 U. S. 1, 11 (1977) ("By placing personal effects inside a double-

[1] Allowing anyone who is legitimately on the premises searched to invoke the exclusionary rule extends the rule far beyond the proper scope of Fourth Amendment protections, as not all who are legitimately present invariably have a reasonable expectation of privacy. And, as the Court points out, the dissenters' standard lacks even the advantage of easy application. See *ante,* at 145–146.

I do not share the dissenters' concern that the Court's ruling will "invit[e] police to engage in patently unreasonable searches every time an automobile contains more than one occupant." See *post,* at 168. A police officer observing an automobile carrying several passengers will not know the circumstances surrounding each occupant's presence in the automobile, and certainly will not know whether an occupant will be able to establish that he had a reasonable expectation of privacy. Thus, there will continue to be a significant incentive for the police to comply with the requirements of the Fourth Amendment, lest otherwise valid prosecutions be voided. Moreover, any marginal diminution in this incentive that might result from the Court's decision today is more than justified by society's interest in restricting the scope of the exclusionary rule to those cases where in fact there is a reasonable expectation of privacy.

locked footlocker, respondents manifested an expectation that the contents would remain free from public examination"); *Katz* v. *United States, supra,* at 352 ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world"). Similarly, the Court has looked to the way a person has used a location, to determine whether the Fourth Amendment should protect his expectations of privacy. In *Jones* v. *United States, supra,* for example, the Court found that the defendant had a Fourth Amendment privacy interest in an apartment in which he had slept and in which he kept his clothing. The Court on occasion also has looked to history to discern whether certain types of government intrusion were perceived to be objectionable by the Framers of the Fourth Amendment. See *United States* v. *Chadwick, supra,* at 7–9. And, as the Court states today, property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable. See *Alderman* v. *United States,* 394 U. S. 165 (1969).

The Court correctly points out that petitioners cannot invoke decisions such as *Alderman* in support of their Fourth Amendment claim, as they had no property interest in the automobile in which they were riding. But this determination is only part of the inquiry required under *Katz.* The petitioners' Fourth Amendment rights were not abridged here because none of the factors relied upon by this Court on prior occasions supports petitioners' claim that their alleged expectation of privacy from government intrusion was *reasonable.*

We are concerned here with an automobile search. Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in

an automobile and one's expectation when in other locations.[2] We have repeatedly recognized that this expectation in "an automobile . . . [is] significantly different from the traditional expectation of privacy and freedom in one's residence." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976). In *United States* v. *Chadwick, supra,* at 12, the distinction was stated more broadly:

> "[T]his Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. *Carroll* v. *United States,* 267 U. S. 132 (1925); *Preston* v. *United States,* [376 U. S. 364,] 366–367 [(1964)]; *Chambers* v. *Maroney,* 399 U. S. 42 (1970). See also *South Dakota* v. *Opperman,* 428 U. S. 364, 367 (1976)." [3]

In *Chadwick,* the Court recognized a reasonable expectation of privacy with respect to one's locked footlocker, and rejected the Government's argument that luggage always should be equated with motor vehicles for Fourth Amendment purposes. 433 U. S., at 13.

A distinction also properly may be made in some circumstances between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile or of its locked compartments. In *South Dakota* v. *Opperman,* 428 U. S. 364 (1976), for example, we

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[2] There are sound reasons for this distinction: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection. The rationale of the automobile distinction does not apply, of course, to objects on the person of an occupant.

[3] Six Members of the Court joined THE CHIEF JUSTICE in *Chadwick,* and the two Justices who dissented in *Chadwick* did not disagree with the automobile distinction.

considered "the citizen's interest in the privacy of the contents of his automobile" where its doors were locked and windows rolled up. See *id.*, at 379 (POWELL J., concurring). Here there were three passengers and a driver in the automobile searched. None of the passengers is said to have had control of the vehicle or the keys. It is unrealistic—as the shared experience of us all bears witness—to suggest that these passengers had any reasonable expectation that the car in which they had been riding would not be searched after they were lawfully stopped and made to get out. The minimal privacy that existed simply is not comparable to that, for example, of an individual in his place of abode, see *Jones* v. *United States, supra;* of one who secludes himself in a telephone booth, *Katz* v. *United States, supra;* or of the traveler who secures his belongings in a locked suitcase or footlocker. See *United States* v. *Chadwick, supra.*[4]

This is not an area of the law in which any "bright line" rule would safeguard both Fourth Amendment rights and the

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[4] The sawed-off rifle in this case was merely pushed beneath the front seat, presumably by one of the petitioners. In that position, it could have slipped into full or partial view in the event of an accident, or indeed upon any sudden stop. As the rifle shells were in the locked glove compartment, this might have presented a closer case if it had been shown that one of the petitioners possessed the keys or if a rifle had not been found in the automobile.

The dissenting opinion suggests that the petitioners here took the same actions to preserve their privacy as did the defendant in *Katz:* Just as Katz closed the door to the telephone booth after him, petitioners closed the doors to their automobile. See *post,* at 165 n. 15. Last Term, this Court determined in *Pennsylvania* v. *Mimms,* 434 U. S. 106 (1977), that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made. The dissenting opinion concedes that there is no question here of the propriety of the stopping of the automobile in which the petitioners were riding. See *post,* at 160 n. 5. Thus, the closing of the doors of a vehicle, even if there were only one occupant, cannot have the same significance as it might in other contexts.

public interest in a fair and effective criminal justice system. The range of variables in the fact situations of search and seizure is almost infinite. Rather than seek facile solutions, it is best to apply principles broadly faithful to Fourth Amendment purposes. I believe the Court has identified these principles.[5]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.[1] Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and

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[5] Even if one agreed with my dissenting Brethren that there was a Fourth Amendment violation in this case, the evidence seized would have been admissible under the modification of the exclusionary rule proposed by MR. JUSTICE WHITE in his dissenting opinion in *Stone* v. *Powell*, 428 U. S. 465, 538 (1976):

"[T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed."

See also *Brown* v. *Illinois*, 422 U. S. 590, 609–610 (1975) (POWELL, J., concurring in part).

[1] For the most part, I agree with the Court's rejection, which was implicit in *Alderman* v. *United States*, 394 U. S. 165 (1969), of petitioners' secondary theory of target standing.

the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his relationship to the owner. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases. Cf. *Stone* v. *Powell,* 428 U. S. 465, 536 (1976) (WHITE, J., dissenting).

I

Two intersecting doctrines long established in this Court's opinions control here. The first is the recognition of some cognizable level of privacy in the interior of an automobile. Though the reasonableness of the expectation of privacy in a vehicle may be somewhat weaker than that in a home, see *United States* v. *Chadwick,* 433 U. S. 1, 12–13 (1977), "[a] search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search." *United States* v. *Ortiz,* 422 U. S. 891, 896 (1975) (footnote omitted). So far, the Court has not strayed from this application of the Fourth Amendment.[2]

The second tenet is that when a person is legitimately present in a private place, his right to privacy is protected from unreasonable governmental interference even if he does

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[2] See *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause for the search").

not own the premises. Just a few years ago, THE CHIEF JUSTICE, for a unanimous Court, wrote that the "[p]resence of the defendant at the search and seizure was held, in *Jones*, to be a sufficient source of standing in itself." *Brown* v. *United States*, 411 U. S. 223, 227 n. 2 (1973); accord, *id.*, at 229 (one basis for Fourth Amendment protection is presence "on the premises at the time of the contested search and seizure"); *Jones* v. *United States*, 362 U. S. 257 (1960) (individual legitimately present in friend's apartment may object to search of apartment). *Brown* was not the first time we had recognized that *Jones* established the rights of one legitimately in a private area against unreasonable governmental intrusion. *E. g.*, *Combs* v. *United States*, 408 U. S. 224, 227, and n. 4 (1972); *Mancusi* v. *DeForte*, 392 U. S. 364, 368, and n. 5 (1968); *Simmons* v. *United States*, 390 U. S. 377, 390 (1968). The Court in *Jones* itself was unanimous in this regard, and its holding is not the less binding because it was an alternative one. See *Combs* v. *United States*, *supra*, at 227 n. 4.

These two fundamental aspects of Fourth Amendment law demand that petitioners be permitted to challenge the search and seizure of the automobile in this case. It is of no significance that a car is different for Fourth Amendment purposes from a house, for if there is some protection for the privacy of an automobile then the only relevant analogy is between a person legitimately in someone else's vehicle and a person legitimately in someone else's home. If both strands of the Fourth Amendment doctrine adumbrated above are valid, the Court must reach a different result. Instead, it chooses to eviscerate the *Jones* principle, an action in which I am unwilling to participate.

II

Though we had reserved the very issue over 50 years ago, see *Carroll* v. *United States*, 267 U. S. 132, 162 (1925), and never expressly dealt with it again until today, many of our opinions have assumed that a mere passenger in an automo-

bile is entitled to protection against unreasonable searches occurring in his presence. In decisions upholding the validity of automobile searches, we have gone directly to the merits even though some of the petitioners did not own or possess the vehicles in question. *E. g., Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973) (sole petitioner was not owner; in fact, owner was not in the automobile at all); *Chambers* v. *Maroney,* 399 U. S. 42 (1970) (sole petitioner was not owner); *Husty* v. *United States,* 282 U. S. 694 (1931). In *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968), the Court, with seven Members agreeing, upset the admission of evidence against three petitioners though only one owned the vehicle. See *id.,* at 221–222. Similarly, in *Preston* v. *United States,* 376 U. S. 364 (1964), the Court unanimously overturned a search though the single petitioner was not the owner of the automobile. The Court's silence on this issue in light of its actions can only mean that, until now, we, like most lower courts,[3] had assumed that *Jones* foreclosed the answer now supplied by the majority. That assumption was perfectly understandable, since all private premises would seem to be the same for the purposes of the analysis set out in *Jones.*

III

The logic of Fourth Amendment jurisprudence compels the result reached by the above decisions. Our starting point is "[t]he established principle . . . that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself . . . ." *Alderman* v. *United States,* 394 U. S. 165, 171–172 (1969).[4] Though the Amendment protects one's liberty

[3] *E. g., United States* v. *Edwards,* 577 F. 2d 883 (CA5 1978) (en banc); *Bustamonte* v. *Schneckloth,* 448 F. 2d 699 (CA9 1971), rev'd on other grounds, 412 U. S. 218 (1973); *United States* v. *Peisner,* 311 F. 2d 94 (CA4 1962).

[4] Accord, *Simmons* v. *United States,* 390 U. S. 377, 389 (1968) ("[W]e have . . . held that rights assured by the Fourth Amendment are personal

and property interests against unreasonable seizures of self[5] and effects,[6] "the primary object of the Fourth Amendment [is] . . . the protection of privacy." *Cardwell* v. *Lewis*, 417 U. S. 583, 589 (1974) (plurality opinion).[7] And privacy is the

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rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure").

[5] See *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest"); *Terry* v. *Ohio*, 392 U. S. 1 (1968).

Thus, petitioners of course have standing to challenge the legality of the stop, and the evidence found may be a fruit of that stop. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 548, 556 (1976). Petitioners have not argued that theory here, perhaps because the justification necessary for such a stop is less than that needed for a search. See *Terry* v. *Ohio*, *supra*. Nor have petitioners chosen to argue that they were "arrested" in constitutional terms as soon as they were ordered from the vehicle and that the search was a fruit of that infringement on their personal rights.

[6] See *United States* v. *Lisk*, 522 F. 2d 228 (CA7 1975), cert. denied, 423 U. S. 1078 (1976) (noted in 64 Geo. L. J. 1187 (1976)), after remand, 559 F. 2d 1108 (CA7 1977).

Petitioners never asserted a property interest in the items seized from the automobile. The evidence found was useful to the prosecution solely on the theory that petitioners' possession of the items was probative of petitioners' identity as the robbers. In *Jones* the Court recognized automatic standing in possessory crimes because the prosecution should not be allowed to take contradictory positions in the suppression hearing and then at trial, and also because of the dilemma that the defendant would face if he were forced to assert possession to challenge a search. 362 U. S., at 263. In *Simmons* we eliminated the dilemma by holding that the accused's testimony at the suppression hearing could not be used against him at trial. 390 U. S., at 394. We also noted that the question whether automatic standing should be recognized for possessory evidence in nonpossessory crimes was an open one. *Id.*, at 391–392. Finally, in *Brown* v. *United States*, 411 U. S. 223, 229 (1973), we reserved the question whether prosecutorial self-contradiction by itself warrants automatic standing.

[7] See *United States* v. *Chadwick*, 433 U. S. 1, 7 (1977).

interest asserted here,[8] so the first step is to ascertain whether the premises searched "fall within a protected zone of privacy." *United States* v. *Miller,* 425 U. S. 435, 440 (1976). My Brethren in the majority assertedly do not deny that automobiles warrant at least some protection from official interference with privacy. Thus, the next step is to decide who is entitled, vis-à-vis the State, to enjoy that privacy. The answer to that question must be found by determining "whether petitioner had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises." *Combs* v. *United States,* 408 U. S., at 227, quoting *Mancusi* v. *DeForte,* 392 U. S., at 368 (bracketed material in original).

Not only does *Combs* supply the relevant inquiry, it also directs us to the proper answer. We recognized there that *Jones* had held that one of those protected interests is created by legitimate presence on the searched premises, even absent any possessory interest. 408 U. S., at 227 n. 4. This makes unquestionable sense. We have concluded on numerous occasions that the entitlement to an expectation of privacy does not hinge on ownership:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz* v. *United States,* 389 U. S. 347, 351–352 (1967).

In *Alderman* v. *United States, supra,* at 196, Mr. Justice Harlan, concurring in part and dissenting in part, noted that "our own past decisions . . . have decisively rejected the no-

[8] See *Cardwell* v. *Lewis,* 417 U. S., at 591 (plurality opinion) ("[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry").

tion that the accused must necessarily have a possessory interest in the premises before he may assert a Fourth Amendment claim." That rejection should not have been surprising in light of our conclusion as early as 1960 that "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones* v. *United States,* 362 U. S., at 266.[9] The proposition today overruled was stated most directly in *Mancusi* v. *DeForte, supra,* at 368: "[T]he protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."

Prior to *Jones,* the lower federal courts had based Fourth Amendment rights upon possession or ownership of the items seized or the premises searched.[10] But *Jones* was foreshadowed by Mr. Justice Jackson's remark in 1948 that "even a guest may expect the shelter of the rooftree he is under against criminal intrusion." *McDonald* v. *United States,* 335 U. S. 451, 461 (1948) (Jackson, J., joined by Frankfurter, J., concurring). Indeed, the decision today is contrary to Mr. Justice Brandeis' dissent in *Olmstead* v. *United States,* 277

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[9] Accord, *id.,* at 589 ("The common-law notion that a warrant to search and seize is dependent upon the assertion of a superior government interest in property, . . . and the proposition that a warrant is valid 'only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it,' . . . were explicitly rejected as controlling Fourth Amendment considerations in *Warden* v. *Hayden,* 387 U. S. 294, 302–306 (1967)").

[10] Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo. L. Rev. 1, 36 n. 238 (1975).

U. S. 438, 478 (1928), expressing a view of the Fourth Amendment thought to have been vindicated by *Katz*. The majority in *Olmstead* found the Fourth Amendment inapplicable absent a trespass on property rights. 277 U. S., at 466. That is exactly what the Court holds in this case; but Mr. Justice Brandeis asserted 50 years ago that more than mere property rights are involved, and the Court's opinion in *Katz* re-emphasized that "'[t]he premise that property interests control the right of the Government to search and seize has been discredited.'" 389 U. S., at 353, quoting *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967). That logic led us inescapably to the conclusion that "[n]o less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." 389 U. S., at 352 (footnotes omitted). And if all of those situations are protected, surely a person riding in an automobile next to his friend the owner, or a child or wife with the father or spouse, must have some protection as well.

The same result is reached by tracing other lines of our Fourth Amendment decisions. If a nonowner may consent to a search merely because he is a joint user or occupant of a "premises," *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969),[11] then that same nonowner must have a protected privacy interest. The scope of the authority sufficient to grant a valid consent can hardly be broader than the contours of protected privacy.[12]

[11] See also *United States* v. *Matlock*, 415 U. S. 164, 169, and 171 n. 7 (1974) ("The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched").

[12] Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 54 (1974).

And why should the owner of a vehicle be entitled to challenge the seizure from it of evidence even if he is absent at the time of the search, see *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), while a nonowner enjoying in person, and with the owner's permission, the privacy of an automobile is not so entitled?

In sum, one consistent theme in our decisions under the Fourth Amendment has been, until now, that "the Amendment does not shield only those who have title to the searched premises." *Mancusi* v. *DeForte,* 392 U. S., at 367. Though there comes a point when use of an area is shared with so many that one simply cannot reasonably expect seclusion, see *id.,* at 377 (WHITE, J., dissenting); *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.,* 416 U. S. 861, 865 (1974), short of that limit a person legitimately on private premises knows the others allowed there and, though his privacy is not absolute, is entitled to expect that he is sharing it only with those persons and that governmental officials will intrude only with consent or by complying with the Fourth Amendment. See *Mancusi* v. *DeForte, supra,* at 369–370.[13]

It is true that the Court asserts that it is not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights, but in reality it is doing exactly that.[14] Petitioners were in a private place with the permis-

[13] See *id.,* at 52 ("The fourth amendment assures us that when we are in a private place we are, so far as the government is concerned, in private").

[14] The Court's reliance on property law concepts is additionally shown by its suggestion that visitors could "contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." *Ante,* at 142 n. 11. See also *ante,* at 149, and n. 16. What difference should that property interest make to constitutional protection against unreasonable searches, which is concerned with privacy? See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 510–521 (1971) (WHITE, J., with BURGER, C. J., concurring and dissenting). Contrary to the Court's suggestion, a legitimate passenger in a car expects to enjoy the privacy of the vehicle whether or not he happens to carry some item along for the

sion of the owner, but the Court states that that is not sufficient to establish entitlement to a legitimate expectation of privacy. *Ante,* at 148. But if that is not sufficient, what would be? We are not told, and it is hard to imagine anything short of a property interest that would satisfy the majority. Insofar as the Court's rationale is concerned, no passenger in an automobile, without an ownership or possessory interest and regardless of his relationship to the owner, may claim Fourth Amendment protection against illegal stops and searches of the automobile in which he is rightfully present. The Court approves the result in *Jones,* but it fails to give any explanation why the facts in *Jones* differ, in a fashion material to the Fourth Amendment, from the facts here.[15] More importantly, how is the Court able to avoid answering the question why presence in a private place with the owner's permission is insufficient? If it is "tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases," *ante,* at 144 n. 12, then it surely must be tautological to decide that issue simply by unadorned fiat.

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ride. We have never before limited our concern for a person's privacy to those situations in which he is in possession of personal property. Even a person living in a barren room without possessions is entitled to expect that the police will not intrude without cause.

[15] Jones had permission to use the apartment, had slept in it one night, had a key, had left a suit and a shirt there, and was the only occupant at the time of the search. *Ante,* at 141 and 149. Petitioners here had permission to be in the car and were occupying it at the time of the search. Thus the only distinguishing fact is that Jones could exclude others from the apartment by using his friend's key. But petitioners and their friend the owner had excluded others by entering the automobile and shutting the doors. Petitioners did not need a key because the owner was present. Similarly, the Court attempts to distinguish *Katz* on the theory that Katz had "shut the door behind him to exclude all others," *ante,* at 149, but petitioners here did exactly the same. The car doors remained closed until the police ordered them opened at gunpoint.

As a control on governmental power, the Fourth Amendment assures that some expectations of privacy are justified and will be protected from official intrusion. That should be true in this instance, for if protected zones of privacy can only be purchased or obtained by possession of property, then much of our daily lives will be unshielded from unreasonable governmental prying, and the reach of the Fourth Amendment will have been narrowed to protect chiefly those with possessory interests in real or personal property. I had thought that *Katz* firmly established that the Fourth Amendment was intended as more than simply a trespass law applicable to the government. Katz had no possessory interest in the public telephone booth, at least no more than petitioners had in their friend's car; Katz was simply legitimately present. And the decision in *Katz* was based not on property rights, but on the theory that it was essential to securing "conditions favorable to the pursuit of happiness" [16] that the expectation of privacy in question be recognized.[17]

At most, one could say that perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place. But that would only change the extent of the protection; it would not free police to do the unreasonable, as does the decision today. And since the accused should be entitled to litigate the application of the Fourth Amendment where his privacy interest is merely arguable,[18] the failure to allow such litigation here is the more incomprehensible.

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[16] *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

[17] See Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 Geo. Wash. L. Rev. 529, 538 (1978).

[18] *Investment Co. Institute* v. *Camp,* 401 U. S. 617, 620 (1971); cf. *ante,* at 140.

IV

The Court's holding is contrary not only to our past decisions and the logic of the Fourth Amendment but also to the everyday expectations of privacy that we all share. Because of that, it is unworkable in all the various situations that arise in real life. If the owner of the car had not only invited petitioners to join her but had said to them, "I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own," then apparently the majority would reverse. But people seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem.[19] If the nonowner were the spouse or child of the owner,[20] would the Court recognize a sufficient interest? If so, would distant relatives somehow have more of an expectation of privacy than close friends? What if the nonowner were driving with the owner's permission? Would nonowning drivers have more of an expectation of privacy than mere passengers? What about a passenger in a taxicab? *Katz* expressly recognized protection for such passengers. Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?

The distinctions the Court would draw are based on relationships between private parties, but the Fourth Amendment is concerned with the relationship of one of those parties to

[19] So far as we know, the owner of the automobile in question might have expressly granted or intended to grant exactly such an interest. Apparently not contemplating today's radical change in the law, petitioners did not know at the suppression hearing that the precise form of the invitation extended by the owner to the petitioners would be dispositive of their rights against governmental intrusion.

[20] In fact, though it was not brought out at the suppression hearing, one of the petitioners is the former husband of the owner and driver of the car. He did testify at the suppression hearing that he was with her when she purchased it.

the government. Divorced as it is from the purpose of the Fourth Amendment, the Court's essentially property-based rationale can satisfactorily answer none of the questions posed above. That is reason enough to reject it. The *Jones* rule is relatively easily applied by police and courts; the rule announced today will not provide law enforcement officials with a bright line between the protected and the unprotected.[21] Only rarely will police know whether one private party has or has not been granted a sufficient possessory or other interest by another private party. Surely in this case the officers had no such knowledge. The Court's rule will ensnare defendants and police in needless litigation over factors that should not be determinative of Fourth Amendment rights.[22]

More importantly, the ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. See *Stone* v. *Powell*, 428 U. S., at 536–542 (WHITE, J., dissenting). This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle, or of the item, will have standing to seek suppression, and the evidence will

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[21] Contrary to the assertions in the majority and concurring opinions, I do not agree that the Court's rule is faithful to the purposes of the Fourth Amendment but reject it only because it fails to provide a "bright line." As the discussion, *supra*, at 159–166, indicates, this dissent disagrees with the Court's view that petitioners lack a reasonable expectation of privacy. The Court's *ipse dixit* is not only unexplained but also is unjustified in light of what persons reasonably do, and should be entitled to, expect. My point in this portion of the opinion is that the Court's lack of faithfulness to the purposes of the Fourth Amendment does not have even the saving grace of providing an easily applied rule.

[22] To say that the Fourth Amendment goes beyond property rights, of course, is not to say that one not enjoying privacy in person would not be entitled to expect protection from unreasonable intrusions into the areas he owns, such as his house. *E. g., Alderman* v. *United States*, 394 U. S. 165 (1969).

presumably be usable against the other occupants.[23] The danger of such bad faith is especially high in cases such as this one where the officers are only after the passengers and can usually infer accurately that the driver is the owner. The suppression remedy for those owners in whose vehicles something is found and who are charged with crime is small consolation for all those owners *and* occupants whose privacy will be needlessly invaded by officers following mistaken hunches not rising to the level of probable cause but operated on in the knowledge that someone in a crowded car will probably be unprotected if contraband or incriminating evidence happens to be found. After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.

Of course, most police officers will decline the Court's invitation and will continue to do their jobs as best they can in accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. Some policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed. In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.

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[23] See Ingber, Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control, 56 B. U. L. Rev. 266, 304–305 (1976) (police may often be willing to risk suppression at the behest of some defendants in order to gain evidence usable against those without constitutional protection); White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333, 349, 365 (1970) (same).

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 77–991. Argued November 6, 1978—Decided December 11, 1978*

Section 1611 (f) of the Social Security Act, which provides that no benefits under the Supplemental Security Income (SSI) program for the needy aged, blind, and disabled are to be paid for any month that the recipient spends entirely outside of the United States, *held* to be constitutional as having a rational basis and not to impose an impermissible burden on the freedom of international travel in violation of the Fifth Amendment. That section, which merely has an incidental effect on international travel (*Kent* v. *Dulles*, 357 U. S. 116; *Aptheker* v. *Secretary of State*, 378 U. S. 500; and *Zemel* v. *Rusk*, 381 U. S. 1, distinguished), clearly effectuates the basic congressional decision to limit SSI payments to residents of the United States. Moreover, § 1611 (f) may represent Congress' decision simply to limit payments to those who need them in the United States. While these justifications for the legislation may not be compelling, its constitutionality, in contrast to the standard applied to laws that penalize the right of interstate travel, does not depend on compelling justifications. Pp. 174–178.

440 F. Supp. 788, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL and BRENNAN, JJ., filed an opinion concurring in the result, *post*, p. 178.

Peter Buscemi argued the cause *pro hac vice* for petitioner in No. 77–991 and respondent in No. 77–5999. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook,* and *William Kanter.*

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*Together with No. 77–5999, *Aznavorian* v. *Califano, Secretary of Health, Education, and Welfare,* also on appeal from the same court.

Peter Anthony Schey argued the cause for respondent in No. 77–991 and petitioner in No. 77–5999. With him on the brief were *Victor Benjamin Harris, Ralph Santiago Abascal, Charles Wolfinger, Phillip M. Gassel,* and *Richard Paez.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1972 Congress enacted the Supplemental Security Income program to aid the needy aged, blind, and disabled. The legislation creating the program provides that benefits are not to be paid for any month that the recipient spends entirely outside of the United States. The primary issue in the present litigation is whether this restriction is a constitutionally impermissible burden on the asserted right of international travel.

I

The 1972 Social Security Act Amendments repealed Titles I, X, and XIV of the Act, which had provided federal aid for state programs for the aged, blind, and disabled. The amendments replaced those programs with a new Title XVI, the Supplemental Security Income (SSI) program. 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* This program is administered by the Federal Government through the Social Security Administration. To be eligible to receive benefits under the program, a person must be a resident of the United States, 42 U. S. C. § 1382c (a)(1)(B); be either over 65 years old or meet statutory definitions of blindness and disability, § 1382c (a); and be poor, §§ 1382a (income), 1382b (resources).

Section 1611 (f) of the Social Security Act, as added in 1972, provides that no person shall receive SSI benefits "for any month during all of which such individual is outside the United States . . . ." The section further provides that

> "after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has

been in the United States for a period of 30 consecutive days." [1]

Thus, if a recipient were to leave the country on May 5 and return on July 10, he would receive his entire payment for May. He would, however, lose his benefits for June and July. He would have been actually away the entire month of June, and, because he had been gone for more than 30 days, he would be treated as having remained outside the country until August 9. In August his payments would automatically resume.

Grace Aznavorian is an American citizen. In 1974 she was a resident of California and an eligible recipient of SSI benefits. On July 21, 1974, she left the United States and traveled to Guadalajara, Mexico. Because of an unexpected illness, she remained in Mexico until September 1, 1974. Accordingly, she did not receive benefits for August or September.

Aznavorian pursued her administrative remedies without success. She then filed this suit in the United States District Court for the Southern District of California, seeking judicial review of the Secretary's decision.[2] Asserting that the suspension of her benefits denied her due process, equal protection, and the right of international travel, all as guaranteed by the Fifth Amendment, she sought declaratory relief and the bene-

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[1] The section reads in full:

"Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days." 86 Stat. 1468, 42 U. S. C. § 1382 (f).

[2] Jurisdiction was based on two provisions of the Social Security Act: §§ 205 (g) and 1631 (c)(3), 42 U. S. C. §§ 405 (g) and 1383 (c)(3).

fits which had been denied because of her visit to Mexico.[3] She moved for certification of a plaintiff class including all persons denied SSI benefits because of international travel. The Secretary moved for summary judgment.

The District Court first considered the motion for class certification. It concluded that a class action was not barred by the Social Security Act because the class would be limited to those who had presented unsuccessful claims to the Secretary. Because the requirements of Fed. Rule Civ. Proc. 23 were otherwise satisfied, it certified the class.[4] 440 F. Supp. 788, 792–794.

The court then granted summary judgment to the plaintiff class. Because international travel is "a basic constitutional right," the District Court held that the statute must bear "a fair and substantial relationship in fact to the governmental purposes that it seeks to achieve." *Id.*, at 795, 797. The court concluded that the limitation on benefits was not sufficiently related to the Government's interest in making payments only to bona fide residents of the United States to be constitutionally valid.

The District Court ordered the Secretary to provide notice of its decision to all class members who were receiving benefits at the time of the order or would have been receiving benefits except for § 1611 (f). It also ordered the Secretary to pay benefits to those members of the class whose benefits had been

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[3] Her original complaint requested injunctive relief and moved that a three-judge court be convened. The motion for a three-judge court was later withdrawn along with the request for an injunction.

[4] The certified class was defined as:

"All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administration reconsideration, an administrative hearing, or an Appeals Council review, based solely on 42 U. S. C. § 1382 (f) and regulations promulgated thereunder, from September 26, 1975 until the entry of this Order."

suspended because of § 1611 (f), but who in fact continued to be actual residents of the United States. Because its order was limited to persons who were still needy within the meaning of the SSI program, the court believed that its order did not violate the sovereign immunity of the United States. 440 F. Supp., at 802–803.

The Secretary appealed directly to this Court, and Aznavorian filed a cross-appeal under 28 U. S. C. § 1252. We noted probable jurisdiction of both appeals and consolidated the cases. 435 U. S. 921.

II

The Secretary raises two questions on his appeal.[5] First, he contends that § 1611 (f) does not violate the Fifth Amendment. Second, he urges that in any event the District Court's award of retroactive monetary relief is barred by sovereign immunity. Aznavorian's cross-appeal takes the position that the District Court erred in awarding monetary relief only to those class members who were eligible for SSI benefits on the date of its order. Because we conclude that § 1611 (f) does not violate the Constitution, there is no occasion to consider the remedial issues raised by the appeal and cross-appeal.

Social welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress' choice.

> "The basic principle that must govern an assessment of any constitutional challenge to a law providing for

[5] The Secretary's jurisdictional statement also claimed that a class action could not be maintained under § 205 (g) of the Social Security Act. That question was raised but not decided in *Norton* v. *Mathews*, 427 U. S. 524. While not abandoning his position, the Secretary has chosen not to argue the question in this case. The question is pending in *Califano* v. *Elliott*, No. 77–1511, cert. granted, *post*, p. 816. It is conceded that Aznavorian, as an individual, met the jurisdictional requirements of § 205 (g).

> governmental payments of monetary benefits is well established. . . . In enacting legislation of this kind a government does not deny equal protection 'merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge* v. *Williams,* 397 U. S. 471, 485.
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> "To be sure, the standard by which legislation such as this must be judged 'is not a toothless one,' *Mathews* v. *Lucas,* 427 U. S. 495, 510. But the challenged statute is entitled to a strong presumption of constitutionality." *Mathews* v. *De Castro,* 429 U. S. 181, 185.

See, *e. g., Califano* v. *Jobst,* 434 U. S. 47; *Califano* v. *Goldfarb,* 430 U. S. 199, 210; *Mathews* v. *Diaz,* 426 U. S. 67; *Weinberger* v. *Salfi,* 422 U. S. 749; *Jefferson* v. *Hackney,* 406 U. S. 535; *Richardson* v. *Belcher,* 404 U. S. 78.

Aznavorian argues that, even though § 1611 (f) may under this standard be valid as against an equal protection or due process attack, a more stringent standard must be applied in a constitutional appraisal of § 1611 (f) because this statutory provision limits the freedom of international travel. We have concluded, however, that § 1611 (f), fortified by its presumption of constitutionality, readily withstands attack from that quarter as well.

The freedom to travel abroad has found recognition in at least three decisions of this Court. In *Kent* v. *Dulles,* 357 U. S. 116, the Secretary of State had refused to issue a passport to a person because of his links with leftwing political groups. The Court held that Congress had not given the Secretary discretion to deny passports on such grounds. Although the holding was one of statutory construction, the Court recognized that freedom of international travel is "basic in our scheme of values" and an "important aspect of the

citizen's 'liberty.'" *Id.*, at 126, 127. *Aptheker* v. *Secretary of State,* 378 U. S. 500, dealt with § 6 of the Subversive Activities Control Act, 50 U. S. C. § 785, which made it a criminal offense for a member of the Communist Party to apply for a passport. The Court again recognized that the freedom of international travel is protected by the Fifth Amendment. Congress had legislated too broadly by restricting this liberty for all members of the party. In *Zemel* v. *Rusk,* 381 U. S. 1, the Court upheld the Secretary's decision not to validate passports for travel to Cuba. The Court pointed out that "the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited." *Id.*, at 14.

Aznavorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over 100 years. *Edwards* v. *California,* 314 U. S. 160; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Williams* v. *Fears,* 179 U. S. 270, 274; *Crandall* v. *Nevada,* 6 Wall. 35, 43–44; *Passenger Cases,* 7 How. 283, 492 (Taney, C. J., dissenting). But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel.

> "The constitutional right of interstate travel is virtually unqualified, *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966); *Griffin* v. *Breckenridge,* 403 U. S. 88, 105–106 (1971). By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process." (Citations omitted.) *Califano* v. *Torres,* 435 U. S. 1, 4 n. 6.

See *Shapiro* v. *Thompson,* 394 U. S. 618, 643 n. 1 (concurring opinion). Thus, legislation which is said to infringe the free-

dom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the States. See *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 254–262; *Dunn* v. *Blumstein,* 405 U. S. 330, 338–342; *Shapiro* v. *Thompson, supra,* at 634.

Unlike cases involving the right of interstate travel, this case involves legislation providing governmental payments of monetary benefits that has an incidental effect on a protected liberty, similar to the legislation considered in *Califano* v. *Jobst, supra.* There, another section of the Social Security Act was challenged because it "penalized" some beneficiaries upon their marriage. The Court recognized that the statutory provisions "may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others," 434 U. S., at 58, but nonetheless upheld the constitutional validity of the challenged legislation.[6]

The statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent, Aptheker,* or *Zemel* cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It merely withdraws a governmental benefit during and shortly after an extended absence from this country. Unless the limitation imposed by Congress is wholly irrational, it is constitutional in spite of its incidental effect on international travel.

It is to be noted that Aznavorian does not question the constitutional validity of the basic decision of Congress to limit SSI payments to residents of the United States, as provided in § 1614 (a)(1)(B) of the Social Security Act, as

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[6] In contrast to the monetary-benefits legislation upheld in the *Jobst* case, a state law that burdened the freedom to marry was held constitutionally invalid later the same Term in *Zablocki* v. *Redhail,* 434 U. S. 374.

amended, 42 U. S. C. § 1382c (a)(1)(B). The statutory provision in issue, § 1611 (f), clearly effectuates this basic congressional decision. Certainly, the longer a person is out of the country, the greater the possibility that he is no longer a resident. The 30-day period provided in § 1611 (f) is no more arbitrary than any similar time period would be. The additional provision of § 1611 (f) that, once a person has been outside the country for 30 consecutive days or more, he will not be eligible for SSI payments until he has spent 30 consecutive days in the United States, simply adds assurance that the beneficiary's residency here is genuine.

Moreover, as the Secretary argues, Congress may simply have decided to limit payments to those who need them in the United States. The needs to which this program responds might vary dramatically in foreign countries. The Social Security Administration would be hard pressed to monitor the continuing eligibility of persons outside the country. And, indeed, Congress may only have wanted to increase the likelihood that these funds would be spent inside the United States.

These justifications for the legislation in question are not, perhaps, compelling. But its constitutionality does not depend on compelling justifications. It is enough if the provision is rationally based. *Dandridge* v. *Williams*, 397 U. S. 471, 487. Section 1611 (f) meets that test. Accordingly, the judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE MARSHALL and MR. JUSTICE BRENNAN, concurring in the result.

We concur in the Court's conclusion that § 1611 (f) of the Social Security Act is constitutional. We do not, however, understand the Court to imply that welfare legislation not involving a fundamental interest or suspect classification is subject to a lesser standard of review than the traditional rational basis test. To sustain classifications in welfare legis-

lation that are "arbitrary," *ante,* at 174, so long as they are not "wholly irrational," *ante,* at 177, would be inconsistent with the settled principle that the "standard by which [welfare] legislation . . . must be judged 'is not a toothless one.'" *Mathews* v. *De Castro,* 429 U. S. 181, 185 (1976), quoting *Mathews* v. *Lucas,* 427 U. S. 495, 510 (1976).

UNITED CALIFORNIA BANK ET AL., CO-EXECUTORS *v.* UNITED STATES

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

No. 77–1016. Argued October 4, 1978—Decided December 11, 1978

The issue in this case involves the computation of the alternative income tax of a decedent's estate that had net long-term capital gains, a portion of which, pursuant to the decedent's will, was set aside for charitable purposes within the meaning of § 642 (c) of the Internal Revenue Code of 1954. Under the provisions of the Code in effect during the years in question, taxpayers, including decedents' estates, with net long-term capital gains exceeding net short-term capital losses, paid either a "normal" income tax calculated by applying ordinary graduated rates to taxable income computed with a 50% capital-gains deduction permitted by § 1202 or, if it was a lesser sum, the alternative tax calculated under § 1201 (b). In 1967 and 1968, petitioners, executors of an estate, realized long-term capital gains from the sale of securities included in the residue; there were no short-term capital losses. Petitioners set aside a portion of the long-term capital gains for the benefit of a specified charity as directed by the decedent's will. In the fiduciary income tax returns for 1967 and 1968, petitioners sought to use the alternative tax, and in computing this tax excluded from the long-term capital gains the portion set aside for charity. The District Director disallowed the exclusion, without which the alternative tax was higher than the normal tax, with the result that the latter tax was due. Additional taxes were assessed and paid, and this suit for refund followed. The District Court allowed the exclusion, but the Court of Appeals reversed. *Held:* The net long-term gains to which the alternative tax is applicable is reducible by the amount of the charitable set-asides in the years in question. Pp. 187–199.

(a) While charitable distributions or set-asides by an estate are not within the conduit system applicable to capital gains passing to non-charitable beneficiaries under §§ 661 (a) and 662 (a) of the Code whereby an estate's distributable income to such beneficiaries is taxable to them rather than to the estate, this does not mean that similar treatment may not be accorded to charitable distributions or set-asides deductible by the estate under § 642 (c). Section 642 (c) serves to extract income destined for charitable entities from an estate's taxable income and thus

supplies a conduit for charitable contributions similar to that provided by §§ 661 (a) and 662 (a) for income passing to taxable distributees. The express exclusion, pursuant to § 663, from §§ 661 (a) and 662 (a) of those amounts deductible under § 642 (c) does not refute conduit treatment of such amounts, but rather such exclusion merely prevents a second deduction for charitable set-asides and recognizes as well that they are accorded separate treatment elsewhere in the Code. Pp. 187–194.

(b) It is doubtful that Congress intended that an estate, which set aside part of its capital gain for charity, should pay a higher income tax than if the same portion of capital gain had been distributed to a taxable beneficiary or that the burden of the extra tax should be borne by the charities themselves or by the noncharitable residual legatees. The former allocation would contravene § 642 (c), which permits deduction of charitable set-asides "without limitation," and would indirectly offend the tax exemption extended to charities by § 501. And allocating the burden to the noncharitable legatees would result in taxation of the capital gain accruing to their benefit at an effective rate higher than the 25% ceiling that § 1201 was intended to impose on the taxation of net long-term capital gains. Pp. 194–195.

(c) The legislative history of the 1954 Code is not incompatible with the general applicability of the conduit concept and in fact clearly indicates that Congress sought rigorously to adhere to the theory that an estate or trust in general is to be treated as a conduit through which income passes to the beneficiary. Pp. 195–196.

(d) A construction of the alternative tax that permits petitioners to exclude the charitable set-asides does not conflict with the decision in *United States* v. *Foster Lumber Co.*, 429 U. S. 32. Pp. 197–199.

(e) The principle that currently distributable income is not to be treated "as the [estate's] income, but as the beneficiary's," whose "share of the income is considered his property from the moment of its receipt by the estate," *Freuler* v. *Helvering*, 291 U. S. 35, 41–42, survived in substance in the 1954 Code. To treat charitable and noncharitable distributions of capital gain differently for the purpose of computing the alternative tax under § 1201 (b) "stresses the form at the neglect of substance," and "the letter of § 1201 (b) must yield when it would lead to an unfair and unintended result," *Statler Trust Co.* v. *Commissioner*, 361 F. 2d 128, 131. P. 199.

563 F. 2d 400, reversed.

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

J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 200.

Ronald E. Gother argued the cause for petitioners. With him on the briefs was *Marc R. Isaacson*.

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

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the provisions of the Internal Revenue Code of 1954 in effect during the years in question, taxpayers, including decedents' estates,[1] with net long-term capital gains exceeding net short-term capital losses, paid either a "normal" income tax calculated by applying ordinary graduated rates to taxable income computed with a 50% capital-gains deduction permitted by § 1202 of the Code or, if it was a lesser sum, the alternative tax calculated as directed by § 1201 (b).[2] Under

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[1] Subchapter J of the Code, 26 U. S. C. § 641 *et seq.* (1964 ed.), deals with the taxation of estates, trusts, beneficiaries, and decedents. Section 641 (b) provides that the tax on estates and trusts "shall be computed in the same manner as in the case of an individual, except as otherwise provided in this part."

[2] Title 26 U. S. C. § 1202 (1964 ed.) provides:

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets."

Title 26 U. S. C. § 1201 (b) (1964 ed.) provides:

"(b) Other taxpayers.

"If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed

the latter section the taxable income for normal tax purposes was first reduced by the portion of the capital gain remaining in that figure, and the regular tax rates were then applied to the resulting amount. To this partial tax was added an amount equivalent to 25% of the "excess of the net long-term capital gain over the net short-term capital loss."

The issue here involves the computation of the alternative tax of a decedent's estate that had net long-term capital gains,[3] a portion of which—pursuant to the terms of the decedent's will—was "during the taxable year, paid or permanently set aside" for charitable purposes within the meaning of § 642 (c), 26 U. S. C. § 642 (c) (1964 ed.). That section permitted an estate to deduct "without limitation" amounts designated for charitable purposes by the controlling instrument, subject, however, to "proper adjustment . . . for any deduction allowable to the estate or trust under section 1202 . . . ."[4]

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a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

"(1) a partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

"(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss."

[3] Because the estate incurred no short-term or long-term capital losses in 1967 and 1968, for brevity's sake we sometimes speak simply of "net long-term capital gain" or "capital gain."

[4] Title 26 U. S. C. § 642 (c) (1964 ed.) provides in relevant part:

"(c) Deduction for amounts paid or permanently set aside for a charitable purpose.

"In the case of an estate or trust (other than a trust meeting the specifications of subpart B) there shall be allowed as a deduction in computing its taxable income (in lieu of the deductions allowed by section 170 (a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a purpose specified in section 170 (c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or

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Walter E. Disney, who died in 1966, left 45% of the residue of his estate by will to a designated charitable trust. During the years 1967 and 1968, petitioners, executors of the estate, sold securities making up part of the residue of the estate, thereby realizing a long-term capital gain in the amount of $500,622.38 in 1967 and $1,058,018.43 in 1968. There were no short-term capital losses, but a net short-term capital gain of $16,944.16 was realized in 1967. Forty-five percent of the net long-term capital gain was set aside as part of the residue of the estate for the benefit of the specified charity. In their fiduciary income tax returns for these years, the executors sought to use the alternative tax prescribed by § 1201 (b). In computing this tax, they excluded from the long-term capital gain to which the alternative tax was applicable the 45% portion of long-term gain permanently set aside for charity. The District Director disallowed this exclusion, without which the alternative tax was higher than the normal tax computed with the § 1202 capital-gains deduction. The normal tax rather than the alternative tax was therefore due.

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for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit. For this purpose, to the extent that such amount consists of gain from the sale or exchange of capital assets held for more than 6 months, proper adjustment of the deduction otherwise allowable under this subsection shall be made for any deduction allowable to the estate or trust under section 1202 (relating to deduction for excess of capital gains over capital losses). . . ."

Where the § 642 (c) charitable set-aside includes net long-term capital gain, the adjustment avoids a redundant subtraction of income destined for charitable beneficiaries. Its effect is to reduce the charitable deduction by one-half so as to reflect that part of the deduction already included in the 50% capital-gain deduction under § 1202. As indicated later in the text, the parties are not in dispute as to the interworkings of §§ 1202 and 642 (c). It is agreed, moreover, that the set-asides at issue were intended for a charitable entity within the meaning of 26 U. S. C. §§ 170 (c)(2), 501 (c)(3) (1964 ed.). Section 170 permits deductions for contributions to charitable organizations, and § 501 affords a tax exemption to the organizations themselves.

Additional taxes were assessed and paid, and this suit for refund followed.

Agreeing with the judgment of the Court of Appeals for the Second Circuit in *Statler Trust* v. *Commissioner,* 361 F. 2d 128 (1966), the District Court sustained the executors' position that, in computing the alternative tax under § 1201 (b), any amount deductible by the estate from its gross income as being permanently set aside for charity could be excluded from the net long-term capital gain subject to the alternative tax. The Court of Appeals reversed, 563 F. 2d 400 (CA9 1977), holding that the alternative tax was to be computed on the total excess of net long-term capital gains over net short-term capital losses, unreduced by any amount deductible by the estate as a charitable set-aside under § 642 (c). The court expressly disagreed with the decision in *Statler Trust, supra.* We granted the executors' petition for certiorari, 435 U. S. 922 (1978).

In this Court, as in the courts below, the parties agree on the method of calculating the normal tax but sharply disagree in regard to the proper computation of the alternative tax under § 1201 (b). To illustrate, the normal tax for 1967 amounted to $88,000 in round figures.[5] According to the

[5] The agreed method for computing the normal tax may be illustrated by utilizing the 1967 figures, rounded off:

Normal tax

Estate gross income, including long-term capital gain of $500,000	$595,000
Less: § 1202 deduction (50% of $500,000 net long-term capital gain)	(250,000)
Charitable deduction (remaining 50% of $225,000 charitable set-aside, plus $32,500 attributable to short-term capital gain and ordinary income set aside for charitable legatees)	(145,000)
Miscellaneous deductions	(54,000)
Estate taxable income	146,000
Tax (at normal rates)	$88,000

executors, the alternative tax was $70,800,[6] which, being a lesser amount than the normal tax, would be the amount due. The Government calculates the alternative tax to be $125,000 and thus insists that the normal tax in the amount of $88,000 was properly payable.[7] As we have indicated, resolution of the issue turns on whether the net long-term gain to which the

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[6] The executors' application of § 1201 (b) to income for 1967 approximated the following:

Alternative tax	
Estate taxable income	$146,000
Less: 50% reduction of net long-term capital gain under § 1201 (b)(1)	(137,500)
The executors reduced the long-term capital gain of $500,000 by the 45% paid to charity (or $225,000), leaving a balance of $275,000 (50% of $275,000=$137,500)	
Partial taxable income	8,500
Tax (at normal rates) on partial taxable income	1,800
Plus: tax on long-term capital gain (25% of $275,000) under § 1201 (b)(2)	69,000
Total tax	$70,800

[7] The Government's computation, using approximate 1967 figures, was as follows:

Alternative tax	
Estate taxable income	$146,000
Less: 50% reduction of net long-term capital gain under § 1201 (b)(1)	(250,000)
The capital-gain figure employed reflects the entire $500,000 of long-term capital gain unreduced by the amounts set aside for charity	
Partial taxable income	-0-
Tax (at normal rates) on partial taxable income	-0-
Plus: tax on long-term capital gain (25% of $500,000) under § 1201 (b)(2)	125,000
Total tax	$125,000

alternative tax is applicable is permissibly reducible by the amount of the charitable set-asides in the years in question. On this score, we agree with the executors and reverse the Court of Appeals.

II

The Government's position rests on what it deems to be the plain language of § 1201 (b), which directs that the "excess of the net long-term capital gain over the net short-term capital loss" be taxed. This language, it is said, unambiguously embraces income distributed to or set aside for charitable beneficiaries, even though in their hands the same income would be tax exempt.

The difficulty with the Government's position is that § 1201 (b) is not always understood to mean what it seems to say. The Government concedes here that if 45% of the net long-term gain had been distributable to taxable beneficiaries rather than to charity, the net long-term gain subject to the § 1201 (b) alternative tax would have been reduced to the extent of the noncharitable distribution, despite the failure of the section's language to provide for this treatment. In that event, the alternative tax would have been $70,800, precisely the amount due by the executors' computation where the 45% distribution or set-aside is for charitable purposes. Thus, it cannot be said that § 1201 (b) *never* permits reduction of the total net long-term capital gain in response to imperatives emerging from other sections of the Code.[8]

[8] The alternative tax has been applied flexibly in another context to effectuate a clear congressional policy facially inconsistent with the language of § 1201. It has been held that the income tax deduction permitted by 26 U. S. C. § 691 (c) for the amount of estate tax attributable to income in respect of a decedent can be offset against the estate's capital gains before application of the alternative tax. The deduction was thought necessary to honor the congressional purpose animating the § 691 (c) deduction of avoiding imposition of both estate and income taxes on sums included in an estate as income in respect of a decedent. See, *e. g., Read* v. *United States,* 320 F. 2d 550 (CA5 1963); *Meissner* v.

The Government explains its application of § 1201 (b) to capital gains distributable to noncharitable beneficiaries by noting that the Internal Revenue Code of 1954 manifests a general pattern of treating estates and trusts as conduits for distributable income. Accordingly, although estates are taxable entities, their distributable income is taxable to the beneficiaries rather than to the estates. Hence, to avoid assessing taxes against both the estate and its beneficiaries, the amounts includable in the beneficiaries' gross income are excluded in computing the estate's alternative tax. Sections 661 (a) and 662 (a) are the sections said to implement this end.[9] Section 661 (a) permits an estate or trust to deduct

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United States, 176 Ct. Cl. 684, 364 F. 2d 409 (1966); *Estate of Sidles* v. *Commissioner*, 65 T. C. 873 (1976), acq. 1976–2 Cum. Bull. 2.

[9] Title 26 U. S. C. § 661 (a) (1964 ed.) states:

"(a) Deduction.

"In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subpart B applies), the sum of—

"(1) any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); and

"(2) any other amounts properly paid or credited or required to be distributed for such taxable year;

"but such deduction shall not exceed the distributable net income of the estate or trust."

Title 26 U. S. C. § 662 (a) (1964 ed.) provides:

"(a) Inclusion.

"Subject to subsection (b), there shall be included in the gross income of a beneficiary to whom an amount specified in section 661 (a) is paid, credited, or required to be distributed (by an estate or trust described in section 661), the sum of the following amounts:

"(1) Amounts required to be distributed currently.

"The amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not. If the amount of income required to be distributed currently to all beneficiaries exceeds the distributable net income (computed without the deduction allowed

from its gross income any income required to be distributed currently and any other amount properly paid or credited or required to be distributed for the taxable year. Section 662 (a) in turn essentially directs a beneficiary to include in its gross income amounts described in § 661 (a).[10]

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by section 642 (c), relating to deduction for charitable, etc., purposes) of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (as so computed) as the amount of income required to be distributed currently to such beneficiary bears to the amount required to be distributed currently to all beneficiaries. For purposes of this section, the phrase 'the amount of income for the taxable year required to be distributed currently' includes any amount required to be paid out of income or corpus to the extent such amount is paid out of income for such taxable year.

"(2) Other amounts distributed.

"All other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of—

"(A) the amount of income for the taxable year required to be distributed currently to all beneficiaries, and

"(B) all other amounts properly paid, credited, or required to be distributed to all beneficiaries

"exceeds the distributable net income of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (reduced by the amounts specified in (A)) as the other amounts properly paid, credited or required to be distributed to the beneficiary bear to the other amounts properly paid, credited, or required to be distributed to all beneficiaries."

[10] The amount deductible by the estate under § 661 (a) and includable in the gross income of the beneficiaries under § 662 (a) is generally limited by "distributable net income," defined in 26 U. S. C. § 643 (a) (1964 ed.) as taxable income computed with certain modifications. One such modification is the exclusion of "[g]ains from the sale or exchange of capital assets . . . to the extent that such gains are allocated to corpus and are not (A) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (B) paid, permanently set aside, or to be used for the purposes specified in section 642 (c)." § 643 (a) (3). Section 643 (a) (3) has been variously interpreted by the Second and

We agree that these provisions of the Code provide a sound justification for treating income distributable to taxable beneficiaries as belonging to them rather than to the estate and

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Ninth Circuits and by the parties in the course of this litigation. The Second Circuit in *Statler Trust* considered capital gains set aside for charity to be "inclu[ded] in the definition of distributable net income in § 643 (a)(3)," 361 F. 2d, at 131, hence indicating conduit treatment for such set-asides. The court below announced a more expansive view. It implied that all "[a]mounts distributed or set aside to charity . . . remain in distributable net income," whether consisting of capital gain or ordinary income. 563 F. 2d, at 404. This construction was thought supportive of the Government's position on the theory that "'conduit' treatment [for charitable set-asides] would suggest that amounts distributed or set aside for charity would be *excluded* from . . . distributable net income." *Ibid.* (emphasis in original).

The executors have insisted all along that the total amount of income constituting distributable net income as defined by § 643 (a)(3) does not include charitable distributions or set-asides whether consisting of capital gain or not. In the executors' view, though § 643 (a)(3) directs that taxable income be modified by excluding capital gains paid to principal *except* for income allocable to charity or possessing other specified characteristics, charitable set-asides are independently extracted from taxable income by virtue of the § 642 (c) deduction. The Government, unlike the court below, has never suggested that charitable set-asides consisting of ordinary income are included in total distributable net income. But the construction developed in the Government's brief before this Court was that amounts deemed distributable to taxable beneficiaries do include *capital gains* added to residue but set aside for an exempt organization. The executors argued in reply, however, that computation of distributable net income pursuant to the Government's formal instructions for the years in question produced a figure equal to the amount of an estate's income exclusive of capital gains set aside for charity. At oral argument, the Government appeared to have changed its mind and to be conceding that its initial view and the more far-reaching construction of the Court of Appeals were in error:

"[F]or purposes of this argument we would be willing to concede that the taxpayers' version of the computation of distributable net income and its [*sic*] attack on the example which we set out in our brief is correct.

"But we do submit that that is just utterly irrelevant. You come to the question of distributable net income only after you have arrived at taxable

hence for reducing the net long-term gain to be taxed to the estate under § 1201 (b) by the amount of gain distributable and taxable to the beneficiary. We also agree, as do the executors, that because § 663 [11] provides expressly that amounts qualifying as charitable deductions under § 642 (c) "shall not be included as amounts falling within section 661 (a) or 662 (a)," charitable distributions or set-asides are not within the conduit system applicable to noncharitable beneficiaries. We reject the Government's view, however, that this explanation for the application of § 1201 to taxable distributions of capital-gains income also negates similar treatment for amounts of current income that are distributed to, or permanently set aside for, charitable beneficiaries and that are deductible by the estate under § 642 (c). Indeed, the latter section serves to extract income destined for charitable entities from the taxable income of the estate and thus supplies a conduit for charitable contributions similar to that provided by §§ 661 (a) and 662 (a) in regard to income passing to taxable distributees. The express exclusion from §§ 661 (a) and

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income [which] has been diminished by that part of a charitable deduction or that part of a set aside for charity which comes out of gross income.

"And it is only at that point . . . that . . . distributable net income adjustments become relevant." Tr. of Oral Arg. 35–36.

We need not attempt to resolve this contrariety of views, for we agree with the Government that the nature and function of distributable net income have little or nothing to do with the treatment of charitable set-asides under § 1201 (b).

[11] Title 26 U. S. C. § 663 (a)(2) (1964 ed.) provides:

"(a) Exclusions.

"There shall not be included as amounts falling within section 661 (a) or 662 (a)—

. . . . . .

"(2) Charitable, etc., distributions.

"Any amount paid or permanently set aside or otherwise qualifying for the deduction provided in section 642 (c) (computed without regard to section 681)."

662 (a) of those amounts deductible under § 642 (c) in no way refutes conduit treatment of such amounts. Rather, the exclusion pursuant to § 663 prevents a second deduction for charitable set-asides and recognizes as well that they are accorded separate treatment elsewhere under the Code.[12]

The Government makes much of § 1202's directive to *exclude* capital gains distributable to taxable beneficiaries in computing the capital-gains deduction, and of the absence of a similar mandate with respect to charitable distributions or set-asides, which are only subject to a *deduction* under § 642 (c). Hence, it is argued, income distributions to charity are not to be considered the property of the beneficiary in the same sense as income passing to taxable entities is attributed to the distributees. We doubt that so much should turn on § 1202.[13] The provision having the operative role in removing

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[12] The legislative history of the 1954 Code makes plain that capital gains passing to charity were not encompassed by §§ 661 (a) and 662 (a)—which ensure conduit treatment of capital gains distributable to taxable beneficiaries—because income paid or set aside for charitable purposes was already immunized from taxation by § 642 (c). The House Committee explained that "[s]ince the estate or trust is allowed a deduction under section 642 (c) for these amounts, they are not allowed as an additional deduction for distributions nor are they treated as amounts distributed for purposes of section 662 in determining the amounts includible in the gross income of the beneficiaries." H. R. Rep. No. 1337, 83d Cong., 2d Sess., A205 (1954); accord, S. Rep. No. 1622, 83d Cong., 2d Sess., 354 (1954).

[13] Section 1202 is far less supportive of the Government's position than the dissent would indicate. Our dissenting colleagues contend that, in excluding capital gains distributable to taxable beneficiaries from the computation of the capital-gains deduction, § 1202 authorizes a modification of the meaning of "excess" of the net long-term capital gain over net short-term capital loss for purposes of § 1201 as well as § 1202. The modification must be extended to § 1201, according to the dissent, in order to preserve the scheme of the alternative tax. More specifically, half of the "excess" is deducted under § 1202, and the other half is deducted pursuant to the first step of § 1201; thus, to ensure that 100% of the excess is deducted by operation of both provisions, the term "excess" must be construed similarly for purposes of both sections. The same mandate

the noncharitable distribution from the estate income is § 661 (a), and that section unmistakably provides a *deduction* for such sums, just as § 642 (c) permits *deductions* for distributions to nontaxable entities.

Nor do we agree that charitable and noncharitable distributions of long-term gain should be regarded differently because in the one case the distribution is taxable in the hands of the beneficiary and in the other it is tax free. Indeed, it is arguable that the reduction of the gain taxable under § 1201 (b) is even more justified when the income distribution is not only

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is assertedly absent with regard to income passing to charity. See *post,* at 208–209.

The dissenters' thesis, however, at most explains why the first step of § 1201 should be computed by excluding capital gains distributable to taxable beneficiaries. It provides no basis for removing such gains from the "excess" subject to the 25% flat rate under the second step of § 1201. Yet our dissenting Brethren agree that § 1201 (b)(2)—the second stage of the alternative tax—should not be literally construed to make capital gains passing to taxable beneficiaries taxable to the estate. The real reason is not to preserve consistency in abstract form, as the dissent's definitional argument misleadingly suggests, but to maintain loyalty to conduit principles as manifested by §§ 661 (a) and 662 (a) in the context of capital gains distributable to taxable beneficiaries. See *post,* at 209.

Moreover, the absence of an exclusionary clause in § 1202 respecting capital gains distributable to charity is readily explainable in a fashion consistent with our position. The clause operates to prevent the estate from deducting under § 1202 50% of all capital gains distributable to taxable beneficiaries and then deducting an amount equal to 100% of such gains under § 661 (a). A redundant deduction is precluded in the context of gains passing to charity by a different, but equally effective, method. Specifically, the charitable counterpart of § 661 (a)—§ 642 (c)—expressly contemplates an adjustment for deductions already taken under § 1202. In that way, § 642 (c) ensures that no more, but certainly no less, than the entire amount of gains passing to charity will be exempt from taxation under the normal tax. In substance, then, capital gains distributable to both taxable and nontaxable beneficiaries are removed from income taxable to the estate by the normal method. Nothing our Brethren say warrants similar treatment for the former but not the latter under § 1201. See also n. 14, *infra.*

deductible from estate income but also looked upon with such favor that it is not taxable at all in the hands of the distributee.[14] Furthermore, distributions of income to taxable beneficiaries retain the same character in their hands as they had in the hands of the estate. 26 U. S. C. § 662 (b) (1964 ed.). If such distributions are wholly or partly composed of capital gain, the distributee treats them as such in his own return. He is entitled to offset the gain with his own capital losses that accrued in other transactions having nothing to do with the estate. He may, therefore, suffer no tax at all on the gain. Nevertheless, and even though the estate would have paid a tax on the capital gain had it not been distributable, the estate's net long-term capital gain for § 1201 (b) purposes would be reduced by the amount of the distribution. The executors' position, with which we agree, is that a similar reduction of the net long-term gain taxable under § 1201 should not be denied simply because the beneficiary is a charity that will pay no tax on the gain set aside for it.

As the Government and the Court of Appeals construe the Internal Revenue Code, the estate in this case, which set aside part of its capital gain for charity, must pay a higher income tax than if the same portion of capital gain had been distributed to a taxable beneficiary. Because the tax will inevitably reduce the residue, the burden of the extra tax will be borne either by the charities themselves or by noncharitable residual

[14] The dissent suggests, however, that charitable and noncharitable distributions should be treated differently because the congressional policy against double taxation is implicated in the latter context but not the former. See *post*, at 209–210. But in exempting charitable entities from tax liability Congress manifested a purpose to insulate all income contributed to charity from taxation. Taxing income en route to charity while temporarily in the possession of an estate is as inconsistent with the congressional policy to exempt such income from federal taxation altogether as taxing other income twice is inconsistent with the congressional policy to tax such income once.

legatees. We doubt that Congress intended either result. The former allocation would contravene the statutory provision for the deduction of charitable set-asides—§ 642 (c) provides for their deductibility "without limitation"—and would indirectly offend the exemption extended to charities by § 501. Allocating the burden to the noncharitable legatees would result in taxation of the capital gain accruing to their benefit at an effective rate higher than the 25% ceiling that § 1201 was intended to impose on the taxation of net long-term capital gain. If all of the net long-term capital gain in this case had been added to corpus and none distributed to or set aside for charity, there is no doubt that the estate's alternative tax would have been lower than its normal tax and the tax on its net gain would have been limited to 25%. We cannot agree that the estate is not to have the full benefit of the 25% ceiling simply because part of its gain is set aside for a tax-exempt entity.

III

In support of its position, the Government presents an interesting history of the income taxation of capital gains. The central submission of this exegesis is that in 1924 taxpayers were permitted to deduct the excess of ordinary deductions over ordinary income from capital gains subject to an alternative tax otherwise resembling § 1201, see Revenue Act of 1924, § 208 (a)(5), 43 Stat. 262, but that in 1938, when the alternative tax in its present form emerged, no allowance was made for reduction of the gain subject to the alternative tax by ordinary losses, see Revenue Act of 1938, § 117 (c)(1), 52 Stat. 501. This development is interpreted by the Government—mistakenly we think—as a deliberate rejection of the computational method advocated by the executors.

The issue here is not whether an excess of deductions over ordinary income may serve generally to reduce the gain subject to the alternative tax; rather, the inquiry concerns whether there is income properly attributable to the charitable

beneficiary that should not be taxed to the estate at all. Assuredly, had all of the capital gain been set aside for charity and had there been no other estate income, there would have been no tax at all; the § 642 charitable deduction would have negated the entire capital-gains income of the estate, thus subjecting no taxable income whatsoever to the normal tax. Equally clear is that when 45% of the capital gain is set aside for a charitable entity, the gain subject to the normal tax is reduced to that extent. The Government does not dispute that the net effect of this § 1202 computation is to recognize the entire amount set aside for the exempt organization. The executors now ask no more than full recognition of the conduit principle in the computation of the alternative tax. The legislative history on which the Government relies is not at all incompatible with the general applicability of the conduit concept. In fact, the legislative history of the 1954 Code makes plain that Congress sought rigorously to adhere "to the conduit theory of the existing law[, which] means that an estate or trust is in general treated as a conduit through which income passes to the beneficiary." H. R. Rep. No. 1337, 83d Cong., 2d Sess., 61 (1954).[15]

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[15] In the same vein the Senate Committee explained that "[y]our committee's bill contains the basic principles of existing law under which estates and trusts are treated as separate taxable entities, but are generally regarded as conduits through which income passes to the beneficiary." S. Rep. No. 1622, 83d Cong., 2d Sess., 82 (1954). Capital gains were to be taxable "to the estate or trust [only] where the gains must be or are added to principal," *id.*, at 343. See also H. R. Rep. No. 1337, 83d Cong., 2d Sess., A194–A195 (1954); H. R. Conf. Rep. No. 2543, 83d Cong., 2d Sess., 54 (1954), excepting amounts paid, credited, or required to be distributed to any beneficiary in the taxable year or "paid, permanently set aside, or to be used for the purposes specified in section 642 (c)." *Ibid.* See also H. R. Rep. No. 1337, *supra*, at A194–A195; S. Rep. No. 1622, *supra*, at 343–344. This legislative history confirms our understanding of the statutory text as manifesting conduit treatment of capital gains passing to taxable and nontaxable beneficiaries alike.

IV

The Government asserts nonetheless that a ruling favoring the executors would run counter to the Court's decision in *United States* v. *Foster Lumber Co.*, 429 U. S. 32 (1976), rendered two Terms ago. That case involved § 172 of the Internal Revenue Code of 1954, 26 U. S. C. § 172 (1964 ed.), which provided that a net operating loss incurred by a corporate taxpayer in one year may be carried as a deduction against taxable income for preceding years. The issue was whether a loss was absorbed by capital gain in addition to ordinary income in the year to which it was first carried, or whether it was limited to offsetting only ordinary income. Section 172 in terms provided that, when a loss had been carried back to the first available year, it survived for carryover to subsequent periods only to the extent that it exceeded the taxable income of the earlier year. Because taxable income was defined generally in the Code to include both capital gain and ordinary income, the Court concluded that a loss carryback must be applied to the sum of the two.

The taxpayer in *Foster Lumber* never disputed that losses in carryover years could not be deducted from capital gain in executing the second step of the alternative tax.[16] In fact, because of that limitation, the taxpayer insisted that loss carrybacks should not be treated as absorbed by capital gains for purposes of § 172. Otherwise, in utilizing the alternative tax, the taxpayer would lose the benefit of that portion of the loss corresponding to capital gain. In rejecting the taxpayer's contention, the Court noted that relevant legislative history belied any notion of a congressional intention to ameliorate all "wastage" of loss deductions. It was able to conclude that "Congress has not hesitated in this area to limit taxpayers to

[16] The alternative tax involved in *Foster Lumber* was set forth in 26 U. S. C. § 1201 (a) (1964 ed.), which was the corporate counterpart of § 1201 (b), the provision directly involved herein.

the enjoyment of one tax benefit even though it could have made them eligible for two." 429 U. S., at 46.

The Government maintains that the executors' construction of the alternative tax conflicts with our assessment of its operation in *Foster Lumber*. The executors, in the Government's view, are no more entitled to exclude charitable set-asides in computing the second component of the alternative tax than was the taxpayer in *Foster Lumber* able to subtract excess ordinary deductions. But the construction of the alternative tax accepted by both parties in *Foster Lumber*, and assumed valid by this Court, merely accorded recognition to decisions discerning a congressional refusal—evidenced by the legislative history discussed in Part III, *supra*—to permit subtraction of ordinary losses from capital gains in the application of § 1201.[17] The executors do not deny that a taxpayer cannot reduce capital gains by the amount of ordinary losses in figuring the alternative tax, but argue that capital gains set aside for charity are not taxable to an *estate* to begin with. The Government acknowledges that there is ample support in the provisions of Subchapter J for reducing the estate's net long-term capital gain by amounts distributable to taxable beneficiaries, and that *Foster Lumber* is thus dis-

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[17] See, *e. g.*, *Weil* v. *Commissioner*, 23 T. C. 424 (1954), aff'd, 229 F. 2d 593 (CA6 1956). There, the taxpayers' total deduction, which included charitable deductions, exceeded their ordinary income, and they sought to utilize this excess to reduce the amount of their capital gains before applying the 25% tax available under § 1201 (b). The claim was rejected because there was no basis in § 1201 or other provisions of the Code for reducing net long-term capital gains by both the net short-term losses and by the excess of ordinary deductions over ordinary income and because pertinent legislative history contradicted the taxpayers' construction. See Part III, *supra*. The court in the *Weil* case, however, had no occasion to consider whether the net long-term gain belonging to a charitable income beneficiary of an estate may be excluded by the estate in computing the alternative tax. See *Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346, 355 (1969), aff'd, 428 F. 2d 474 (CA1 1970).

tinguishable in that context. We believe the decision is similarly inapposite when charitable beneficiaries are involved.[18]

We think, then, that the Court of Appeals for the Second Circuit arrived at the correct result in the *Statler Trust* case. The court there recognized what this Court had earlier said: that currently distributable income is not treated "as the [estate's] income, but as the beneficiary's," whose "share of the income is considered his property from the moment of its receipt by the estate." *Freuler* v. *Helvering,* 291 U. S. 35, 41–42 (1934). That principle survived in substance in the 1954 Code; and to treat differently charitable and noncharitable distributions of capital gain for the purpose of computing the alternative tax under § 1201 (b) "stresses the form at the neglect of substance." *Statler Trust* v. *Commissioner,* 361 F. 2d, at 131. We agree with the Second Circuit that "the letter of § 1201 (b) must yield when it would lead to an unfair and unintended result." *Ibid.*

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[18] It is notable, too, that the executors do not endeavor to pyramid the tax advantages associated with charitable income and capital gains in the face of a discernible congressional intention to "limit taxpayers to the enjoyment of one tax benefit." *United States* v. *Foster Lumber Co.,* 429 U. S., at 46. Indeed, it seems to us that the Government's construction itself yields cumulative tax benefits that Congress very likely never intended. According to the Government, § 1201 (b) (1) compels the reduction of the taxable income figure computed under § 1202 by "an amount equal to 50 percent" of the total "excess" of net long-term capital loss rather than by 50% of the long-term gain not set aside for charity. Although not the case here, in other circumstances the deduction afforded by the Government's construction of § 1201 (b) (1) with its diminution of the partial tax may more than offset the higher tax resulting from the Government's computation under § 1201 (b) (2) and may yield an alternative tax lower than the tax resulting from the executors' approach and thus lower than that which would ensue if income moving to charity had never been held by the estate.

The contingency may be demonstrated by a hypothetical example. Assuming an effective tax rate on ordinary net income of 60% and estate receipts of $125,000 in ordinary income and $500,000 in long-term capital gains, with one-half of the capital gains allocable to a charitable benefi-

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Section 1202 of the Internal Revenue Code describes the "normal" method of computing the tax on a long-term capital

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ciary, the parties would compute the normal tax and the alternative tax as follows:

Normal tax	
Gross income	$625,000
Less: § 1202 deduction	(250,000)
§ 642 (c) deduction	(125,000)
Taxable income	250,000
Tax (at 60% rate)	$150,000

Alternative tax, per executors' method	
Estate taxable income	$250,000
Less: 50% of that portion of long-term capital gain not set aside for charity (50% of $250,000)	(125,000)
Partial taxable income	125,000
Partial tax (60% effective rate)	75,000
Tax on long-term capital gain not set aside for charity (25% of $250,000)	62,500
Total alternative tax	$137,500

Alternative tax, per Government's method	
Estate taxable income	$250,000
Less: 50% of all the excess of net long-term capital gain over net short-term capital loss (50% of $500,000)	(250,000)
Partial taxable income	-0-
Partial tax	-0-
Tax on all net long-term capital gain (25% of $500,000)	125,000
Total alternative tax	$125,000

Significantly, the executors do not complain that the redundant deduction available under the Government's computational method would be "wasted" were ordinary income inadequate to absorb it. Quite to the

gain.[1] Section 1201 describes the "alternative" method which must be used if it produces a lesser tax than the § 1202 computation.[2] Under the "normal" method, one-half of the gain is deducted and the other half is included in taxable income and taxed at ordinary graduated rates. If a taxpayer's income places him in a high enough tax bracket, the rate of tax under the normal method may exceed 25%. The "alternative" method prescribed by § 1201 protects the high-bracket taxpayer from this risk by imposing a flat 25% tax on the total capital gain and limiting the application of the graduated rates to the remainder of his income.

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contrary, it is their position that the cumulative deduction would never be afforded under conduit treatment of capital gains en route to charity.

[1] "§ 1202. Deduction for capital gains.

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets." 26 U. S. C. § 1202 (1964 ed.).

[2] Section 1201 (b) provides:

"Other taxpayers.

"If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

"(1) a partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

"(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss." 26 U. S. C. § 1201 (b) (1964 ed.).

The "alternative" method for corporate taxpayers is specified in 26 U. S. C. § 1201 (a) (1964 ed.).

The alternative method was expressly designed to provide a limited benefit for a limited class of taxpayers. That class includes individuals, corporations, and fiduciaries. The statutory language used to describe the precise scope of the benefit is clear and has been consistently applied to corporate and individual taxpayers for decades. The question presented by this case is whether a departure from the plain meaning of the statute should be adopted for the special benefit of fiduciaries in the high tax brackets.

The Court does not squarely address that question. Instead it regards the controlling question as whether there is any justification for a distinction between distributions by a fiduciary to taxable beneficiaries and such distributions to nontaxable beneficiaries. In my judgment both questions should be answered by adhering to the language used by Congress to define taxpayers' responsibilities. The language requires both fiduciaries and nonfiduciaries to use the same methods of computing their capital-gains taxes, but draws a sharp distinction between distributions by fiduciaries to taxable beneficiaries and such distributions to charity.

I

The controversy in this case centers around the meaning of the word "excess." The term is used both in § 1202's description of the "normal" tax and in § 1201's description of the "alternative" tax. In both sections "excess" is defined to mean the amount by which, in any year, the taxpayer's "net long-term capital gain exceeds the net short-term capital loss." The Government takes the straightforward position that "excess" means exactly what the statute says—the difference between the taxpayer's net long-term capital gain and his net short-term capital loss—and that this meaning is exactly the same in both the normal and the alternative tax computations.

With respect to § 1202's normal method, the petitioners do not challenge the Government's interpretation or the final tax

that it produces. Both parties agree that the dollar value of the statutory term "excess" as used in the normal calculation of petitioners' 1967 income tax is $500,000.[3] On their return petitioners recognized that the § 1202 capital-gains deduction of "50 percent of the amount of such excess," was $250,000, or half of the total net long-term capital gain of $500,000.[4] In computing the § 1202 deduction petitioners did not even suggest that this excess should have first been reduced by the portion set aside for charity.[5]

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[3] The dollar value of the statutory term "excess" is reflected twice in the normal tax calculation. Taking the rounded-off figures from petitioners' 1967 return, set forth *ante*, at 185 n. 5 of the Court's opinion, the estate's 1967 gross income of $595,000 included net long-term capital gain of $500,000. As the first step in the calculation of its normal tax, the taxpayer is allowed a deduction of "50 percent of the amount of *such excess*" or $250,000. 26 U. S. C. § 1202 (1964 ed.) (emphasis added). In the next step, the charitable deduction is taken: Under § 642 (c) of the Code, an adjustment in the charitable deduction is required to reflect the fact that half of the contribution out of long-term capital gains has already been included in the § 1202 "deduction for excess of capital gains over capital losses." This required adjustment yields a net charitable deduction of $112,500 rather than the total amount of $225,000 actually set aside for charity. After subtracting all other miscellaneous deductions, the estate shows a taxable income of $146,000 subject to tax, at normal rates, of $88,000.

[4] Because the estate incurred no short-term or long-term capital losses in 1967 and 1968, I sometimes refer simply to "net long-term capital gain" or "capital gain."

[5] They recognized as well that for purposes of the § 642 (c) adjustment to the charitable deduction, "the excess of capital gains over capital losses" referred to the total excess, without any prior reduction for charitable contributions. Section 642 (c), with emphasis added to the portion relevant to this discussion, provides:

"§ 642. Special rules for credits and deductions.

. . . . . .

"(c) Deduction for amounts paid or permanently set aside for a charitable purpose.

"In the case of an estate or trust (other than a trust meeting the specifications of subpart B) there shall be allowed as a deduction in com-

It is with respect to the alternative method that the petitioners and the Government part company on the meaning of the term "excess." The § 1201 alternative calculation is actually a sequel to § 1202's normal calculation which provides a deduction of 50% of the "excess." In the alternative calculation the taxpayer deducts the second half of the "excess" from his ordinary income and computes a partial tax on the income remaining after the entire "excess" has been excluded; then he computes the alternative tax on the entire capital gain, or excess, at a 25% rate.

Using 1967 as an example, see *ante*, at 186, nn. 6 and 7, under the Government's view, not only the first 50% of the excess deducted pursuant to § 1202 but also the second 50% deducted pursuant to § 1201 (b)(1) amounts to $250,000. This consistency effects an exclusion of the entire $500,000 capital gain from the calculation of the partial tax. Petitioners, however, make what I regard as the astounding contention that even though the first half of the excess calculated under § 1202 amounted to $250,000, the second half

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puting its taxable income (in lieu of the deductions allowed by section 170 (a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a purpose specified in section 170 (c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit. *For this purpose, to the extent that such amount consists of gain from the sale or exchange of capital assets held for more than 6 months, proper adjustment of the deduction otherwise allowable under this subsection shall be made for any deduction allowable to the estate or trust under section 1202 (relating to deduction for excess of capital gains over capital losses).* In the case of a trust, the deduction allowed by this subsection shall be subject to section 681 (relating to unrelated business income and prohibited transactions)." 26 U. S. C. § 642 (c) (1964 ed.) (emphasis added).

calculated under § 1201 amounted to only $137,500.[6] Petitioners obtained this latter figure by treating the term "excess" in § 1201 as the amount remaining after 45% had been set aside for charity.[7]

In my judgment, there is simply no basis for accepting petitioners' argument that "excess" means one thing when used in § 1202 and quite another when used in § 1201. Nor is there any basis for rewriting the statutory definition of "excess" in either section in order to reduce the amount by which "net long-term capital gain exceeds the net short-term capital loss" by the portion of the capital gains set aside for charity. No rewriting is necessary in order to fulfill the purpose of the statute. For the Government's reading is consistent with both the plain meaning and the underlying purpose of the statutory provision. The Government's view allows every taxpayer either to include 50% of his capital gain in ordinary income and to take a charitable deduction under § 642 or, alternatively, to exclude the entire capital gain from the portion of his income which is taxed at ordinary rates (after charitable and other deductions have been taken) and to pay the 25% tax on the entire capital gain.

To be sure, in situations like this it may be to the taxpayer's advantage in calculating his alternative tax to take the char-

[6] The Court makes the equally astonishing suggestion that even if the relationship between § 1202 and the first step in the § 1201 calculation requires that "excess" be given the same meaning, that word may nevertheless be given a different meaning in the second step of the § 1201 calculation. See *ante,* at 192–193, n. 13. This suggestion is no more tenable than the taxpayer's argument and would produce a different tax than the Court approves today.

[7] Although the exclusion of $137,500 instead of $250,000 produces a higher partial tax than a consistent interpretation of the word "excess," this gambit is rewarded by the second step of the alternative calculation. Section 1201 (b) (2) imposes a flat 25% tax on the excess of the net long-term capital gain over the net short-term capital loss: Under the Government's view, this amounts to $125,000 (25% of $500,000) whereas under petitioner's view the capital gains tax is only $68,750 (25% of $275,000).

itable deduction, not against ordinary income subject to the partial tax, but rather against capital-gain income subject to the flat 25% tax rate. The advantage petitioners seek would avoid "wasting" a portion of the charitable deductions. But the fiduciary taxpayer is not alone in facing this risk as a result of the Government's interpretation. Individual and corporate taxpayers may similarly find that a portion of their charitable deductions are "wasted" in the calculation of the alternative tax. Nor do fiduciaries have any special interest in the policy of encouraging charitable contributions; from the point of view of the charity which receives the contributions, it does not matter whether the donor is an individual, a corporation, or a fiduciary.

Nonetheless, it is established and accepted that individual and corporate taxpayers are not free to calculate their alternative taxes in the manner which the Court today holds is acceptable for fiduciary taxpayers. While the Revenue Act of 1924 did in certain circumstances authorize the use of ordinary deductions to reduce the amount of capital gains,[8] that aspect of the law was changed in 1938.[9] Ever since that time, the

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[8] Section 208 (a)(5) of the Revenue Act of 1924 provided:

"The term 'capital net gain' means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gain." 43 Stat. 262.

[9] "The 1938 Revenue Act combined the percentage concept of the then existing law with the alternative tax principles of the revenue acts in effect prior to the 1934 Act. Except for changes immaterial to the issue in the instant case, the provisions of the 1938 Act and the 1939 Code in effect for 1948 are substantially the same. Compare sections 117 (b) and 117(c)(1) of the 1938 Act with sections 117 (b) and 117 (c)(2) of the 1939 Code as amended. The effect of section 117 of the 1938 Act, as intended by the Congress which first enacted it, was to place an upper limit on the amount of tax levied upon capital gain. See S. Rept. No. 1567, 75th Cong., at p. 20, reported in 1939–1 C. B. (Part 2) 779, 794. The 1938 Act thus provided that the taxable portion of such gain is either added to the taxpayer's other gross income and taxed in

Government's interpretation of the capital-gains tax computation has been applied consistently to individual and corporate taxpayers to deny them the benefit which petitioners today are granted.[10]

In upholding the Government's interpretation of the alternative tax calculation with respect to an individual taxpayer, the Tax Court observed:

> "We agree with petitioners that respondent's determination renders ineffective a part of their charitable contributions. We repeat, however, that the alternative tax is imposed only if it is less than the tax computed under the regular method which permits deduction of the total contributions in the instant case." [11]

That observation is equally relevant to this case. That the "alternative" method, as computed by the Government, results in a greater total tax than the "normal" method means only that the taxpayer must pay the "normal" tax. The "alternative" method is just that: it is to be used in those cases, and only those cases, in which it produces a lower tax.

In this case, the statutory language is plain and unambiguous. It has been well understood for four decades in cases involving individual and corporate taxpayers. In view of this clarity and consistency of interpretation, the burden of

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the regular manner at the prescribed rate, or taxed separately at a flat rate, according to which method produces the lesser tax." *Weil* v. *Commissioner*, 23 T. C. 424, 428–429 (1954), aff'd, 229 F. 2d 593 (CA6 1956).

[10] In two especially thoughtful opinions, the Tax Court upheld this interpretation with respect to individual and corporate taxpayers, finding it to be mandated by the plain words and legislative history of the statutory provisions involved. See *Weil* v. *Commissioner, supra; Chartier Real Estate Co.* v. *Commissioner*, 52 T. C. 346, 350–356 (1969), aff'd, 428 F. 2d 474 (CA1 1970). In its opinion today, the Court does not in any way question the soundness of these decisions. Instead it has fashioned a special rule, applicable only to fiduciaries.

[11] *Weil* v. *Commissioner, supra*, at 432.

demonstrating that the same language should be read differently for fiduciaries is especially heavy. In my judgment, petitioners have completely failed to carry that burden.

II

Petitioners make no attempt to explain why the calculation of the alternative capital-gains taxes of estates and trusts should be any different from the calculations of such taxes for individual and corporate taxpayers. Nor do petitioners point to any statutory language which even arguably supports the different meanings they attach to the term "excess" in §§ 1202 and 1201 (b). Instead, they contend that the Government has ignored the plain meaning of the term "excess" with respect to capital gains set aside for taxable beneficiaries and therefore should do the same—at least in the calculation of the alternative tax—when the beneficiaries are charitable.[12]

In my view the Government has been faithful to the statute in its treatment of distributions to taxable beneficiaries, as well as in its treatment of charitable contributions. It is true, as petitioners argue, that the Government allows estates to exclude distributions to taxable beneficiaries from the "excess" long-term capital gains used in the alternative tax computations. But such distributions are also excluded from the "excess" in making the normal calculation pursuant to § 1202. The reason for this treatment is clear, and is critical in undermining petitioners' argument.

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[12] Were it in fact the case that the Government's interpretation of "excess" with respect to distributions to taxable beneficiaries is inconsistent with the statute, that would hardly establish that it should apply the same incorrect interpretation when the beneficiaries are not taxable. It would only suggest that the Government ought to address and correct the mistaken interpretation. An error is not cured by compounding it, nor does a taxpayer have a right to be freed of a correct calculation of his taxes because the Government may have erred with respect to a different class of taxpayers.

The express language of § 1202, which prescribes the normal deduction for capital gains, directs estates and trusts to *exclude* from their calculation of "excess" all amounts which are included in the income of taxable beneficiaries.[13] Consistency in making the sequential calculations prescribed by §§ 1202 and 1201 (b) mandates a similar exclusion from "such excess" with respect to both provisions; otherwise, the statutory scheme of the alternative method would be frustrated. For, as has already been noted, the first half of "such excess" is deducted under § 1202 and the other half of the same excess is deducted in the partial tax computation under § 1201.

The Government's reading of the statute not only gives the word "excess" a consistent meaning, but also effectuates the clearly stated intent of Congress expressed in §§ 661 (a) and 662 (a) of the Code. Those sections provide, as the majority so strongly emphasizes, that the estate is a mere conduit with respect to income distributed to taxable beneficiaries. In purpose and effect, they reflect a legislative decision to avoid a double tax on the same income and to place the burden of paying the single tax which is due on the beneficiary. The Government's interpretation of "excess" in § 1202 and § 1201 (b), which excludes from the estate's income the amounts included in the income of the taxable beneficiary under § 662 (a), clearly serves these purposes; any other interpretation would result in the double taxation of estate income which Congress, as the majority recognizes, has clearly sought to avoid.[14]

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[13] "In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets." 26 U. S. C. § 1202 (1964 ed.).

[14] Effectuation of that intent also explains the other departures from the literal meaning of § 1201 in the cases cited *ante*, at 187–188, n. 8.

Obviously, there is no risk of double taxation when the beneficiary is a charity: The only potential taxpayer is the estate itself and the only question is how much tax it shall pay.[15] When there are two potential taxpayers—the estate and the beneficiary—the total tax on the income of the estate is the sum of the taxes paid by both. Thus, while petitioners are technically correct in arguing that the *estate's* taxes in this case would have been lower, under the Government's interpretation, if the entire capital gain had been distributed to taxable beneficiaries, this argument ignores the taxes paid by the beneficiaries on their receipts from the estate. By treating the trust as a mere conduit for the income distributed to taxable beneficiaries, Congress shifted the tax burden without changing the amount of income subject to tax or imposing a double tax burden on the same income.[16]

Thus, whether one focuses on the word "excess" in connection with distributions to charities, or in connection with distributions to taxable beneficiaries, the Government ascribes the same meaning to the term in § 1201 as in § 1202. The Government's conclusion that § 1202's express direction to exclude distributions to taxable beneficiaries requires a like exclusion in § 1201 merely illustrates the paramount impor-

[15] In calculating its taxable income under the normal method, the estate is, as the Court emphasizes, permitted under § 642 (c) a deduction "without limitation" for its charitable contributions. But this provision for charitable deductions "without limitation" serves only to free fiduciaries from the percentage limitations of § 170 (b) applicable to individual taxpayers; it does not, in itself, support or establish "conduit" treatment for charitable contributions in the calculation of the alternative tax.

[16] Petitioners also argue that because the estate's capital-gains tax must be paid out of the residue, the effective rate of the tax on the beneficiaries may exceed the 25% ceiling the alternative tax provisions were designed to impose. See *ante*, at 194–195. The ceiling on the tax on the estate's $500,000 gain in 1967 amounted to $125,000. This litigation involves a dispute over whether the estate's total tax in 1967 amounts to $88,000 or only $70,800. Petitioners do not explain how the resolution of that dispute can have the effect of breaking through the $125,000 ceiling.

tance of giving the word "excess" the same meaning in both sections. It surely provides no support for petitioners' remarkable contention that two halves of the same excess are unequal.

III

In final analysis, this case requires us to consider how the law in a highly technical area can be administered most fairly. I firmly believe that the best way to achieve evenhanded administration of our tax laws is to adhere closely to the language used by Congress to define taxpayers' responsibilities. Occasionally there will be clear manifestations of a contrary intent that justify a nonliteral reading, but surely this is not such a case.

I respectfully dissent.

CORBITT *v.* NEW JERSEY

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 77–5903. Argued October 3, 1978—Decided December 11, 1978

Under the New Jersey homicide statutes, life imprisonment is the mandatory punishment for defendants convicted by a jury of first-degree murder, while a term of not more than 30 years is the punishment for second-degree murder. Trials to the court and guilty pleas are not allowed in murder cases, but a plea of *non vult* is allowed. If such a plea is accepted, the judge need not decide whether the murder is first or second degree, but the punishment is either life imprisonment or the same punishment as is imposed for second-degree murder. Appellant, after pleading not guilty to a murder indictment, was convicted by a jury of first-degree murder and accordingly sentenced to life imprisonment. The New Jersey Supreme Court affirmed, rejecting appellant's contention that the possibility of a sentence of less than life upon the plea of *non vult,* combined with the absence of a similar possibility when found guilty of first-degree murder by a jury, was an unconstitutional burden on his rights under the Fifth, Sixth, and Fourteenth Amendments and also violated his right to equal protection under the Fourteenth Amendment. *Held:*

1. The New Jersey sentencing scheme does not impose an unconstitutional burden on appellant's rights under the Fifth, Sixth, and Fourteenth Amendments. Pp. 216–225.

(a) Although the mandatory punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading *non vult* because the judge accepting the plea has authority to impose a life term. *United States* v. *Jackson,* 390 U. S. 570, distinguished. Pp. 216–217.

(b) Not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid; specifically, there is no *per se* rule against encouraging guilty pleas. Here, the probability or certainty of leniency in return for a *non vult* plea did not invalidate the mandatory life sentence, there having been no assurances that a plea would have been accepted and if it had been that a lesser sentence would have been imposed. Cf. *Bordenkircher* v. *Hayes,* 434 U. S. 357. Pp. 218–222.

(c) If appellant had tendered a plea and if it had been accepted and a term of years less than life had been imposed, this would simply

have recognized that there had been a plea and that in sentencing it is constitutionally permissible to take that fact into account. Absent the abolition of guilty pleas and plea bargaining, it is not forbidden under the Constitution to extend a proper degree of leniency in return for guilty pleas, and New Jersey has done no more than that. Pp. 222–223.

(d) There was no element of retaliation or vindictiveness against appellant for going to trial, where it does not appear that he was subjected to unwarranted charges or was being punished for exercising a constitutional right. While defendants pleading *non vult* may be treated more leniently than those who go to trial, withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as plea bargaining is held to be a proper procedure. Pp. 223–224.

(e) The New Jersey sentencing scheme does not exert such a powerful influence to coerce inaccurate pleas *non vult* as to be deemed constitutionally suspect. Here, the State did not trespass on appellant's rights so long as he was free to accept or refuse the choice presented to him by the State, *i. e.*, to go to trial and face the risk of life imprisonment or to seek acceptance of a *non vult* plea and imposition of the lesser penalty. P. 225.

2. Nor does the sentencing scheme infringe appellant's right to equal protection under the Fourteenth Amendment, since all New Jersey defendants are given the same choice as to whether to go to trial or plead *non vult*. Defendants found guilty by a jury are not penalized for exercising their right to a jury trial any more than defendants who plead guilty are penalized for giving up the chance of acquittal at trial. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision. Pp. 225–226.

74 N. J. 379, 378 A. 2d 235, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 226. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 228.

James K. Smith, Jr., argued the cause for appellant. With him on the brief was *Stanley C. Van Ness*.

John DeCicco, Deputy Attorney General of New Jersey, argued the cause for appellee. With him on the brief were

John J. Degnan, Attorney General, *David S. Baime*, Assistant Attorney General, and *Anthony J. Parrillo*, Deputy Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the New Jersey homicide statutes,[1] some murders are of the first degree; the rest are of the second degree. Juries

[1] The relevant statutes are N. J. Stat. Ann. §§ 2A:113–1 to 2A:113–4 (West 1969 and Supp. 1978–1979):

"2A:113–1. Murder

"If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, constable or other officer of justice, either civil or criminal, of this State, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

"2A:113–2. Degrees of murder; designation in verdict

"Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

"2A:113–3. Murder; plea of guilty not to be received; plea of non vult or nolo contendere and sentence thereon

"In no case shall the plea of guilty be received upon any indictment for

rendering guilty murder verdicts are to designate whether the murder was a first- or second-degree crime. The mandatory punishment, to be imposed by the judge, for those convicted by a jury of first-degree murder is life imprisonment;[2] second-degree murder is punished by a term of not more than 30 years. Trials to the court in murder cases are not permitted, and guilty pleas to murder indictments are forbidden. Pleas of *non vult* or *nolo contendere,* however, are allowed. "If such plea be accepted," the punishment "shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."[3] The judge

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murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

"Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

"2A:113–4. Murder; punishment

"Every person convicted of murder in the first degree, [his] aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

"Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years."

Manslaughter is separately defined in § 2A:113–5 (West 1969).

[2] The provision for the death penalty in § 2A:113–4 was invalidated in *Funicello* v. *New Jersey,* 403 U. S. 948 (1971). On remand, the New Jersey Supreme Court held the death penalty provision severable from the statute and ruled that life imprisonment was to be imposed upon all defendants convicted by a jury of first-degree murder, *State* v. *Funicello,* 60 N. J. 60, 286 A. 2d 55, cert. denied *sub nom. New Jersey* v. *Presha,* 408 U. S. 942 (1972).

[3] N. J. Stat. Ann. § 2A:113–3 (West 1969). As the statute suggests, the trial judge has complete discretion to refuse to accept the plea. See *State* v. *Sullivan,* 43 N. J. 209, 246, 203 A. 2d 117, 196 (1964). He may not, however, accept a plea if the defendant maintains his innocence,

entertaining the plea determines that there is a factual basis for conviction but need not decide whether the murder is first or second degree.

Appellant Corbitt, after pleading not guilty to a murder indictment, was convicted of committing murder in the course of an arson—a felony murder and one of the first-degree homicides.[4] He was sentenced to the mandatory punishment of life imprisonment. His conviction and sentence were affirmed by the New Jersey appellate courts. The New Jersey Supreme Court rejected his contention that because defendants pleading *non vult* could be sentenced to a lesser term, the mandatory life sentence following a first-degree murder verdict was an unconstitutional burden upon his right to a jury trial under the Sixth and Fourteenth Amendments and upon his right against compelled self-incrimination under the Fifth and Fourteenth Amendments, as well as a violation of his right to equal protection of the laws under the Fourteenth Amendment. 74 N. J. 379, 378 A. 2d 235 (1977). We noted probable jurisdiction. 434 U. S. 1060 (1978).

Appellant's principal reliance is upon *United States* v. *Jackson,* 390 U. S. 570 (1968). There, this Court held that the death sentence provided by the Federal Kidnaping Act was invalid because it could be imposed only upon the recommendation of a jury accompanying a guilty verdict, whereas the maximum penalty for those tried to the court after waiving a jury and for those pleading guilty was life

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stands mute, or refuses to admit facts that establish guilt. *State* v. *Reali,* 26 N. J. 222, 139 A. 2d 300 (1958); *State* v. *Sands,* 138 N. J. Super. 103, 109–112, 350 A. 2d 274, 277–279 (App. Div. 1975); *State* v. *Rhein,* 117 N. J. Super. 112, 283 A. 2d 759 (App. Div. 1971).

[4] Corbitt was indicted on two counts of arson and one count of murder. The State presented its case on a felony-murder basis. He was found guilty on one count of arson and on the murder count. Sentences of life imprisonment for felony murder and a concurrent term for arson were imposed. Because the arson conviction was deemed merged into the murder conviction, the separate sentence for arson was set aside on appeal.

imprisonment. Only those insisting on a jury trial faced the possibility of a death penalty. These provisions were held to be a needless encouragement to plead guilty or to waive a jury trial, and the death penalty was consequently declared unconstitutional.

We agree with the New Jersey Supreme Court that there are substantial differences between this case and *Jackson,* and that *Jackson* does not require a reversal of Corbitt's conviction. The principal difference is that the pressures to forgo trial and to plead to the charge in this case are not what they were in *Jackson.* First, the death penalty, which is "unique in its severity and irrevocability," *Gregg* v. *Georgia,* 428 U. S. 153, 187 (1976), is not involved here. Although we need not agree with the New Jersey court that the *Jackson* rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death. Furthermore, in *Jackson,* any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment,[5] the risk of that punishment is not completely avoided by pleading *non vult* because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial.

It is nevertheless true that while life imprisonment is the

[5] New Jersey Stat. Ann. § 2A:113–2 (West 1969) directs a jury finding a defendant guilty of murder to "designate by their verdict whether it be murder in the first degree or in the second degree." It thus appears that in appropriate cases the jury would be instructed on both first- and second-degree murder. In this case, however, the State proceeded on a felony-murder basis; the judge considered it to be a first-degree felony-murder case; and there were no instructions on second-degree murder or manslaughter. As far as the record before us reveals, Corbitt did not request or object to the absence of instructions on lesser crimes.

mandatory punishment for a defendant against whom a jury has returned a first-degree murder verdict, a judge accepting a *non vult* plea does not classify the murder [6] and may impose either life imprisonment or a term of up to 30 years. The defendant who wishes to avoid the certainty of life imprisonment if he is tried and found guilty by the jury of first-degree murder, may seek to do so by tendering a *non vult* plea. Although there is no assurance that he will be so favored, the judge does have the power to accept the plea and to sentence him to a lesser term.[7] It is Corbitt's submission that the possibility of a sentence of less than life upon the plea of *non vult,* combined with the absence of a similar possibility when found guilty by a jury, is an unconstitutional burden on his federal rights under the Fifth, Sixth, and Fourteenth Amendments.

As did the New Jersey Supreme Court, we disagree. The cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.[8] Specifically, there is no *per se* rule against encour-

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[6] Under New Jersey law, the plea is to be directed to the indictment, which may charge murder generally. The trial court accepting a plea does not hold a hearing for the purpose of determining the degree of guilt or make any such determination. *State* v. *Williams,* 39 N. J. 471, 479, 189 A. 2d 193, 197 (1963); *State* v. *Walker,* 33 N. J. 580, 588–589, 166 A. 2d 567, 571–572 (1960).

[7] If the plea is accepted, the sentencing judge would appear to have discretion not only to impose up to 30 years on facts that might have warranted a first-degree murder verdict by a jury but also to impose a life term where the facts indicate a second-degree murder verdict.

[8] For example, in *Crampton* v. *Ohio,* decided with *McGautha* v. *California,* 402 U. S. 183 (1971), we upheld Ohio's procedure whereby the jury determines both guilt and punishment in a single trial and in a single verdict. Crampton argued that the unitary procedure impaired his Fifth and Fourteenth Amendment right against compelled self-incrimination because he could remain silent on the issue of guilt only at the cost of

aging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.[9] The plea may obtain for the defendant

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surrendering any chance to plead his case on the issue of punishment. As we stated there, in rejecting his argument:

"The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson,* 397 U. S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.,* at 213.

See also *Brady* v. *United States,* 397 U. S. 742, 750 (1970).

In *United States* v. *Nobles,* 422 U. S. 225 (1975), we held that a District Court could condition the admissibility of impeachment testimony by a defense witness upon production of an investigative report prepared by the witness, rejecting Nobles' contention that to do so would violate his Sixth Amendment right to compulsory process and cross-examination.

[9] The Court intimated as much in *Jackson* itself: "[T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U. S., at 583. Decisions after *Jackson* sustained practices that, although encouraging guilty pleas, were not "needless." In the first of these cases, *Brady* v. *United States, supra,* the petitioner had pleaded guilty and was sentenced to 50 years' imprisonment after being indicted under the same statute, the Federal Kidnaping Act, at issue in *Jackson.* Brady claimed that his guilty plea had been involuntary, relying on our holding in *Jackson* that the death penalty provision of the Federal Kidnaping Act served to encourage guilty pleas needlessly. In effect, Brady argued that *Jackson* required the invalidation of every guilty plea entered under the Federal Kidnaping Act prior to *Jackson.* We concluded that he had "read far too much into the *Jackson* opinion." 397 U. S., at 746. *Jackson* had in no way altered the test of *Boykin* v. *Alabama,* 395 U. S. 238, 242 (1969), that guilty pleas are valid if knowing, voluntary, and intelligent.

Subsequent decisions reaffirmed the permissibility of plea bargaining even though "every such circumstance has a discouraging effect on the defendant's assertion of his trial rights," because the "imposition of these difficult choices [is the] inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin* v. *Stynchcombe,* 412 U. S. 17, 31 (1973). See *McMann* v. *Richardson,* 397 U. S. 759 (1970); *Parker* v. *North Carolina,* 397 U. S. 790 (1970); *North*

"the possibility or certainty . . . [not only of] a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty . . . ," *Brady* v. *United States,* 397 U. S. 742, 751 (1970), but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury. In *Bordenkircher* v. *Hayes,* 434 U. S. 357 (1978), the defendant went to trial on an indictment charging him as a habitual criminal, for which the mandatory punishment was life imprisonment. The prosecutor, however, had been willing to accept a plea of guilty to a lesser charge carrying a shorter sentence. The defendant chose to go to trial, was convicted, and was sentenced to life. We affirmed the conviction, holding that the State, through the prosecutor, had not violated the Constitution since it "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." *Id.,* at 365. Relying upon and quoting from *Chaffin* v. *Stynchcombe,* 412 U. S. 17 (1973), we also said:

> "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' *Chaffin*

Carolina v. *Alford,* 400 U. S. 25 (1970); *Santobello* v. *New York,* 404 U. S. 257 (1971); *Bordenkircher* v. *Hayes,* 434 U. S. 357 (1978).

In *Ludwig* v. *Massachusetts,* 427 U. S. 618 (1976), the appellant challenged the Massachusetts system for disposition of certain state crimes in which the defendant is first tried without a jury. If convicted, he may appeal and obtain a jury trial *de novo.* Although the range of penalties was the same at each tier, Ludwig suffered a harsher sentence when he appealed and was found guilty by a jury. Recognizing the interest of the State in efficient criminal procedure, we rejected a claim based on *Jackson* that the system discouraged the assertion of the right to a jury trial by imposing harsher sentences upon those that exercised that right. 427 U. S., at 627–628, n. 4.

> v. *Stynchcombe, supra,* at 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." 434 U. S., at 364.

There is no difference of constitutional significance between *Bordenkircher* and this case.[10] There, as here, the defendant went to trial on an indictment that included a count carrying a mandatory life term under the applicable state statutes. There, as here, the defendant could have sought to counter the mandatory penalty by tendering a plea. In *Bordenkircher,* as permitted by state law, the prosecutor was willing to forgo the habitual criminal count if there was a plea, in which event the mandatory sentence would have been avoided. Here, the state law empowered the judge to impose a lesser term either in connection with a plea bargain or otherwise. In both cases, the defendant gave up the possibility of leniency if he went to trial and was convicted on the count carrying the mandatory penalty. In *Bordenkircher,* the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial. It should not do so here, where there was no assurance that a plea would be accepted if tendered and, if it had been, no assurance that a sentence less than life would be imposed. Those matters rested ultimately in the discretion of the judge,

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[10] In *Bordenkircher,* the original indictment did not include the habitual criminal count, which was added when the defendant was reindicted following his refusal to plead. This escalation of the charges after the failure of plea bargaining, which to the dissenters in this Court demonstrated impermissible vindictiveness, is not present here; and we need not rely on this aspect of the *Bordenkircher* decision. The rationale of that case would *a fortiori* govern a case where the original indictment contains a habitual criminal count and conviction on that count follows the defendant's decision not to plead to a lesser charge.

perhaps substantially influenced by the prosecutor and the plea-bargaining process permitted by New Jersey law.[11]

Bordenkircher, like other cases here, unequivocally recognized the State's legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process mutually beneficial to both the defendant and the State.[12] In pursuit of this interest, New Jersey has provided that the judge may, but need not, accept pleas of *non vult* and that he may impose life or the specified term of years. This not only provides for discretion in the trial judge but also sets the limits within which plea bargaining on punishment may take place. The New Jersey Supreme Court observed that the

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[11] New Jersey expressly authorizes plea bargaining. N. J. Court Rule 3:9–3 (a). Any agreement reached is "placed on the record in open court at the time the plea is entered." Rule 3:9–3 (b). The New Jersey Rules also permit disclosure of the tentative agreement to the judge to secure advance approval. Rule 3:9–3 (c). In any event, if the judge "determines that the interest of justice would not be served by effectuating the agreement," he must permit the defendant to withdraw the plea. Rule 3:9–3 (e).

[12] The Court has several times recognized the benefits of plea bargaining to the defendant as well as to the State. In *Blackledge* v. *Allison,* 431 U. S. 63, 71 (1977), we said:

"Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings." (Footnote omitted.)

See also *Santobello* v. *New York, supra,* at 260–261; *Brady* v. *United States,* 397 U. S., at 751–752. There is thus much more to be derived from plea bargaining than simply conserving scarce prosecutorial resources, and those benefits accrue equally where the plea bargaining occurs within a statutory framework.

"encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program." 74 N. J., at 396, 378 A. 2d, at 243–244. Its conclusion was that in this light there were substantial benefits to the State in providing the opportunity for lesser punishment and that the statutory pattern could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of *United States* v. *Jackson*.

We are in essential agreement with the New Jersey Supreme Court. Had Corbitt tendered a plea and had it been accepted and a term of years less than life imposed, this would simply have recognized the fact that there had been a plea and that in sentencing it is constitutionally permissible to take that fact into account. The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas. New Jersey has done no more than that.

We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right.[13] Indeed, insofar as this record reveals, Corbitt may have tendered a plea and it was refused. There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undis-

[13] The dissent's suggestion, *post*, at 229–230, that New Jersey concedes that its statutes have both the purpose and effect of penalizing the assertion of the right not to plead guilty is untenable, see Brief for Appellee 28–31, and seems inconsistent with the later description of the State's position, *post*, at 230.

turbed. Those cases, as we have said, unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based.[14]

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[14] The dissent appears to question any system that subjects the defendant who stands trial to a substantial risk of greater punishment than the defendant who pleads guilty. But in the next breath, the dissent appears to embrace plea bargaining, although the plea-bargaining systems operating in a majority of the jurisdictions throughout the country inherently extend to defendants who plead guilty the probability or the certainty of leniency that will not be available if they go to trial.

The dissent asserts that the attack here is on the statutory scheme rather than upon the system of plea bargaining, which is said to individualize defendants and does not mandate a different standard of punishment depending solely on whether or not a plea is entered. The distinction is without substance for the purposes of this case. In the first place, plea bargaining by state prosecutors operates by virtue of state law, here by virtue of the formal rules of the Supreme Court of New Jersey. That system permits a proper amount of leniency in return for pleas, leniency that is denied if one goes to trial. In this sense, the standard of punishment is necessarily different for those who plead and for those who go to trial. For those who plead, that fact itself is a consideration in sentencing, a consideration that is not present when one is found guilty by a jury. Second, under the New Jersey statutes, pleas may be rejected even if tendered; there must, for example, be a factual basis for the plea. Even if a plea is accepted, there is discretion to impose life imprisonment. The statute leaves much to the judge and to the prosecutor and does not mandate lesser punishment for those pleading *non vult* than is imposed on those who go to trial. It is also true that under normal circumstances, juries in New Jersey may find a defendant guilty of second-degree murder rather than first.

Third, we cannot hold that a prosecutor may charge a person with a crime carrying a mandatory punishment and secure a valid conviction, despite his power to offer leniency to those who plead—including dismissal of the mandatory count in return for a plea—and yet hold that the legislature may not openly provide for the possibility of leniency in return for a plea. This is particularly true where it is contemplated that plea bargaining will in any event go forward within the limits set by the legislature.

Finally, we are unconvinced that the New Jersey statutory pattern exerts such a powerful influence to coerce inaccurate pleas *non vult* that it should be deemed constitutionally suspect. There is no suggestion here that Corbitt was not well counseled or that he misunderstood the choices that were placed before him. Here, as in *Bordenkircher,* the State did not trespass on the defendant's rights "so long as the accused [was] free to accept or reject" the choice presented to him by the State, 434 U. S., at 363, that is, to go to trial and face the risk of life imprisonment or to seek acceptance of a *non vult* plea and the imposition of the lesser penalty authorized by law.[15]

Appellant also argues that the sentencing scheme infringes his right to equal protection under the Fourteenth Amendment because it penalizes the exercise of a "fundamental right." We rejected a similar argument in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), noting that "[t]o fit the problem . . . into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.,* at 723. All New Jersey defendants are given the same choice. Those electing to contest their guilt face a certainty of life imprisonment if convicted of first-degree murder; but they may be acquitted instead or, in a proper case, may be convicted of a lesser degree of homicide and receive a sentence of less than life. Furthermore, a plea of *non vult* may itself result in a life sentence. The result, therefore,

> "may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply can-

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[15] We do not suggest that every conceivable statutory sentencing structure, plea-bargaining system, or particular plea bargain would be constitutional. We hold only that a State may make due allowance for pleas in its sentencing decisions and that New Jersey has not exceeded its powers in this respect by its statutory provision extending the possibility of leniency to those who plead *non vult* in homicide cases.

not be said that a state has invidiously 'classified' . . . ." *Id.*, at 722.

It cannot be said that defendants found guilty by a jury are "penalized" for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance, the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision. The judgment of the Supreme Court of New Jersey is affirmed.

It is so ordered.

MR. JUSTICE STEWART, concurring in the judgment.

I agree with the Court that *United States* v. *Jackson*, 390 U. S. 570, is not controlling in this case. In the *Jackson* case, a convicted defendant could be sentenced to death if he had requested a jury trial but could be sentenced to no more than a life sentence if he either had pleaded guilty or had pleaded not guilty and waived a jury trial. Under these circumstances, the Court held that this part of the federal statute was unconstitutional because it "impose[d] an impermissible burden upon the exercise of a constitutional right." *Id.*, at 572.

Under the New Jersey statutory scheme, by contrast, no such impermissible burden is present. Unlike the statute at issue in the *Jackson* case, the death penalty is not involved here, and a convicted defendant can be sentenced to the maximum penalty of life imprisonment whether he pleads *non vult* or goes to trial. Moreover, although in New Jersey a defendant pleads *non vult* to a general indictment of murder, he can be sentenced to the maximum sentence even though the underlying facts would have supported no more than a second-degree murder conviction if the defendant had gone to trial and been found guilty by a jury. Since the latter offense can-

not be punished by life imprisonment, a defendant who is guilty of second-degree murder is subject to a greater penalty if he pleads *non vult* than if he pleads not guilty and is convicted of that offense after a jury trial. Finally, a defendant who pleads not guilty and goes to trial can be convicted of a lesser included offense or acquitted even though in fact he is guilty of first- or second-degree murder or manslaughter. It is, therefore, impossible to state with any confidence that the New Jersey statute does in fact penalize a defendant's decision to plead not guilty.*

I cannot agree with the statement of the Court, however, that "[t]here is no difference of constitutional significance between *Bordenkircher* and this case." *Ante,* at 221. *Bordenkircher* v. *Hayes,* 434 U. S. 357, involved plea negotiations between the attorney for the prosecution and the attorney for the defense in the context of an adversary system of criminal justice. It seems to me that there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case. While a prosecuting attorney, acting as an advocate, necessarily must be able to settle an adversary criminal lawsuit through plea bargaining with his adversary, a state legislature has a quite different function to perform. Could a state legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not-guilty plea? I would suppose that such legislation would be clearly unconstitutional under *United States* v. *Jackson.* Since the reasoning of part

*Indeed, despite the appellant's claim that the statute coerces or encourages guilty pleas, the appellant himself pleaded not guilty, went to trial and was convicted. The petitioner in *United States* v. *Jackson,* by contrast, brought a facial attack on the constitutionality of the statute by way of a motion to dismiss the indictment. See 390 U. S., at 571.

of the Court's opinion suggests otherwise, I concur only in the judgment.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The concept of a "false" not-guilty plea has no place in our jurisprudence.[1] A defendant has a constitutional right to require the State to support its accusation with evidence.[2] He is therefore given an unqualified right—before trial when he retains the presumption of innocence—to plead not guilty.[3]

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[1] "[T]he plea is not evidence. Nor is it testimonial. It is not under oath. Nor is it subject to cross-examination. When it is 'not guilty,' it has no effect as testimony or evidence . . . . The function of that plea is to put the Government to its proof and to preserve the right to defend. . . .

"If the plea were testimonial or evidentiary, the court would have no power to demand it. . . . But if, having used its power to extract the plea for its proper purpose, it can go further and over the defendant's objection convert or pervert it into evidence, in substance if not in form it compels the defendant to testify in his own case. That it has no power to do." *Wood* v. *United States,* 75 U. S. App. D. C. 274, 282–283, 128 F. 2d 265, 273–274 (1942) (Rutledge, J.).

See also *Sorrells* v. *United States,* 287 U. S. 435, 452 (not-guilty plea is not inconsistent with entrapment defense even though latter implies admission that the offense was committed); *State* v. *Valentina,* 71 N. J. L. 552, 556, 60 A. 177, 179 (1905) (not-guilty plea and confession of guilt are not inconsistent).

[2] Among the implications of the Fifth Amendment privilege against self-incrimination is that "[g]overnments, state and federal, [may be] constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan,* 378 U. S. 1, 7–8. As expressed by Dean Wigmore, the Fifth Amendment gives the individual the right to "requir[e] the government in its contest with the individual to shoulder the entire load." 8 J. Wigmore, Evidence § 2251, p. 317 (McNaughten rev. ed. 1961), quoted in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55.

[3] "Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty." *Davis* v. *United States,* 160 U. S. 469, 485–486. See *Byrd* v. *United States,* 119 U. S. App. D. C.

Because the entry of such a plea cannot at once be criminally punishable and constitutionally protected, a statute that has no other purpose or effect than to penalize assertion of the right not to plead guilty is "patently unconstitutional." The Court so held in *United States* v. *Jackson,* 390 U. S. 570, 581, and that holding is dispositive of this case.[4]

Today, however, the Court decides that a defendant who has been convicted after a full trial may be punished not only for the crime charged in the indictment but additionally for entering a "false" plea of not guilty. The holding in *Jackson,* though not specifically overruled, has been divorced from the rationale on which it rested.

New Jersey does not seriously contend that § 2A:113–3 has any purpose or effect other than to penalize assertion of the right not to plead guilty. Its argument that the statute is justified by a valid state interest in conserving scarce prosecu-

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360, 362, 342 F. 2d 939, 941 (1965); *United States* v. *Mayfield,* 59 F. 118, 119 (ED La. 1893).

Long before the incorporation of the Fifth Amendment into the Fourteenth, the States had firmly enforced these principles:

"[A] plea of not guilty, to a criminal charge, at once calls to the defense of defendant the presumption of innocence, denies the credibility of evidence for the State, and casts upon the State the burden of establishing guilt beyond a reasonable doubt. . . . These words are not mere formalities, but express vital principles of our criminal jurisprudence and criminal procedure. These principles ought not to be readily abandoned, or worn away by invasion." *State* v. *Hardy,* 189 N. C. 799, 804–805, 128 S. E. 152, 155 (1925).

[4] "Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *United States* v. *Jackson,* 390 U. S., at 581 (footnote omitted).

torial resources is simply a restatement of the obvious purpose of the law to motivate defendants to plead guilty instead of exercising their expensive right to trial. If appellee is correct in its assertion that the statute has been effective as a money-saving inducement to guilty pleas, that success is necessarily attributable to the deterrent effect of the penalty imposed on those who resist the inducement.

In its attempt to distinguish *Jackson,* the State argues that its statute imposes no penalty for "falsely" pleading not guilty because it provides the same maximum punishment regardless of the plea. That argument is beside the point because the statute provides a significantly more severe standard of punishment for the defendant who exercises his constitutional rights than for the one who submits without trial. For the former, a mandatory life sentence is prescribed whereas for the latter, life is "only the maximum in a discretionary spectrum of length" that extends downward anywhere from a term of 30 years to no term at all. *Dobbert* v. *Florida,* 432 U. S. 282, 300. Whether viewed in light of the legislative purpose in enacting the statute or in light of its impact on the defendant's choice of how to plead, this difference in punitive standards has the same "onerous" effect as if the maximum, as well as the minimum, penalty differed.[5] Just as in *Jackson,* the

[5] This conclusion was the predicate for the Court's holding in *Lindsey* v. *Washington,* 301 U. S. 397. In that case the Court held that a change in statutory sentencing provisions for burglary could not be applied retroactively even though the new provisions did not increase the 15-year maximum sentence, but only made it mandatory:

"The effect of the new statute is to make mandatory what was before only the maximum sentence. . . .

"Removal of the possibility of a sentence of less than fifteen years . . . operates to [defendants'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old." *Id.,* at 400–401.

Accord, *Dobbert* v. *Florida,* 432 U. S. 282, 300 ("[O]ne is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous

statute subjects the defendant who stands trial to a substantial risk of greater punishment than the defendant who pleads guilty.[6]

Nor is this statutory scheme the equivalent of a plea bargain negotiated between defense counsel and the prosecutor. While such bargains serve a state interest in common with § 2A:113–3, they do so without penalizing the defendant's assertion of his legal rights. In the bargaining process, indi-

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than that which he might have received under the old"). See also *Lockett* v. *Ohio*, 438 U. S. 586, 619 (BLACKMUN, J., concurring in judgment) (A statutory sentencing scheme under which "a defendant can plead not guilty only by enduring a semimandatory [death-penalty provision], rather than [the] purely discretionary, capital-sentencing provision" applicable to defendants who plead guilty creates a "disparity between a defendant's prospects under the two sentencing alternatives [that] is . . . too great to survive under *Jackson*").

Mr. Justice Stone's opinion for the unanimous Court in *Lindsey* also disposes of appellee's argument that the statute here is distinguishable from the one in *Jackson* because it does not make death the consequence of a "false" not-guilty plea: When "a punishment for murder of life imprisonment or death [is] changed to death alone," it is "only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and a minimum punishment by making the maximum compulsory." 301 U. S., at 401. In either case, "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive" less than the maximum. *Id.*, at 402–403. See also *Brady* v. *United States*, 397 U. S. 742, 747–752, holding that a defendant who pleads guilty to avoid the death penalty is entitled to no different treatment from one who pleads guilty to avoid any other "maximum sentence authorized by law."

[6] In one important respect, the statute invalidated in *Jackson* was less onerous than the New Jersey statute involved in this case. The *Jackson* defendant could avoid the more severe penalty by merely forgoing his Sixth Amendment right to a jury and trying the case to the court alone. Here, however, the price of avoiding the statutory penalty for an incorrect plea of not guilty is the waiver not only of the right to a jury but also the right to put the government to its proof, to confront one's accusers, and to present a defense. See *Boykin* v. *Alabama*, 395 U. S. 238, 243.

vidual factors relevant to the particular case may be considered by the prosecutor in charging and by the trial judge in sentencing, regardless of the defendant's plea; [7] the process does not mandate a different standard of punishment depending solely on whether or not a plea is entered.[8]

Of even greater importance is the fact that a defendant who refuses a plea bargain will not be punished for his constitutionally protected recalcitrance; whatever punishment he receives will be for his conduct in committing the offense or offenses the State has proved at trial.[9] In contrast, a defendant who faces a more severe range of statutory penalties simply because he has insisted on a trial, is subjected to punishment not only for the crime the State has proved but also for the "offense" of entering a "false" not-guilty plea.

Because the legislature, the voice of the community in iden-

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[7] See *North Carolina* v. *Pearce,* 395 U. S. 711, 723. Whenever this flexibility and individualization has given way to prosecutorial or judicial vindictiveness against those who assert their rights, the Court has condemned the practice. *Id.,* at 725. The message of *Pearce,* as well as *Jackson; Brady* v. *United States, supra; Chaffin* v. *Stynchcombe,* 412 U. S. 17; and *Bordenkircher* v. *Hayes,* 434 U. S. 357, is that where the legislature, prosecutor, judge, or all three "deliberately employ their charging and sentencing powers to induce [a] defendant to tender a plea of guilty," *Brady, supra,* at 751 n. 8, and where they do so with the "objective [of] penaliz[ing] a person's reliance on his legal rights, [such action] is 'patently unconstitutional.'" *Bordenkircher, supra,* at 363, quoting *Chaffin, supra,* at 32–33, n. 20.

[8] This point was made most forcefully in *Brady* v. *United States.* In that case, the Court upheld a conviction under the same statute challenged in *Jackson.* However, petitioner in *Brady,* unlike respondent in *Jackson,* had not received a higher sentence as "the price of a jury trial." 397 U. S., at 746. Instead, he had knowingly and voluntarily pleaded guilty and brought himself within the lower range of penalties provided for those who did not insist upon trial. The Court affirmed the conviction because the plea-bargaining process, even when buttressed by the invalid statute, was not "inherently coercive of guilty pleas." *Ibid.*

[9] See *Bordenkircher* v. *Hayes, supra,* at 364.

tifying crimes and penalties,[10] has inflexibly engraved the different standard of punishment in the statute itself, New Jersey may not disavow or disparage its policy of imposing a special punishment simply because a person has done what the law plainly allows him to do. As the Court reiterated last Term, the implementation of such a policy inevitably produces a due process violation of the most basic sort.[11]

The right of the defendant to stand absolutely mute before the bar of justice and to force the government to make its case without his aid has been accepted since the earliest days of the Republic.[12] That silence, and its formal invocation by entry of a not-guilty plea, cannot retain the protection of the Fifth Amendment and be simultaneously a punishable offense. The same act cannot be both lawful and unlawful. That is the essence of the Court's holding in *Jackson*. I respectfully dissent from its repudiation.

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[10] See *Coker* v. *Georgia*, 433 U. S. 584, 594. Cf. *United States* v. *Hudson and Goodwin*, 7 Cranch 32.

[11] "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, *supra*, at 363.

[12] *United States* v. *Hare*, 26 F. Cas. 148 (No. 15,304) (CC Md. 1818); *United States* v. *Gibert*, 25 F. Cas. 1287 (No. 15,204) (CC Mass. 1834) (Story, J.). The days have long since passed when a refusal to plead qualified as an admission of guilt or an invitation for the extraction of a plea through torture or *piene forte et dure*. See *McPhaul* v. *United States*, 364 U. S. 372, 386–387 (Douglas, J., dissenting); *In re Smith*, 13 F. 25 (CC Mass. 1882). Today, it is universally accepted that silence at arraignment is equivalent to a plea of not guilty. See *United States* v. *Beadon*, 49 F. 2d 164 (CA2 1931), cert. denied, 284 U. S. 625.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* FIRST LINCOLNWOOD CORP.

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

No. 77-832. Argued October 11, 1978—Decided December 11, 1978

Section 3 (a) of the Bank Holding Company Act of 1956 (Act) prohibits any company from acquiring control of a bank without prior approval by the Board of Governors of the Federal Reserve System (Board). Under § 3 (c) of the Act, the Board must disapprove a transaction that would, *inter alia,* generate anticompetitive effects not clearly outweighed by beneficial effects upon the acquired bank's ability to serve the community. Section 3 (c) also directs the Board "[i]n every case" to "take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served." Individual stockholders who controlled an existing bank organized respondent corporation to acquire their bank stock. Respondent submitted the transaction for the Board's approval. Upon review, the Board found that the transaction would have no anticompetitive effects and would not change the services offered by the bank to customers. However, it ultimately disapproved the transaction, against the recommendation of the Comptroller of the Currency, on the ground that formation of the holding company would not bring the bank's financial position up to the Board's standards. The Court of Appeals set aside the Board's order, holding that § 3 (c) empowers the Board to withhold approval because of financial or managerial deficiencies only if those deficiencies would be "caused or enhanced by the proposed transaction." *Held:*

1. The Board has authority under § 3 (c) to disapprove formation of a bank holding company solely on grounds of financial or managerial unsoundness. This conclusion is supported by the language of the statute and the legislative history and in addition comports with the Board's own longstanding construction, which is entitled to great respect. Pp. 242-248.

2. The Board's authority is not limited to instances in which the financial or managerial unsoundness would be caused or exacerbated by the proposed transaction. Such a limitation would be inconsistent with the language and legislative history of the statute and with the Board's own construction of its mandate, a construction in which Congress has

acquiesced. Nor does the legislative history suggest that Congress intended to reserve questions of bank safety to the Comptroller of the Currency or state agencies except where a transaction would harm the financial condition of an applicant or a bank. Pp. 249–252.

3. The Board's denial of the application is supported by substantial evidence that respondent would not be a sufficient source of financial and managerial strength to its subsidiary bank. Pp. 252–254.

560 F. 2d 258, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 254.

Stephen M. Shapiro argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Harriet S. Shapiro, Ronald R. Glancz, Neal L. Petersen,* and *J. Virgil Mattingly.*

George B. Collins argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 3 (a) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1842 (a), prohibits any company from acquiring control of a bank without prior approval by the Board of Governors of the Federal Reserve System (Board).[1] Under § 3

**Horace R. Hansen* and *Wayne P. Dordell* filed a brief for the Independent Bankers Association of America urging affirmance.

[1] More specifically, § 3 (a), 70 Stat. 134, as amended, 80 Stat. 237, 12 U. S. C. § 1842 (a), provides in pertinent part:

"It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other

(c)(1) of the Act, 12 U. S. C. § 1842 (c)(1), the Board may not approve a transaction that would create a monopoly or further an attempt to monopolize the business of banking. In addition, it must disapprove a transaction that would generate anticompetitive effects not clearly outweighed by beneficial effects upon the bank's ability to serve the community. § 1842 (c)(2). The final sentence of § 3 (c) directs that

> "[i]n every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served." [2]

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than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company."

Section 2 (a)(1) of the Act, 70 Stat. 133, as amended, 84 Stat. 1760, 12 U. S. C. § 1841 (a)(1), defines a "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act."

A company has "control" over a bank or over any company if

"(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

"(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

"(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company." § 2 (a)(2) of the Act, 70 Stat. 133, as amended, 84 Stat. 1760, 12 U. S. C. § 1841 (a)(2).

[2] In its entirety, § 3 (c) provides:

"The Board shall not approve—

"(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monop[o]lize or to attempt to monopolize the business of banking in any part of the United States, or

"(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in

The threshold question before us is whether this final sentence authorizes the Board to disapprove a transaction on grounds of financial unsoundness in the absence of any anticompetitive impact. If so, we must decide whether the Board can only exercise that authority when the transaction would cause or exacerbate the financial unsoundness of the holding company or a subsidiary bank.

I

The First National Bank of Lincolnwood, Ill., is controlled by four individuals who hold 86% of its stock in a voting trust. These individuals organized respondent, the First Lincolnwood Corp., to serve as a bank holding company. They planned to exchange their shares in the bank for shares of respondent and, in addition, to have respondent assume a $3.7 million debt they had incurred in acquiring control of the bank.[3] Respondent intended to use the dividends it would receive on the bank's shares to retire this debt over a 12-year period. Further, in order to augment the bank's capital,

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any other manner would be in restraint or [*sic*] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served." 70 Stat. 135, as amended, 80 Stat. 237, 12 U. S. C. § 1842 (c).

[3] The four individuals incurred part of this $3.7 million debt in order to buy out the shares of a former chairman and president of the bank, who had been indicted for securities fraud. See 546 F. 2d 718, 723–724, n. 1 (CA7 1976) (Fairchild, C. J., dissenting from the panel opinion). The entire $3.7 million debt was secured by the bank stock they had acquired in this and previous transactions. While the proposed transaction with respondent would relieve the individual shareholders of their primary obligations under the loans, these shareholders would remain secondarily liable if respondent defaulted and its obligations exceeded the value of the bank's stock. See App. 24, 29–30, 42, 55–56.

respondent would issue $1.5 million in capital notes and then use the proceeds to purchase new shares issued by the bank. The purpose of restructuring ownership interests in this fashion was to enable the holding company and the bank to file a consolidated tax return and thereby realize substantial tax savings.[4]

Because under the proposed transaction respondent would become a bank holding company, § 3 (a) of the Act required that the proposal be submitted for the Board's approval. See n. 1, *supra*. Respondent filed its application with the Federal Reserve Bank of Chicago, as specified by Board regulations.[5]

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[4] The Internal Revenue Code of 1954, 26 U. S. C. § 1501, permits an affiliated group of corporations to file a consolidated income tax return. Respondent and the bank would be affiliated by virtue of respondent's ownership of at least 80% of the bank's stock. 26 U. S. C. § 1504. Filing a consolidated return would permit the group to deduct the interest on the $3.7 million debt from the bank's gross income when determining the taxable income of the consolidated entity. 26 CFR § 1.1502–11 (a)(1) (1977); 26 U. S. C. § 163. The tax savings from this deduction could then be transferred to respondent as a tax-free intercorporate dividend and used to retire the acquisition debt. 26 CFR § 1.1501–14 (a)(1) (1977). Although in the absence of this transaction, the individual shareholders presumably can deduct from personal income their interest payments on the debt, see 26 U. S. C. § 163, respondent contends that approval of the transaction would have saved the bank and holding company approximately $142,000 in taxes in the first year alone. Brief for Respondent 5–6, n. 2. These tax savings would have diminished as interest payments on the outstanding debt declined.

[5] A company seeking to acquire a bank must submit an application to the Federal Reserve bank of the district in which the applicant is located. 12 CFR §§ 225.3 (a)–(b), 262.3 (b) (1978). The Reserve bank evaluates the application against the Board's standards and makes a recommendation to the Board. § 262.3 (c). At the "appropriate" time, the Reserve bank forwards the application to the Board so that the Board staff can undertake an independent evaluation. *Ibid.*

After the application is forwarded, the Board must notify the Comptroller of the Currency if a national bank is involved, or state supervisory authorities if a state bank is involved, and in most cases must allow the agency 30 days to submit a recommendation. 12 U. S. C. § 1842 (b). See

The Chicago Reserve Bank concluded that the Lincolnwood bank's capital position—in essence, the difference between its assets and its liabilities—was inadequate and, under respondent's proposal, was unlikely to improve enough to attain the minimum level the Board had determined necessary to protect the bank's depositors.[6] Nonetheless, the Lincolnwood bank's favorable earnings prospects and strong management led the Chicago Reserve Bank to recommend that the transaction be approved. The Comptroller of the Currency, however, independently reviewed respondent's application and concluded that it should be denied unless the bank's capital position was strengthened.

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n. 12, *infra*. If the Comptroller or state supervisory authority recommends that the application be denied, the Board must notify the applicant and conduct a hearing. 12 U. S. C. § 1842 (b). On the other hand, if the Comptroller or state authority recommends approval of the transaction or declines to submit a timely recommendation, several Courts of Appeals have held that the Board need not provide a hearing before making its decision, see, *e. g.*, *Kirsch* v. *Board of Governors*, 353 F. 2d 353, 356 (CA6 1965); *Northwest Bancorporation* v. *Board of Governors*, 303 F. 2d 832, 842–844 (CA8 1962), though it may choose to provide one. See 12 CFR §§ 262.3 (g)(2), (3) (1978). In neither case is the Board bound by the recommendation of these agencies. See *Whitney Nat. Bank* v. *Bank of New Orleans*, 379 U. S. 411, 419–420, 423 (1965). For a more complete explication of the Board's procedures, see P. Heller, Handbook of Federal Bank Holding Company Law 317–363 (1976).

[6] The Board uses several measures of capital adequacy. One is the ratio of equity capital to total liabilities less cash on hand, known as the invested-asset ratio. Another is the ratio of total capital (debt and equity) to total assets, known as the capital-asset ratio. See Heller, *supra* n. 5, at 131–132; Clark, The Soundness of Financial Intermediaries, 86 Yale L. J. 1, 63 (1976). The Board regards an invested-asset ratio of 9%, see App. 52–53 (Board staff memorandum), and a capital-asset ratio of 8%, see Hearing on Problem Banks before the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess., 137 (1976), as the minimal levels of capital necessary to maintain financial soundness. Respondent has not specifically challenged the validity of these standards as measures of bank safety.

Respondent thereupon modified its proposal to accommodate the Comptroller's objections. Instead of issuing $1.5 million in capital notes and using the proceeds to purchase new bank stock, respondent proposed that the bank itself sell $1 million in long-term capital notes and $1.1 million in new common stock. In addition, respondent proposed a substantial reduction in the dividends to be paid on the bank stock. Upon review of the modified proposal, the Chicago Reserve Bank adhered to its original recommendation, finding the modification salutary insofar as it increased the total addition to the bank's capital, though "slightly unfavorable" insofar as it decreased the addition to the bank's equity capital from $1.5 to $1.1 million.[7] The Comptroller considered the revised plan superior to the original proposal; therefore, he, too, recommended approval.

The Board staff independently evaluated the application and determined that the bank's projected capital position would fall below the Board's requirements.[8] The staff also found that respondent had not established its ability to raise the additional capital without the individual shareholders'

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[7] While the Board considers capital notes that are subordinated to depositors' demands to be part of a bank's overall capital, it regards them as a less desirable financial cushion than equity. See Heller, *supra* n. 5, at 130–131, n. 209; see, *e. g., Clayton Bancshares Corp.,* 50 Fed. Res. Bull. 1261, 1264 (1964); *Mid-Continent Bancorporation,* 52 Fed. Res. Bull. 198, 200 (1966).

[8] The bank's invested-asset ratio was 5.3% in 1975. The Board staff estimated that an infusion of $2.5 million in equity capital would be necessary to bring the bank up to the Board's minimum standard of 9%. The respondent's proposed addition of $1.1 million in equity and $1 million in debt would have raised the bank's invested-asset ratio to only 6.8%, $1.5 million short of the minimum 9%. The additional $2.1 million in total capital would have raised the bank's capital-asset ratio for 1975 from 5.2% to 7.4%. However, amortization of the $3.7 million acquisition debt and the $1 million in capital notes would have caused the ratio to dwindle to 5.2% by 1987, well short of the Board's 8% minimum. App. 52–54.

incurring more debt. Although acknowledging that the bank's management was capable, the staff concluded that

> "it would appear desirable that Bank's overall capital position should be materially improved and that financing arrangements for the proposed capital injections into Bank [should] be made more definite." App. 54–55.

The Board concurred. It reviewed each of the elements enumerated in § 3 (c), determining first that the proposal had no anticompetitive impact because the transaction merely transferred control of the bank "from individuals to a corporation owned by the same individuals." *First Lincolnwood Corp.*, 62 Fed. Res. Bull. 153 (1976). Similiarly, the Board found that the proposal would effect no significant changes in the services offered by the bank to customers, so factors relating to the convenience and needs of the community militated neither for nor against approval. *Id.*, at 154. Thus, the financial and managerial considerations specified in the final sentence of § 3 (c) were dispositive of respondent's application.

Addressing these considerations, the Board ruled that a bank holding company "should provide a source of financial and managerial strength to its subsidiary bank(s)." 62 Fed. Res. Bull., at 153. Here, the Board found, even if the bank's optimistic earnings projections were realized, respondent would lack the financial flexibility necessary both to service its debt and to maintain adequate capital at the bank. This, as well as the uncertainty regarding the proposed source of the capital injections, raised serious doubts as to respondent's financial ability to resolve unforeseen problems that could arise at the bank. The Board therefore concluded that

> "it would not be in the public interest to approve the formation of a bank holding company with an initial debt structure that could result in the weakening of Bank's overall financial condition." *Id.*, at 154.

A divided panel of the Court of Appeals for the Seventh Circuit affirmed, the majority finding substantial evidence to

support the denial of respondent's application. 546 F. 2d 718, 720–721 (1976).[9] On rehearing en banc, the court unanimously set aside the Board's order. The court recognized that Congress had empowered the Board "to deny approval of a bank acquisition upon finding it not to be in the public interest for reasons other than an anticompetitive tendency." 560 F. 2d 258, 261 (1977). However, in the court's view, § 3 (c) of the Act did not permit the Board to withhold approval because of financial or managerial deficiencies unless those deficiencies were "caused or enhanced by the proposed transaction." 560 F. 2d, at 262. This transaction, the court observed, merely reshuffled ownership interests in the bank. Apart from the proposed addition to capital and the tax advantage, which could accelerate reduction of the $3.7 million debt, respondent's proposal was without financial consequence. The court therefore held that the Board had overstepped its authority under § 3 (c) in denying respondent's application. 560 F. 2d, at 262–263.

We granted certiorari because of the impact of this holding on the Board's ability to fulfill its regulatory responsibilities under the Bank Holding Company Act. 434 U. S. 1061 (1978). We conclude that the court below improperly restricted the Board's authority, and, accordingly, we reverse.

II

Respondent contends that the Court of Appeals misinterpreted the legislative history of the Bank Holding Company Act in sustaining the Board's authority to deny applications for holding-company status solely on grounds of financial or managerial unsoundness. As respondent reads the legislative history, Congress' only concern in passing the Act was with the anticompetitive potential in the concentration of banking resources and the combination of banking and nonbanking

[9] The Court of Appeals had jurisdiction to review the Board's order pursuant to 12 U. S. C. § 1848.

enterprises. See S. Rep. No. 1095, 84th Cong., 1st Sess., 2 (1955); S. Rep. No. 1179, 89th Cong., 2d Sess., 2 (1966). This focus on competitive considerations was reflected in the amendment of the Act in 1966 to conform § 3 (c) with the standards enunciated in the Bank Merger Act amendments of the same year. See 80 Stat. 8, 12 U. S. C. § 1828 (c)(5). The amended standards in the Bank Merger Act were intended to provide an exception to the antitrust laws for those bank mergers in which the benefits to the community outweighed the anticompetitive impact. See *United States* v. *Third Nat. Bank*, 390 U. S. 171 (1968). By incorporating these same standards into the Bank Holding Company Act, respondent infers, Congress intended to authorize the Board to consider financial and managerial resources only as counterweights to a transaction's anticompetitive impact. We do not agree that the Board's authority under the Bank Holding Company Act is so limited.

The language of the statute supports the Board's interpretation of § 3 (c) as an authorization to deny applications on grounds of financial and managerial unsoundness even in the absence of any anticompetitive impact. Section 3 (c) directs the Board to consider the financial and managerial resources and future prospects of the applicants and banks concerned "[i]n every case," not just in cases in which the Board finds that the transaction will have an anticompetitive effect.

Moreover, the Board's interpretation of § 3 (c) draws support from the legislative history. Section 19 of the original version of the Banking Act of 1933, 48 Stat. 186, authorized the Board to regulate the financial and managerial soundness of bank holding companies and their banking subsidiaries. Holding companies were required to obtain a permit from the Board before voting the shares of a national bank. Section 19 directed the Board to consider, in acting upon an application for a voting permit, the financial condition of the company and the general character of its management. 48 Stat. 186. In addition, an applicant had to submit to

financial examination by the Board and to maintain a prescribed reserve of liquid assets. 48 Stat. 187. However, the voting-permit provisions applied only if the bank was a member of the Federal Reserve System and the holding company sought to exercise control by actually voting the bank shares. Because of this limitation, § 19 ultimately proved of little value in ensuring the financial responsibility of bank holding companies and their subsidiaries. See H. R. Rep. No. 609, 84th Cong., 1st Sess., 4–5 (1955).

To ameliorate this deficiency, Congress expanded the Board's authority by enacting the Bank Holding Company Act of 1956. Section 3 (c) of the Act enumerated five factors for the Board to consider whenever a company sought to acquire control of a bank:

> "(1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking." 70 Stat. 135.

The House Report on the Act noted the similarity between these factors and those specified in other banking statutes as the basis for admitting state banks to membership in the Federal Reserve System and for granting federal deposit-insurance coverage. H. R. Rep. No. 609, *supra*, at 15. In both instances, the adequacy of the bank's capital is an important factor to be considered by the reviewing agency. See 12 U. S. C. §§ 329, 1816.[10]

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[10] Section 329 provides that no state bank may be admitted to membership in the Federal Reserve System unless "it possesses capital stock and surplus which, in the judgment of the Board of Governors of the Federal

In amending § 3 (c) to conform to the language of the Bank Merger Act in 1966, see *supra,* at 243, Congress did not intend to confine the Board's consideration of financial and managerial soundness only to transactions that would have an anticompetitive impact. The sole reason given for the change was "the interests of uniform standards" in regulating both mergers and acquisitions in the banking industry. S. Rep. No. 1179, *supra,* at 9. Regardless of whether Congress intended to limit the inquiry under the Bank Merger Act,[11] there

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Reserve System, are adequate in relation to the character and condition of its assets and to its existing and prospective deposit liabilities and other corporate responsibilities." 38 Stat. 258, as amended, 12 U. S. C. § 329.

Section 1816 enumerates the factors to be considered in the determination whether to grant a bank federal deposit insurance coverage:

"The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this Act." 64 Stat. 876, 12 U. S. C. § 1816.

[11] Respondent's argument that Congress circumscribed the role of banking factors in the Board's inquiry under § 3 by borrowing the language of the Bank Merger Act assumes that supervisory agencies applying that Act can consider such factors only as they bear upon competitive considerations. This assumption may be unwarranted.

The House Report on the 1966 amendments to the Bank Merger Act is somewhat ambiguous regarding the weight that may be assigned to financial and managerial factors, but it does not appear to preclude consideration of those factors as independent bases for disapproval of a merger:

"Of course, the expression of these factors in the statute would not preclude the banking agencies, charged as they are with general supervisory responsibility, from considering in any particular case such other factors as they might deem relevant. However, only the convenience and needs of the community to be served can be weighed against anticompetitive effects, with financial and managerial resources being considered only as they throw light on the capacity of the existing and proposed institutions

is no indication that it intended to incorporate that limitation into the Bank Holding Company Act. Indeed, in 1966 Congress repealed the voting-permit provisions of the 1933 Act, which had been left intact in 1956, because it believed that the Board retained authority under § 3 (c), even as amended, to ensure the financial and managerial soundness of holding companies and their subsidiary banks. The Senate Committee on Banking and Currency stated:

> "Since the Bank Holding Company Act makes it necessary for any bank holding company to obtain the Board's prior approval before acquiring the stock of any bank (whether member or nonmember) and since, in granting

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to serve the community." H. R. Rep. No. 1221, 89th Cong., 2d Sess., 4 (1966).

This language speaks only to the role of financial and managerial factors in determining under 12 U. S. C. § 1828 (c)(5)(B) whether the anticompetitive effects of a merger outweigh its benefits to the community. In this specific determination, financial and managerial resources are relevant only as they affect the assessment of those benefits. But the House Report says nothing about a situation where, as here, the merger has *no* anticompetitive impact. This situation was addressed by Senator Robertson, Chairman of the Senate Committee on Banking and Currency, which was responsible for the Bank Merger Act amendments:

"Of course, if there are no substantial anticompetitive effects and no tendency to create a monopoly and no suggestion of restraint of trade, the banking agency will proceed to consider the merger on the basis of the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served. The banking agency may approve the merger if it thinks the merger will be beneficial from these points of view, or it can turn the merger down if it thinks the merger undesirable or objectionable in any respects from these points of view." 112 Cong. Rec. 2656 (1966) (prepared statement).

See also *id.*, at 2457, 2460 ("[S]upervisory agencies must use the banking factors to evaluate whether or not a merger will result in a solvent and viable institution, and . . . they should not allow a merger unless this prerequisite is met") (Rep. Todd).

> that approval, the Board must consider the financial condition and management of the holding company, the voting permit procedure . . . serves no substantial purpose." S. Rep. No. 1179, *supra*, at 12.

In 1970, Congress amended the Bank Holding Company Act to extend its coverage to holding companies that controlled only one bank. 84 Stat. 1760, 12 U. S. C. § 1841 (a). Previously, the Act had applied only to multibank holding companies. The principal purpose of this change was to prevent one-bank holding companies from entering businesses not related to banking. S. Rep. No. 91–1084, pp. 2–4 (1970). Nothing in the legislative history of the 1970 amendments suggests that in extending the Act, Congress intended to depart from its prior understanding of the Board's authority or to establish a different rule for one-bank holding companies.[12]

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[12] Congress has amended the Bank Holding Company Act twice since 1970, but those amendments do not affect the disposition of this case. In 1977, Congress made essentially technical refinements in the Bank Holding Company Act. These amendments permit the Board to extend further the time for a bank or a bank holding company to divest itself of bank stock acquired in the course of collecting or securing a debt. The amendments also empower the Board to dispense with the requirement that the Comptroller or state authority be given 30 days' notice before the Board acts on an application, if more rapid action is necessary to prevent the failure of the bank to be acquired. §§ 301, 302, 91 Stat. 1388–1390, amending 12 U. S. C. §§ 1842 (a), (b). See H. R. Rep. No. 95–774, pp. 7–8 (1977).

In 1978, Congress strengthened the Board's regulatory powers principally by permitting the assessment of civil penalties for certain violations of the Bank Holding Company Act. § 106, 92 Stat. 3647, amending 12 U. S. C. § 1847. The 1978 amendments also authorize the Board to require a holding company to divest itself of nonbank subsidiaries whenever necessary to avoid "serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank" or to be consistent with sound banking principles. § 105, amending 12 U. S. C. § 1844. These amendments, in particular, reflect Congress' intent to vest the Board with authority to ensure the financial soundness of bank holding companies and

Our conclusion as to the scope of the Board's authority is bolstered by reference to the principle that an agency's long-standing construction of its statutory mandate is entitled to great respect, "especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969); *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). The Board has regularly treated deficiencies in the financial and managerial resources of holding companies and their banking subsidiaries as sufficient grounds for denying an application. *Clayton Bancshares Corp.*, 50 Fed. Res. Bull. 1261, 1264–1265 (1964); *Mid-Continent Bancorporation*, 52 Fed. Res. Bull. 198, 200–201 (1966); *Midwest Bancorporation, Inc.*, 56 Fed. Res. Bull. 948, 950 (1970); *Citizens Bancorp*, 61 Fed. Res. Bull. 806 (1975); *Bankshares of Hawley, Inc.*, 62 Fed. Res. Bull. 610 (1976); see 12 CFR § 265.2 (f)(22)(vii) (1978). Moreover, Congress has been made aware of this practice,[13] yet four times has "revisited the Act and left the practice untouched." *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974). See 80 Stat. 236; 84 Stat. 1760; 91 Stat. 1388; 92 Stat. 3641.[14] We therefore agree with the Court of Appeals that the Board can disapprove formation of a bank holding company solely on grounds of financial or managerial unsoundness.

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their subsidiaries, a purpose entirely consonant with our interpretation of the Board's authority under § 3 (c).

[13] See Senate Committee on Banking, Housing, and Urban Affairs, Compendium of Major Issues in Bank Regulation, 94th Cong., 1st Sess., 379, 411 (Comm. Print 1975); Hearings on Financial Institutions and the Nation's Economy before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Currency, and Housing, 94th Cong., 1st and 2d Sess., pt. 3, p. 2403 (1976); Hearings on the Safe Banking Act of 1977 before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess., pt. 3, pp. 1321, 1439 (1977).

[14] See n. 12, *supra*.

III

While the Court of Appeals recognized the Board's authority to treat financial or managerial unsoundness as a dispositive consideration, it held that this authority was limited to instances in which the unsoundness was caused or exacerbated by the proposed transaction.[15] The Court of Appeals rejected the Board's argument that permission to form a holding company is "a reward which it may withhold until the applicant's financial status fulfills the Board's standard of desirability." 560 F. 2d, at 262. The legislative history, the court held, revealed nothing that would allow the Board to disapprove formation of a bank holding company where the transaction would not weaken a subsidiary bank's financial condition. In addition, the already extensive regulation of the financial integrity of banks by the Comptroller of the Currency and state regulatory agencies persuaded the court that Congress could not have intended to extend identical authority to the Federal Reserve Board. *Id.*, at 262–263.

We perceive no basis for the limitation the Court of Appeals imposed. Certainly, it is not compelled by the language of the statute. By its terms, § 3 (c) requires the Board to consider financial and managerial factors in "every case." Just as we observed earlier that this language encompasses cases in which the proposed transaction would have no anti-competitive effect, *supra,* at 243, so, too, it encompasses cases in which the transaction would not weaken the bank or the

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[15] The Board contends that the transaction would in fact weaken the capital position of the bank. Reply Brief for Petitioner 2 n. 2. The Court of Appeals found otherwise, relying on the Board's concession during oral argument before the original panel that operation of the bank through a holding company "might in fact be financially sounder" as a result of the tax advantage. 560 F. 2d, at 263 n. 3. Because we conclude that the Board had authority to deny respondent's application regardless of whether the transaction would weaken the bank's capital position, we need express no opinion on this dispute.

bank holding company. Indeed, the Court of Appeals' construction of the statute would require the Board to approve formation of a bank holding company with corrupt management simply because management would become no more corrupt by virtue of the transaction. We hesitate to adopt a construction that would yield such an anomalous result.

Furthermore, the legislative record does provide support for the Board's actions. In deliberations on the Bank Holding Company Act, see, *e. g.*, H. R. Rep. No. 609, 84th Cong., 1st Sess., 4–5 (1955); H. R. Rep. No. 95–1383, p. 19 (1978), and in subsequent inquiries into banking regulation, see, *e. g.*, Hearing on Problem Banks, *supra,* n. 6; Hearings on the Safe Banking Act of 1977, pts. 1–4, *supra,* n. 13, Congress has evinced substantial concern for the financial soundess of the banking system. And Congress has long regarded capital adequacy as a measure of bank safety. See, *e. g.*, 12 U. S. C. § 329 (Federal Reserve Act), § 1816 (Federal Deposit Insurance Act); S. Rep. No. 133, 63d Cong., 1st Sess., pt. 2, p. 11 (1913); S. Rep. No. 1623, 82d Cong., 2d Sess., 2 (1952). To rule that the Board could not require applicants for holding-company status and their subsidiary banks to meet minimum capital-adequacy requirements would be inconsistent with this general legislative mandate.

Nor can we accept the conclusion that Congress intended to reserve questions of bank safety to the Comptroller or state agencies except where a transaction would harm the financial condition of an applicant or the bank. The history of the Bank Holding Company Act nowhere suggests that Congress sought to delineate such a jurisdictional boundary. Indeed, our decision in *Whitney Nat. Bank* v. *Bank of New Orleans,* 379 U. S. 411 (1965), indicates that the Board's jurisdiction is paramount. We ruled there that the Comptroller could not deny a new bank a license to do business—a decision normally within his competence, see 12 U. S. C. §§ 26, 27—once the Board approved a bank holding company transac-

tion that entailed formation of the new bank. 379 U. S., at 419, 423. It follows that the Federal Reserve Board's actions here are not invalid merely because the powers exercised duplicate those of other regulators.

Again, our conclusion is influenced by the principle that courts should defer to an agency's construction of its own statutory mandate, *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S., at 381; *Commissioner* v. *Sternberger's Estate,* 348 U. S. 187, 199 (1955), particularly when that construction accords with well-established congressional goals. The Board has frequently reiterated that holding companies should be a source of strength to subsidiary financial institutions. See, *e. g., Northern States Financial Corp.,* 58 Fed. Res. Bull. 827, 828 (1972); *Citizens Bancorp,* 61 Fed. Res. Bull. 806 (1975); *Downs Bancshares, Inc.,* 61 Fed. Res. Bull. 673 (1975). It has used the substantial advantages of bank holding-company status to induce applicants to improve their own and their subsidiaries' capital positions. See P. Heller, Handbook of Federal Bank Holding Company Law 127, and n. 195 (1976); The Bank Holding Company—1973, pp. 35, 83 (R. Johnson ed. 1973).[16] In fact, between 1970 and 1975, the Board convinced 397 applicants to provide additional capital totaling $788 million and indirectly prompted the infusion of even more capital. Hearings on Financial Institutions and the Nation's Economy, *supra* n. 13, at 2403 (testimony of Philip Coldwell, member of the Board of Governors of the Federal Reserve System). Congress has been apprised of this consistent

[16] Among these advantages are a bank holding company's ability to expand into banking-related activities with the Board's approval, 12 U. S. C. § 1843 (c)(8), to avoid some state-law restrictions against branch banking, see *Whitney Nat. Bank* v. *Bank of New Orleans,* 379 U. S., at 413, and to realize substantial tax savings. See n. 4, *supra.* Given the applicable state law, Ill. Const., Art. 13, § 8; Ill. Rev. Stat., ch. 16½, § 106 (1975), and the nature of respondent's proposed transaction, only the last of these advantages afforded the Board leverage in this case.

administrative practice, *ibid.;* Compendium of Major Issues in Bank Regulation, *supra* n. 13, at 379, and has not undertaken to change it. Indeed, a Report of the Senate Committee on Banking, Housing, and Urban Affairs in 1977 echoed the exact language of the Board's standard. S. Rep. No. 95-323, p. 11 ("Holding companies are supposed to be a source of strength to subsidiary financial institutions").[17]

We hold that the Board may deny applications for holding-company status solely on grounds of financial or managerial unsoundness, regardless of whether that unsoundness would be caused or exacerbated by the proposed transaction.[18]

IV

Respondent contends that the Board's denial of its application was arbitrary and capricious. We have already determined that the Board's "source of strength" requirement

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[17] The Senate Report accompanied the Financial Institutions Supervisory Act Amendments of 1977, S. 71, 95th Cong., 1st Sess. (1977). These amendments were passed by the Senate but were not brought before the House. In the next session, Congress enacted a subsequent version of these amendments as the Financial Institutions Regulatory and Interest Rate Control Act of 1978, *supra,* n. 12.

[18] The dissent argues that because the proposed transaction would not exacerbate the financial difficulties of the bank, the Board's disapproval rests not on the *effects* of the transaction, but on "pre-existing or unrelated conditions." *Post,* at 255. In the dissent's view, the Board, by looking beyond the transaction before it, attempted to exercise the day-to-day regulatory authority over banks which Congress denied to it and conferred on the Comptroller. We disagree with the basic premise of the dissent's argument. As the Board found, the *effect* of this transaction would have been the formation of a financially unsound bank holding company. Thus, the Board's attempt to prevent this effect and to induce respondent to form an enterprise that met the Board's standards of financial soundness was entirely consistent with the language the dissent cites. Moreover, congressional concern with financial soundness and capital adequacy is by no means "irrelevant," *post,* at 257, to whether the Board's attempt exceeded its authority.

is consistent with the language, purpose, and legislative history of the Bank Holding Company Act. Our only remaining inquiry is whether substantial evidence supports the Board's finding that respondent fell short of this standard. 12 U. S. C. § 1848.[19]

The Court of Appeals panel had "no difficulty" in finding substantial evidence to sustain the Board's decision, 546 F. 2d, at 720, and respondent did not press this issue in its petition for rehearing en banc. We, too, find in this record more than the amount of evidence "a reasonable mind might accept as adequate to support [the Board's] conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197, 229 (1938); accord, *Richardson* v. *Perales,* 402 U. S. 389, 401 (1971); *Consolo* v. *FMC,* 383 U. S. 607, 619–620 (1966). The application failed to establish that respondent could raise the $2.1 million in additional capital in the manner proposed. Moreover, it revealed that even with this infusion, the bank's capital would have been well below the level the Board had determined necessary to sustain the financial soundness of the enterprise. Thus, the Board was entitled to conclude that respondent would not be a sufficient source of financial and managerial strength to its subsidiary bank. Having so determined, the Board was entitled to deny the application.[20]

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[19] Section 9 of the Bank Holding Company Act, 70 Stat. 138, as amended, 12 U. S. C. § 1848, provides that "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive."

[20] We also find substantial evidence to sustain the Board's determination that considerations involving the convenience and needs of the community do not support respondent's application. Indeed, the Board previously has recognized the connection between the needs of the community and the financial well-being of a bank, holding that an applicant's financial inability to resolve unforeseen problems could "impair [the bank's] overall ability to continue to serve the community as a viable banking organization." *Citizens Bancorp,* 61 Fed. Res. Bull. 806 (1975); accord, *Downs Bancshares, Inc.,* 61 Fed. Res. Bull. 673, 674 (1975).

We hold that the Board's actions were within the authority conferred by Congress and were supported by substantial evidence. Consequently, the judgment is

Reversed.

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

This case involves a proposal to restructure the ownership of a relatively small bank in order to reduce its income taxes. From the standpoint of the bank's competitors, its creditors, its owners, and its customers, as well as the public at large, the proposed transaction is at worst completely harmless, and at best substantially beneficial.

The Federal Reserve Board nevertheless refused to approve the transaction, not because of any concern about adverse effects of the transaction itself, but rather to induce the owners of the bank to take action that the Board has no authority to require of bank owners generally. In the Board's view, its approval power is a sort of lever that it may use to bend the will of independent bank owners and managers. I share the opinion expressed by Chief Judge Fairchild for the unanimous Court of Appeals for the Seventh Circuit sitting en banc that the application of this kind of leverage has not been authorized by Congress.[1]

The normal reason for subjecting any type of transaction to advance administrative approval is a concern about the possible consequences of the transaction itself. I can think of no judicial precedent or statutory analog authorizing an agency to use approvals as an all-purpose tool to accomplish objects entirely unrelated to the approved transaction. Before concluding that Congress intended to pass such an unprecedented

[1] "The Board assumes the stance that the tax advantage of bank holding company status is a reward which it may withhold until the applicant's financial status fulfills the Board's standard of desirability. We do not find this power or breadth of discretion in the statute." 560 F. 2d 258, 262 (1977) (en banc).

approval statute, therefore, I would insist upon a clear expression of that intent from Congress itself. Because the language, structure, and legislative history of § 3 (c) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1842 (c), belie any such intent, I cannot accept the Board's interpretation.

Read in its entirety, the language of § 3 (c) confines the Board's authority to the evaluation of the *effects* of proposed holding company transactions.[2] Specifically, the statute commands the Board to disapprove any acquisition "which would *result* in a monopoly," or "whose *effect*" may be substantially to lessen competition, unless it finds that the "anticompetitive *effects*" are outweighed "by the probable *effect* of the transaction in meeting the convenience and needs of the community." Although the last sentence in § 3 (c) does not also explicitly limit the Board's consideration to the financial and managerial "effects" of the proposed reorganization, when read in context its reference to "future prospects" surely reflects the same concern for the consequences of the transaction rather than pre-existing or unrelated conditions.[3]

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[2] Section 3 (c) is quoted in the opinion of the Court, *ante*, at 236–237, n. 2.

[3] It is not disputed that the last sentence in § 3 (c) serves in part to explain the Board's duty to analyze a transaction's "probable *effect*" on the "convenience and needs of the community" and then to weigh those effects against any anticompetitive "*result*[*s*]" of the transaction. Because the statute so clearly limits the Board's consideration to effects in that endeavor, it makes little sense to read the same sentence to give the Board broader authority in analyzing the financial and managerial aspects of the transaction apart from its anticompetitive results.

The Board's position is especially untenable in that the two principal concerns reflected in § 3 (c) are concentration of commercial banking facilities under a single management and the combination under single control of banking and nonbanking enterprises. These concerns, neither of which is even remotely implicated by this transaction, were described in the testimony of Chairman Martin on behalf of the Board in 1955. He thought legislation was necessary because of:

"(1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of com-

The overall structure of the federal banking laws lends credence to this interpretation. It is not the Board but instead the Comptroller of the Currency that has day-to-day regulatory jurisdiction over existing financial and managerial conditions at national banks such as the one involved here.[4] If the Board can employ its holding-company approval power as a lever for inducing banks to achieve more satisfactory financing, management, future prospects, and community service, it can indirectly exercise authority that Congress has denied it and given directly to another agency.[5]

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mercial bank facilities in a particular area under a single control and management; and

"(2) The combination under single control of both banking and nonbanking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking. Such a combination involves the lending of depositors' money, whereas other types of business enterprise, not connected with banking, do not involve this element of trusteeship." S. Rep. No. 1095, 84th Cong., 1st Sess., 2 (1955).

In the Board's anomalous view, therefore, Congress has carefully confined the agency's power to carry out the two primary purposes of the legislation, while leaving it with virtually unbounded authority to effectuate the statute's secondary goal of assuring financial and managerial stability in bank holding companies.

[4] Although the Board decides which banks qualify for membership in the Federal Reserve System, 12 U. S. C. § 329, its day-to-day regulatory authority extends only to *state* member banks that are insured by the Federal Deposit Insurance Corporation. National member banks, such as respondent, are subject to the daily control of the Comptroller of the Currency. 12 U. S. C. §§ 1813 (b), (d), (h), 1818.

[5] To use the Court's example, *ante,* at 250, if the Board is concerned with possible corruption in a national bank's management, it may not address that problem directly by way of a cease-and-desist order or other remedies. That power resides exclusively in the Comptroller. See n. 4, *supra.* The Board nonetheless claims the power to require a change in management before the bank can earn a reward in the form of tax savings available through holding-company ownership—even when it concludes that the change in ownership form would in no way enhance the dangers of corrupt management and would only improve the bank's overall situation. Having

The sparse legislative history cited by the Court on this point, *ante,* at 250, is of no help to the Board's position. It is true that Congress has been concerned with the "financial soundness" and "capital adequacy" of banks controlled by holding companies. But that concern is simply irrelevant to the issue whether Congress intended the Board to deny holding-company approval that would not adversely affect, but rather would enhance, the bank's financial soundness and capital adequacy.

The authority claimed by the Board is also illogical. If certain capital ratios are essential for sound banking operations, and if the Comptroller is unable to achieve them, then the Board should be given power to require them by a general rule or standard applicable to all banks. Haphazard enforcement against only those banks that seek approval of holding company status is a most unusual and disorderly way to administer any significant policy.

In the end, the Court's decision rests entirely on "the principle that courts should defer" to the administrative agency's own interpretation of its statutory authority. *Ante,* at 251. The Court assumes that the Board's asserted authority originated with the passage of the Bank Holding Company Act of 1956. *Ante,* at 244. Not until eight years later, however, did the Board purport to exercise that authority, and it did so without explaining the statutory basis for its actions. *Clayton Bancshares Corp.,* 50 Fed. Res. Bull. 1261, 1264–1265 (1964); see opinion of the Court, *ante,* at 248. Such a belated and casual assertion of power by the Board, no matter how long it has persisted, hardly qualifies as the type of administrative policy that may stand in place of an expression of legislative intent. See *SEC* v. *Sloan,* 436 U. S. 103 (overturning as beyond the authority of the SEC a policy followed by that agency for 34 years). See also *Adamo*

withheld the former power, I think it is illogical to assume without any proof at all that Congress intended to grant the latter.

Wrecking Co. v. *United States,* 434 U. S. 275, 287–289, and n. 5. I would not allow this agency, no matter how well respected and how well motivated, to construe vague statutory language as conferring such wide-ranging power on itself. Like Chief Judge Fairchild and his colleagues, I "do not find this power or breadth of discretion in the statute." 560 F. 2d 258, 262 (CA7 1977).[6]

I respectfully dissent.

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[6] In the text of its opinion the Court states its intention to "decide whether the Board can only exercise [its approval] authority when the transaction would cause or exacerbate the financial unsoundness of the holding company or a subsidiary bank." *Ante,* at 237. Later the Court purports to "hold that the Board may deny applications for holding-company status solely on grounds of financial or managerial unsoundness, regardless of whether that unsoundness would be caused or exacerbated by the proposed transaction." *Ante,* at 252. What purports to be a broad holding, however, is significantly qualified by n. 18 which was added in response to this dissent. In that footnote the Court limits its holding to a case in which the effect of the transaction is the formation of a financially unsound bank holding company. So limited, this case involves nothing more than a dispute over whether this particular holding company was financially unsound—a dispute that hardly merits this Court's attention. Even on this narrow ground of decision, however, I find the Court's reasoning unpersuasive. The financial soundness of the bank is surely a matter of greater public interest than the financial soundness of its parent; yet neither the Board nor the Comptroller of the Currency has asserted any basis for requiring the bank to take any remedial action. Everyone agrees that the financial strength of the bank will be improved by the formation of a holding company and that no adverse consequences will result.

Syllabus

LALLI v. LALLI, ADMINISTRATRIX, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 77–1115. Argued October 4, 1978—Decided December 11, 1978

Appellant, assertedly the illegitimate son of Mario Lalli, who died intestate in New York, filed a petition for a compulsory accounting from appellee administratrix of the estate, claiming that he was entitled to inherit from Mario as his child. Appellee opposed the petition, arguing that even if appellant were Mario's child, he was not a lawful distributee of the estate because he had failed to comply with a New York statutory provision (§ 4–1.2) that in pertinent part allows an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction has, during the father's lifetime, entered an order declaring paternity. Appellant contended that his failure to obtain such an order during Mario's lifetime could not bar his inheritance because § 4–1.2 discriminated against him on the basis of his illegitimate birth in violation of the Equal Protection Clause of the Fourteenth Amendment. Appellant tendered evidence that he was Mario's child. The Surrogate's Court ruled that appellant was properly excluded as a distributee under § 4–1.2. The New York Court of Appeals affirmed and upheld the constitutionality of the statute. *Held:* The judgment is affirmed. Pp. 264–276; 276; 276–277.

43 N. Y. 2d 65, 371 N. E. 2d 481, affirmed.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE STEWART, concluded that § 4–1.2 does not violate the Equal Protection Clause of the Fourteenth Amendment. *Trimble* v. *Gordon,* 430 U. S. 762, distinguished. Pp. 264–276.

(a) While classifications based on illegitimacy are not subject to "strict scrutiny," they are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests, *Mathews* v. *Lucas,* 427 U. S. 495, 506; *Trimble* v. *Gordon, supra,* at 767. P. 265.

(b) The Illinois statute invalidated in *Trimble* (which, in addition to requiring the father's acknowledgment of paternity, required the legitimation of the child through intermarriage of the parents as a precondition to inheritance) eliminated "the possibility of a middle ground between the extremes of complete exclusion [of illegitimates claiming under their fathers' estates] and case-by-case determination of paternity." But the single requirement at issue under § 4–1.2 is an evidentiary one; the marital status of the parents is irrelevant. Pp. 266–267.

(c) The primary goal underlying the challenged aspects of § 4–1.2 is

to provide for the just and orderly disposition of a decedent's property where paternal inheritance by illegitimate children is concerned, an area involving unique and difficult problems of proof. Pp. 268–271.

(d) Section 4–1.2 represents a carefully considered legislative judgment on how best to "grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children," while protecting the important state interest in the just and orderly disposition of decedents' estates. Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father, which (in addition to permitting a man to defend his reputation against unjust paternity claims) helps to forestall fraudulent assertions of paternity. Estate administration is facilitated, and delay and uncertainty minimized, where the entitlement of an illegitimate child is a matter of judicial record before administration commences. While there may be some instances where § 4–1.2, as is often the case with statutory classifications, will produce inequitable results, the reach of the statute, unlike that involved in *Trimble*, does not exceed justifiable state objectives. Pp. 271–274.

MR. JUSTICE BLACKMUN would affirm the judgment below on the basis of *Labine* v. *Vincent*, 401 U. S. 532, and rather than distinguishing *Trimble, supra*, would overrule that decision. Pp. 276–277.

MR. JUSTICE REHNQUIST concurred in the judgment for the reasons stated in his dissent in *Trimble, supra*, at 777. P. 276.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART, J., joined. STEWART, J., filed a concurring opinion, *post*, p. 276. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 276. REHNQUIST, J., filed a statement concurring in the judgment, *post*, p. 276. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and STEVENS, JJ., joined, *post*, p. 277.

Leonard M. Henkin argued the cause for appellant. With him on the brief was *Morris R. Henkin.*

Irwin M. Strum, Assistant Attorney General of New York, argued the cause for appellee Lefkowitz. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Neil S. Solon* and *Suzanne McGrattan,* Assistant Attorneys General.*

**John E. Kirklin, Kalman Finkel,* and *Jane Greengold Stevens* filed a

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

This case presents a challenge to the constitutionality of § 4–1.2 of New York's Estates, Powers, and Trusts Law,[1] which requires illegitimate children who would inherit from their fathers by intestate succession to provide a particular form of proof of paternity. Legitimate children are not subject to the same requirement.

I

Appellant Robert Lalli claims to be the illegitimate son of Mario Lalli who died intestate on January 7, 1973, in the State of New York. Appellant's mother, who died in 1968, never was married to Mario. After Mario's widow, Rosamond Lalli, was appointed administratrix of her husband's estate, appellant petitioned the Surrogate's Court for Westchester County for a compulsory accounting, claiming that he and his sister Maureen Lalli were entitled to inherit from Mario as his children. Rosamond Lalli opposed the petition. She argued that even if Robert and Maureen were Mario's children, they were not lawful distributees of the estate because they had failed to comply with § 4–1.2,[2] which provides in part:

"An illegitimate child is the legitimate child of his

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brief for the Legal Aid Society of New York City et al. as *amici curiae* urging reversal.

[1] 1965 N. Y. Laws, ch. 958, § 1. The statute was initially codified as N. Y. Decedent Est. Law § 83–a. In 1966 it was recodified without material change as N. Y. Est., Powers & Trusts Law § 4–1.2 (McKinney 1967). 1966 N. Y. Laws, ch. 952. Further nonsubstantive amendments were made the next year. 1967 N. Y. Laws, ch. 686, §§ 28, 29.

[2] Section 4–1.2 in its entirety provides:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that

> father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child."

Appellant conceded that he had not obtained an order of filiation during his putative father's lifetime. He contended, however, that § 4–1.2, by imposing this requirement, discriminated against him on the basis of his illegitimate birth in violation of the Equal Protection Clause of the Fourteenth Amendment.[3] Appellant tendered certain evidence of his relationship with Mario Lalli, including a notarized document

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he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

"(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)." N. Y. Est., Powers & Trusts Law § 4–1.2 (McKinney 1967).

[3] Appellant also claimed that § 4–1.2 was invalid under N. Y. Const., Art. 1, § 11. The New York Court of Appeals did not rule on this issue, nor do we. We also do not consider whether § 4–1.2 unconstitutionally discriminates on the basis of sex or whether the administratrix of Mario's estate is required to account for her alleged failure to bring a wrongful-death action on behalf of appellant. The latter question was not considered by the Court of Appeals, and the former was raised for the first time by a brief *amici curiae* in this Court.

in which Lalli, in consenting to appellant's marriage, referred to him as "my son," and several affidavits by persons who stated that Lalli had acknowledged openly and often that Robert and Maureen were his children.

The Surrogate's Court noted that § 4–1.2 had previously, and unsuccessfully, been attacked under the Equal Protection Clause. After reviewing recent decisions of this Court concerning discrimination against illegitimate children, particularly *Labine* v. *Vincent,* 401 U. S. 532 (1971), and three New York decisions affirming the constitutionality of the statute, *In re Belton,* 70 Misc. 2d 814, 335 N. Y. S. 2d 177 (Surr. Ct. 1972); *In re Hendrix,* 68 Misc. 2d 439, 444, 326 N. Y. S. 2d 646, 652 (Surr. Ct. 1971); *In re Crawford,* 64 Misc. 2d 758, 762–763, 315 N. Y. S. 2d 890, 895 (Surr. Ct. 1970), the court ruled that appellant was properly excluded as a distributee of Lalli's estate and therefore lacked status to petition for a compulsory accounting.

On direct appeal the New York Court of Appeals affirmed. *In re Lalli,* 38 N. Y. 2d 77, 340 N. E. 2d 721 (1975). It understood *Labine* to require the State to show no more than that "there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible State objective." 38 N. Y. 2d, at 81, 340 N. E. 2d, at 723. After discussing the problems of proof peculiar to establishing paternity, as opposed to maternity, the court concluded that the State was constitutionally entitled to require a judicial decree during the father's lifetime as the exclusive form of proof of paternity.

Appellant appealed the Court of Appeals' decision to this Court. While that case was pending here, we decided *Trimble* v. *Gordon,* 430 U. S. 762 (1977). Because the issues in these two cases were similar in some respects, we vacated and remanded to permit further consideration in light of *Trimble. Lalli* v. *Lalli,* 431 U. S. 911 (1977).

On remand,[4] the New York Court of Appeals, with two judges dissenting, adhered to its former disposition. *In re Lalli,* 43 N. Y. 2d 65, 371 N. E. 2d 481 (1977). It acknowledged that *Trimble* contemplated a standard of judicial review demanding more than "a mere finding of some remote rational relationship between the statute and a legitimate State purpose," 43 N. Y. 2d, at 67, 371 N. E. 2d, at 482, though less than strictest scrutiny. Finding § 4–1.2 to be "significantly and determinatively different" from the statute overturned in *Trimble,* the court ruled that the New York law was sufficiently related to the State's interest in " 'the orderly settlement of estates and the dependability of titles to property passing under intestacy laws,' " 43 N. Y. 2d, at 67, 69–70, 371 N. E. 2d, at 482–483, quoting *Trimble, supra,* at 771, to meet the requirements of equal protection.

Appellant again sought review here, and we noted probable jurisdiction. 435 U. S. 921 (1978). We now affirm.

II

We begin our analysis with *Trimble.* At issue in that case was the constitutionality of an Illinois statute providing that a child born out of wedlock could inherit from his intestate father only if the father had "acknowledged" the child and the child had been legitimated by the intermarriage of the parents. The appellant in *Trimble* was a child born out of wedlock whose father had neither acknowledged her nor married her mother. He had, however, been found to be her father in a judicial decree ordering him to contribute to her support. When the father died intestate, the child was excluded as a distributee because the statutory requirements for inheritance had not been met.

We concluded that the Illinois statute discriminated against

[4] On remand from this Court, the New York Attorney General was permitted to intervene as a defendant-appellee. He has filed a brief on the merits and argued the case in this Court. Appellee Rosamond Lalli did not present oral argument and has not filed a brief on the merits.

illegitimate children in a manner prohibited by the Equal Protection Clause. Although, as decided in *Mathews* v. *Lucas*, 427 U. S. 495, 506 (1976), and reaffirmed in *Trimble*, *supra*, at 767, classifications based on illegitimacy are not subject to "strict scrutiny," they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests. Upon examination, we found that the Illinois law failed that test.

Two state interests were proposed which the statute was said to foster: the encouragement of legitimate family relationships and the maintenance of an accurate and efficient method of disposing of an intestate decedent's property. Granting that the State was appropriately concerned with the integrity of the family unit, we viewed the statute as bearing "only the most attenuated relationship to the asserted goal." *Trimble*, *supra*, at 768. We again rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits" that would accrue to them were they legitimate. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 173 (1972). The statute therefore was not defensible as an incentive to enter legitimate family relationships.

Illinois' interest in safeguarding the orderly disposition of property at death was more relevant to the statutory classification. We recognized that devising "an appropriate legal framework" in the furtherance of that interest "is a matter particularly within the competence of the individual States." *Trimble*, *supra*, at 771. An important aspect of that framework is a response to the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates. See *infra*, at 270–271. These difficulties, we said, "might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." *Trimble*, *supra*, at 770.

The Illinois statute, however, was constitutionally flawed because, by insisting upon not only an acknowledgment by the father, but also the marriage of the parents, it excluded "at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws." *Id.*, at 771. We concluded that the Equal Protection Clause required that a statute placing exceptional burdens on illegitimate children in the furtherance of proper state objectives must be more " 'carefully tuned to alternative considerations,' " *id.*, at 772, quoting *Mathews* v. *Lucas*, *supra*, at 513, than was true of the broad disqualification in the Illinois law.

III

The New York statute, enacted in 1965, was intended to soften the rigors of previous law which permitted illegitimate children to inherit only from their mothers. See *infra*, at 269. By lifting the absolute bar to paternal inheritance, § 4–1.2 tended to achieve its desired effect. As in *Trimble*, however, the question before us is whether the remaining statutory obstacles to inheritance by illegitimate children can be squared with the Equal Protection Clause.

A

At the outset we observe that § 4–1.2 is different in important respects from the statutory provision overturned in *Trimble*. The Illinois statute required, in addition to the father's acknowledgment of paternity, the legitimation of the child through the intermarriage of the parents as an absolute precondition to inheritance. This combination of requirements eliminated "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Trimble*, 430 U. S., at 770–771. As

illustrated by the facts in *Trimble,* even a judicial declaration of paternity was insufficient to permit inheritance.

Under § 4–1.2, by contrast, the marital status of the parents is irrelevant. The single requirement at issue here is an evidentiary one—that the paternity of the father be declared in a judicial proceeding sometime before his death.[5] The child need not have been legitimated in order to inherit from his father. Had the appellant in *Trimble* been governed by § 4–1.2, she would have been a distributee of her father's estate. See *In re Lalli,* 43 N. Y. 2d, at 68 n. 2, 371 N. E. 2d, at 482 n. 2.

A related difference between the two provisions pertains to the state interests said to be served by them. The Illinois law was defended, in part, as a means of encouraging legitimate family relationships. No such justification has been offered in support of § 4–1.2. The Court of Appeals disclaimed that the purpose of the statute, "even in small part,

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[5] Section 4–1.2 requires not only that the order of filiation be made during the lifetime of the father, but that the proceeding in which it is sought be commenced "during the pregnancy of the mother or within two years from the birth of the child." The New York Court of Appeals declined to rule on the constitutionality of the two-year limitation in both of its opinions in this case because appellant concededly had never commenced a paternity proceeding at all. Thus, if the rule that paternity be judicially declared during his father's lifetime were upheld, appellant would lose for failure to comply with that requirement alone. If, on the other hand, appellant prevailed in his argument that his inheritance could not be conditioned on the existence of an order of filiation, the two-year limitation would become irrelevant since the paternity proceeding itself would be unnecessary. See *In re Lalli,* 43 N. Y. 2d 65, 68 n. 1, 371 N. E. 2d 481, 482 n. 1 (1977); *In re Lalli,* 38 N. Y. 2d 77, 80 n., 340 N. E. 2d 721, 723 n. (1975). As the New York Court of Appeals has not passed upon the constitutionality of the two-year limitation, that question is not before us. Our decision today therefore sustains § 4–1.2 under the Equal Protection Clause only with respect to its requirement that a judicial order of filiation be issued during the lifetime of the father of an illegitimate child.

was to discourage illegitimacy, to mold human conduct or to set societal norms." *In re Lalli, supra,* at 70, 371 N. E. 2d, at 483. The absence in § 4–1.2 of any requirement that the parents intermarry or otherwise legitimate a child born out of wedlock and our review of the legislative history of the statute, *infra,* at 269–271, confirm this view.

Our inquiry, therefore, is focused narrowly. We are asked to decide whether the discrete procedural demands that § 4–1.2 places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve.

B

The primary state goal underlying the challenged aspects of § 4–1.2 is to provide for the just and orderly disposition of property at death.[6] We long have recognized that this is an area with which the States have an interest of considerable magnitude. *Trimble, supra,* at 771; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S., at 170; *Labine* v. *Vincent,* 401 U. S., at 538; see also *Lyeth* v. *Hoey,* 305 U. S. 188, 193 (1938); *Mager* v. *Grima,* 8 How. 490, 493 (1850).

This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult. As one New York Surrogate's Court has observed: "[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is the child of a particular woman is rarely difficult to prove." *In re Ortiz,* 60 Misc. 2d

[6] The presence in this case of the State's interest in the orderly disposition of a decedent's property at death distinguishes it from others in which that justification for an illegitimacy-based classification was absent. *E. g., Jimenez* v. *Weinberger,* 417 U. S. 628 (1974); *Gomez* v. *Perez,* 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 170 (1972); *Levy* v. *Louisiana,* 391 U. S. 68 (1968).

756, 761, 303 N. Y. S. 2d 806, 812 (1969). Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy." *Ibid.* (emphasis in original); accord, *In re Flemm,* 85 Misc. 2d 855, 861, 381 N. Y. S. 2d 573, 576–577 (Surr. Ct. 1975); *In re Hendrix,* 68 Misc. 2d, at 443, 326 N. Y. S. 2d, at 650; cf. *Trimble, supra,* at 770, 772.

Thus, a number of problems arise that counsel against treating illegitimate children identically to all other heirs of an intestate father. These were the subject of a comprehensive study by the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates. This group, known as the Bennett Commission,[7] consisted of individuals experienced in the practical problems of estate administration. *In re Flemm, supra,* at 858, 381 N. Y. S. 2d, at 575. The Commission issued its report and recommendations to the legislature in 1965. See Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Legis. Doc. No. 19 (1965) (hereinafter Commission Report). The statute now codified as § 4–1.2 was included.

Although the overarching purpose of the proposed statute was "to alleviate the plight of the illegitimate child," Commission Report 37, the Bennett Commission considered it necessary to impose the strictures of § 4–1.2 in order to mitigate serious difficulties in the administration of the estates of

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[7] The Bennett Commission was created by the New York Legislature in 1961. It was instructed to recommend needed changes in certain areas of state law, including that pertaining to "the descent and distribution of property, and the practice and procedure relating thereto." 1961 N. Y. Laws, ch. 731, § 1.

both testate and intestate decedents. The Commission's perception of some of these difficulties was described by Surrogate Sobel, a member of "the busiest [surrogate's] court in the State measured by the number of intestate estates which traffic daily through this court," *In re Flemm, supra,* at 857, 381 N. Y. S. 2d, at 574, and a participant in some of the Commission's deliberations:

> "An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent. . . . And, in probating the will of his parent (though not named a beneficiary) or in probating the will of any person who makes a class disposition to 'issue' of such parent, the illegitimate must be served with process. . . . How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware? And of greatest concern, how achieve finality of decree in *any* estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the Surrogates' Courts since title to real property passes under such decree. Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, *all* illegitimates must be served with process. This would be no real problem with respect to those few estates where there are 'known' illegitimates. But it presents an almost insuperable burden as regards 'unknown' illegitimates. The point made in the [Bennett] commission discussions was that instead of affecting only a few estates, procedural problems would be created for many—some members suggested a majority—of estates." 85 Misc. 2d, at 859, 381 N. Y. S. 2d, at 575–576.

Cf. *In re Leventritt,* 92 Misc. 2d 598, 601–602, 400 N. Y. S. 2d 298, 300–301 (Surr. Ct. 1977).

Even where an individual claiming to be the illegitimate child of a deceased man makes himself known, the difficulties facing an estate are likely to persist. Because of the particular problems of proof, spurious claims may be difficult to expose. The Bennett Commission therefore sought to protect "innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs." Commission Report 265.

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As the State's interests are substantial, we now consider the means adopted by New York to further these interests. In order to avoid the problems described above, the Commission recommended a requirement designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration. Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. As the New York Court of Appeals observed in its first opinion in this case, the "availability [of the putative father] should be a substantial factor contributing to the reliability of the fact-finding process." *In re Lalli,* 38 N. Y. 2d, at 82, 340 N. E. 2d, at 724. In addition, requiring that the order be issued during the father's lifetime permits a man to defend his reputation against "unjust accusations in paternity claims," which was a secondary purpose of § 4–1.2. Commission Report 266.

The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences. Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put

before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.[8]

Appellant contends that § 4–1.2, like the statute at issue in *Trimble,* excludes "significant categories of illegitimate children" who could be allowed to inherit "without jeopardizing the orderly settlement" of their intestate fathers' estates. *Trimble,* 430 U. S., at 771. He urges that those in his position—"known" illegitimate children who, despite the absence of an order of filiation obtained during their fathers' lifetimes, can present convincing proof of paternity—cannot rationally be denied inheritance as they pose none of the risks § 4–1.2 was intended to minimize.[9]

We do not question that there will be some illegitimate children who would be able to establish their relationship to

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[8] In affirming the judgment below, we do not, of course, restrict a State's freedom to require proof of paternity by means other than a judicial decree. Thus, a State may prescribe any *formal* method of proof, whether it be similar to that provided by § 4–1.2 or some other regularized procedure that would assure the authenticity of the acknowledgment. As we noted in *Trimble,* 430 U. S., at 772 n. 14, such a procedure would be sufficient to satisfy the State's interests. See also n. 11, *infra.*

[9] Appellant claims that in addition to discriminating between illegitimate and legitimate children, § 4–1.2, in conjunction with N. Y. Dom. Rel. Law § 24 (McKinney 1977), impermissibly discriminates between classes of illegitimate children. Section 24 provides that a child conceived out of wedlock is nevertheless legitimate if, before or after his birth, his parents marry, even if the marriage is void, illegal, or judicially annulled. Appellant argues that by classifying as "legitimate" children born out of wedlock whose parents later marry, New York has, with respect to these children, substituted marriage for § 4–1.2's requirement of proof of paternity. Thus, these "illegitimate" children escape the rigors of the rule unlike their unfortunate counterparts whose parents never marry.

Under § 24, one claiming to be the legitimate child of a deceased man would have to prove not only his paternity but also his maternity and the fact of the marriage of his parents. These additional evidentiary requirements make it reasonable to accept less exacting proof of paternity and to treat such children as legitimate for inheritance purposes.

their deceased fathers without serious disruption of the administration of estates and that, as applied to such individuals, § 4–1.2 appears to operate unfairly. But few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.

The Illinois statute in *Trimble* was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. Section 4–1.2 does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

The New York courts have interpreted § 4–1.2 liberally and in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic. For example, a father of illegitimate children who is willing to acknowledge paternity can waive his defenses in a paternity proceeding, *e. g., In re Thomas,* 87 Misc. 2d 1033, 387 N. Y. S. 2d 216 (Surr. Ct. 1976), or even institute such a proceeding himself.[10] N. Y. Family Court Act § 522 (McKinney Supp. 1978); *In re Flemm,* 85 Misc. 2d, at 863, 381 N. Y. S. 2d, at 578. In addition, the courts have excused "technical" failures by illegitimate children to comply with

[10] In addition to making intestate succession possible, of course, a father is always free to provide for his illegitimate child by will. See *In re Flemm,* 85 Misc. 2d 855, 864, 381 N. Y. S. 2d 573, 579 (Surr. Ct. 1975).

the statute in order to prevent unnecessary injustice. *E. g., In re Niles,* 53 App. Div. 2d 983, 385 N. Y. S. 2d 876 (1976), appeal denied, 40 N. Y. 2d 809, 392 N. Y. S. 2d 1027 (1977) (filiation order may be signed *nunc pro tunc* to relate back to period prior to father's death when court's factual finding of paternity had been made); *In re Kennedy,* 89 Misc. 2d 551, 554, 392 N. Y. S. 2d 365, 367 (Surr. Ct. 1977) (judicial support order treated as "tantamount to an order of filiation," even though paternity was not specifically declared therein).

As the history of § 4–1.2 clearly illustrates, the New York Legislature desired to "grant to illegitimates *in so far as practicable* rights of inheritance on a par with those enjoyed by legitimate children," Commission Report 265 (emphasis added), while protecting the important state interests we have described. Section 4–1.2 represents a carefully considered legislative judgment as to how this balance best could be achieved.

Even if, as MR. JUSTICE BRENNAN believes, § 4–1.2 could have been written somewhat more equitably, it is not the function of a court "to hypothesize independently on the desirability or feasibility of any possible alternative[s]" to the statutory scheme formulated by New York. *Mathews* v. *Lucas,* 427 U. S., at 515. "These matters of practical judgment and empirical calculation are for [the State]. . . . In the end, the precise accuracy of [the State's] calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality." *Id.,* at 515–516.[11]

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[11] The dissent of MR. JUSTICE BRENNAN would reduce the opinion in *Trimble* v. *Gordon, supra,* to a simplistic holding that the Constitution *requires* a State, in a case of this kind, to recognize as sufficient any "formal acknowledgment of paternity." This reading of *Trimble* is based on a single phrase lifted from a footnote. 430 U. S., at 772 n. 14. It ignores both the broad rationale of the Court's opinion and the context in

We conclude that the requirement imposed by § 4–1.2 on illegitimate children who would inherit from their fathers is substantially related to the important state interests the stat-

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which the note and the phrase relied upon appear. The principle that the footnote elaborates is that the States are free to recognize the problems arising from different forms of proof and to select those forms "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." *Ibid.* The New York Legislature, with the benefit of the Bennett Commission's study, exercised this judgment when it considered and rejected the possibility of accepting evidence of paternity less formal than a judicial order. Commission Report 266–267.

The "formal acknowledgment" contemplated by *Trimble* is such as would minimize post-death litigation, *i. e.*, a regularly prescribed, legally recognized method of acknowledging paternity. See n. 8, *supra.* It is thus plain that footnote in *Trimble* does not sustain the dissenting opinion. Indeed, the document relied upon by the dissent is not an acknowledgment of paternity at all. It is a simple "Certificate of Consent" that apparently was required at the time by New York for the marriage of a minor. It consists of one sentence:

"THIS IS TO CERTIFY that I, who have hereto subscribed my name, do hereby consent that Robert Lalli who is my son and who is under the age of 21 years, shall be united in marriage to Janice Bivins by any minister of the gospel or other person authorized by law to solemnize marriages." App. A–14.

Mario Lalli's signature to this document was acknowledged by a notary public, but the certificate contains no oath or affirmation as to the truth of its contents. The notary did no more than confirm the identity of Lalli. Because the certificate was executed for the purpose of giving consent to marry, not of proving biological paternity, the meaning of the words "my son" is ambiguous. One can readily imagine that had Robert Lalli's half-brother, who was not Mario's son but who took the surname Lalli and lived as a member of his household, sought permission to marry, Mario might also have referred to him as "my son" on a consent certificate.

The important state interests of safeguarding the accurate and orderly disposition of property at death, emphasized in *Trimble* and reiterated in our opinion today, could be frustrated easily if there were a constitutional rule that any notarized but unsworn statement identifying an individual as a "child" must be accepted as adequate proof of paternity regardless of the context in which the statement was made.

ute is intended to promote. We therefore find no violation of the Equal Protection Clause.

The judgment of the New York Court of Appeals is

Affirmed.

For the reasons stated in his dissent in *Trimble* v. *Gordon,* 430 U. S. 762, 777 (1977), MR. JUSTICE REHNQUIST concurs in the judgment of affirmance.

MR. JUSTICE STEWART, concurring.

It seems to me that MR. JUSTICE POWELL's opinion convincingly demonstrates the significant differences between the New York law at issue here and the Illinois law at issue in *Trimble* v. *Gordon,* 430 U. S. 762. Therefore, I cannot agree with the view expressed in MR. JUSTICE BLACKMUN's opinion concurring in the judgment that *Trimble* v. *Gordon* is now "a derelict," or with the implication that in deciding the two cases the way it has this Court has failed to give authoritative guidance to the courts and legislatures of the several States.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I agree with the result the Court has reached and concur in its judgment. I also agree with much that has been said in the plurality opinion. My point of departure, of course, is at the plurality's valiant struggle to distinguish, rather than overrule, *Trimble* v. *Gordon,* 430 U. S. 762 (1977), decided just the Term before last, and involving a small probate estate (an automobile worth approximately $2,500) and a sad and appealing fact situation. Four Members of the Court, like the Supreme Court of Illinois, found the case "constitutionally indistinguishable from *Labine* v. *Vincent,* 401 U. S. 532 (1971)," and were in dissent. *Id.,* at 776, 777.

It seems to me that the Court today gratifyingly reverts to the principles set forth in *Labine* v. *Vincent.* What Mr. Justice Black said for the Court in *Labine* applies with equal

force to the present case and, as four of us thought, to the Illinois situation with which *Trimble* was concerned.

I would overrule *Trimble,* but the Court refrains from doing so on the theory that the result in *Trimble* is justified because of the peculiarities of the Illinois Probate Act there under consideration. This, of course, is an explanation, but, for me, it is an unconvincing one. I therefore must regard *Timble* as a derelict, explainable only because of the overtones of its appealing facts, and offering little precedent for constitutional analysis of State intestate succession laws. If *Trimble* is not a derelict, the corresponding statutes of other States will be of questionable validity until this Court passes on them, one by one, as being on the *Trimble* side of the line or the *Labine-Lalli* side.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

Trimble v. *Gordon,* 430 U. S. 762 (1977), declares that the state interest in the accurate and efficient determination of paternity can be adequately served by requiring the illegitimate child to offer into evidence a "formal acknowledgment of paternity." *Id.,* at 772 n. 14. The New York statute is inconsistent with this command. Under the New York scheme, an illegitimate child may inherit intestate only if there has been a judicial finding of paternity during the lifetime of the father.

The present case illustrates the injustice of the departure from *Trimble* worked by today's decision sustaining the New York rule. All interested parties concede that Robert Lalli is the son of Mario Lalli. Mario Lalli supported Robert during his son's youth. Mario Lalli formally acknowledged Robert Lalli as his son. See *In re Lalli,* 38 N. Y. 2d 77, 79, 340 N. E. 2d 721, 722 (1975). Yet, for want of a judicial order of filiation entered during Mario's lifetime, Robert Lalli is denied his intestate share of his father's estate.

There is no reason to suppose that the injustice of the present case is aberrant. Indeed it is difficult to imagine an instance in which an illegitimate child, acknowledged and voluntarily supported by his father, would ever inherit intestate under the New York scheme. Social welfare agencies, busy as they are with errant fathers, are unlikely to bring paternity proceedings against fathers who support their children. Similarly, children who are acknowledged and supported by their fathers are unlikely to bring paternity proceedings against them. First, they are unlikely to see the need for such adversary proceedings. Second, even if aware of the rule requiring judicial filiation orders, they are likely to fear provoking disharmony by suing their fathers. For the same reasons, mothers of such illegitimates are unlikely to bring proceedings against the fathers. Finally, fathers who do not even bother to make out wills (and thus die intestate) are unlikely to take the time to bring formal filiation proceedings. Thus, as a practical matter, by requiring judicial filiation orders entered during the lifetime of the fathers, the New York statute makes it virtually impossible for acknowledged and freely supported illegitimate children to inherit intestate.

Two interests are said to justify this discrimination against illegitimates. First, it is argued, reliance upon mere formal public acknowledgments of paternity would open the door to fraudulent claims of paternity. I cannot accept this argument. I adhere to the view that when "a father has formally acknowledged his child . . . there is no possible difficulty of proof, and no opportunity for fraud or error. This purported interest [in avoiding fraud] . . . can offer no justification for distinguishing between a formally acknowledged illegitimate child and a legitimate one." *Labine* v. *Vincent,* 401 U. S. 532, 552 (1971) (BRENNAN, J., dissenting).

But even if my confidence in the accuracy of formal public acknowledgments of paternity were unfounded, New York has available less drastic means of screening out fraudulent

claims of paternity. In addition to requiring formal acknowledgments of paternity, New York might require illegitimates to prove paternity by an elevated standard of proof, *e. g.*, clear and convincing evidence, or even beyond a reasonable doubt. Certainly here, where there is no factual dispute as to the relationship between Robert and Mario Lalli, there is no justification for denying Robert Lalli his intestate share.

Second, it is argued, the New York statute protects estates from belated claims by unknown illegitimates. I find this justification even more tenuous than the first. Publication notice and a short limitations period in which claims against the estate could be filed could serve the asserted state interest as well as, if not better than, the present scheme. In any event, the fear that unknown illegitimates might assert belated claims hardly justifies cutting off the rights of known illegitimates such as Robert Lalli. I am still of the view that the state interest in the speedy and efficient determination of paternity "is completely served by public acknowledgment of parentage and simply does not apply to the case of acknowledged illegitimate children." *Id.*, at 558 n. 30 (BRENNAN, J., dissenting).

I see no reason to retreat from our decision in *Trimble* v. *Gordon*. The New York statute on review here, like the Illinois statute in *Trimble*, excludes "forms of proof which do not compromise the State['s] interests." *Trimble* v. *Gordon*, *supra*, at 772 n. 14. The statute thus discriminates against illegitimates through means not substantially related to the legitimate interests that the statute purports to promote. I would invalidate the statute.

MASSACHUSETTS *v.* WHITE

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 77-1388. Argued November 28, 1978—Decided December 11, 1978

— Mass. —, 371 N. E. 2d 777, affirmed by an equally divided Court.

Barbara A. H. Smith, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With her on the briefs were *Francis X. Bellotti,* Attorney General, and *Stephen R. Delinsky,* Assistant Attorney General.

Robert S. Cohen argued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

**Fred E. Inbau, Wayne W. Schmidt, Robert Smith,* and *James P. Costello* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

HUNTER *v.* DEAN, SHERIFF

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 77-6248. Argued October 11, 1978—Decided December 11, 1978

Certiorari dismissed. Reported below: 240 Ga. 214, 239 S. E. 2d 791.

James C. Bonner, Jr., argued the cause for petitioner. With him on the brief was *C. Michael Abbott.*

G. Stephen Parker argued the cause for respondent. On the brief were *Arthur K. Bolton,* Attorney General of Georgia, *Robert S. Stubbs II,* Executive Assistant Attorney General, *Don A. Langham,* First Assistant Attorney General, *John C. Walden,* Senior Assistant Attorney General, and *B. Dean Grindle, Jr.,* Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MICHIGAN *v.* DORAN

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 77–1202. Argued October 4, 1978—Decided December 18, 1978

After respondent had been arrested in Michigan and charged with receiving and concealing stolen property (a truck driven from Arizona) and Michigan had notified Arizona authorities, Arizona charged respondent with theft, and an Arizona Justice of the Peace issued an arrest warrant reciting, in accordance with Arizona law, that there was "reasonable cause" to believe that respondent had committed the offense. Thereafter, the Governor of Arizona issued a requisition for respondent's extradition accompanied by the arrest warrant, supporting affidavits, and the original complaint; the Governor of Michigan issued an arrest warrant and ordered extradition. Upon being arraigned on the Michigan warrant, respondent petitioned for a writ of habeas corpus, alleging that the extradition warrant was invalid because it did not comply with the Uniform Criminal Extradition Act in effect in Michigan, and the petition was denied. The Michigan Supreme Court reversed the denial of habeas relief and ordered respondent's release on the ground that Arizona had failed to show a factual basis for its finding of probable cause to support its charge, the Arizona judicial finding of "reasonable cause" and the other supporting documents being found deficient in this respect. *Held:* Once the Governor of the asylum State has acted on a requisition for extradition based on the demanding State's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum State. Pp. 286–290.

(a) Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of the Extradition Clause of the United States Constitution, which requires that a fugitive from justice found in another State be delivered to the State from which he fled on demand of that State's executive authority, and that Clause never contemplated that the asylum State was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial. P. 288.

(b) The courts of an asylum State are bound by the Extradition Clause, the implementing federal statute, 18 U. S. C. § 3182, and, where adopted, the Uniform Criminal Extradition Act. Once the asylum State's Governor has granted extradition, such grant being prima facie evidence that the constitutional and statutory requirements have been

met, a court of that State considering release on habeas corpus can do no more than decide whether the extradition documents on their face are in order, whether the petitioner has been charged with a crime in the demanding State, whether he is the person named in the extradition request, and whether he is a fugitive. Pp. 288–289.

(c) The Michigan Supreme Court's holding that the Arizona judicial finding of "reasonable cause" was deficient finds no support in the record read in the light of the Extradition Clause and Arizona law and overlooks the "conclusory language" in which criminal charges are ordinarily cast. Pp. 289–290.

401 Mich. 235, 258 N. W. 2d 406, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 290.

Robert A. Derengoski, Solicitor General of Michigan, argued the cause for petitioner. With him on the brief were *Frank J. Kelley,* Attorney General, and *John A. Wilson* and *Jann Ryan Baugh,* Assistant Attorneys General.

Kathleen M. Cummins argued the cause and filed a brief for respondent.

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

We granted certiorari to determine whether the courts of an asylum state may nullify the executive grant of extradition on the ground that the demanding state failed to show a factual basis for its charge supported by probable cause. 435 U. S. 967 (1978).

(1)

On December 18, 1975, Doran was arrested in Michigan and charged with receiving and concealing stolen property. Mich. Comp. Laws § 750.535 (1970). The charge rested on Doran's possession of a stolen truck bearing California license plates, which he had driven from Arizona. Michigan notified Ari-

zona authorities of Doran's arrest and sent them a photograph of Doran taken on the day of his arrest. On January 7, 1976, a sworn complaint was filed with an Arizona Justice of the Peace, charging Doran with the theft of the described motor vehicle, Ariz. Rev. Stat. Ann. §§ 13–661 to 13–663, 13–672 (A) (Supp. 1957–1977), or, alternatively, with theft by embezzlement, § 13–682 (Supp. 1957–1977). The Justice of the Peace issued an arrest warrant which stated that she had found "reasonable cause to believe that such offense(s) were committed and that [Doran] committed them . . . ."

While the Michigan charges were pending, Doran was arraigned in Michigan on January 12 as a fugitive. A magistrate extended Doran's detention as a fugitive to provide time to receive the expected request for extradition from Arizona.[1] On February 11 the Governor of Arizona issued a requisition for extradition. Attached to the requisition were the arrest warrant, two supporting affidavits, and the original complaint on which the charge was based. The Governor of Michigan issued a warrant for Doran's arrest and his extradition was ordered.

Doran was arraigned on the Michigan warrant on March 29. He then petitioned the arraigning court for a writ of habeas corpus, contending that the extradition warrant was invalid because it did not comply with the Uniform Criminal Extradition Act. Mich Comp. Laws §§ 780.1 to 780.31 (1970). Cf. Ariz. Rev. Stat. Ann. §§ 13–1301 to 13–1328 (Supp. 1957–1977). The court twice denied a writ of habeas corpus; the Michigan Court of Appeals denied an application for leave to appeal and dismissed Doran's complaint for habeas corpus. *People* v. *Doran,* Nos. 28507 (May 4, 1976) and 30516 (Nov. 22, 1976). The Michigan Supreme Court, however, granted leave to appeal the denial of the first habeas corpus petition.

[1] Michigan dismissed its criminal charges against Doran on February 9 in deference to the extradition on charges pending in Arizona.

People v. *Doran,* 397 Mich. 886 (1976). On review, the court reversed the trial court's order and mandated Doran's immediate release. *In re Doran,* 401 Mich. 235, 258 N. W. 2d 406, rehearing denied, 402 Mich. 951 (1977).[2]

(2)

The Michigan Supreme Court reasoned that because a significant impairment of liberty occurred whenever a person was arrested in one state and extradited to another that impairment must be preceded by a showing of probable cause to believe that the fugitive had committed a crime. In addition to relying on *Gerstein* v. *Pugh,* 420 U. S. 103 (1975),[3] the court found support for its conclusion in § 3 of the Uniform Criminal Extradition Act, Mich. Comp. Laws § 780.3 (1970), which requires that an affidavit must "substantially charge" [4] the fugitive with having committed a crime under the law of the demanding state. That court construed "substantially charge" to mean there must be a showing of probable cause.

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[2] At the time of his release, Doran had been in custody for 18 months in Michigan pending the extradition proceedings and his challenge to them. Doran's counsel moved to dismiss certiorari in this Court on the ground of mootness due to her inability to locate him in Michigan. That motion is denied. Cf. *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304, 306–308 (1946).

[3] In *Gerstein* we held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U. S., at 114. Because Arizona provided a judicial determination of probable cause for the arrest warrant, we need not decide whether the criminal charge on which extradition is requested must recite that it was based on a finding of probable cause.

[4] These terms appear to derive from language in *Munsey* v. *Clough,* 196 U. S. 364, 373 (1905): "If it appear that the indictment substantially charges an offense for which the person may be returned to the State for trial, it is enough for this [extradition] proceeding." See also *Pearce* v. *Texas,* 155 U. S. 311, 313 (1894); Uniform Criminal Extradition Act § 3, 11 U. L. A. 93 (1974).

The essence of the holding of the Supreme Court of Michigan is that the courts of an asylum state may review the action of the governor and in that process re-examine the factual basis for the finding of probable cause which accompanies the requisition from the demanding state.[5] The court concluded:

> "In the case at bar, there is no indictment or document reflecting a prior judicial determination of probable cause. The Arizona complaint and arrest warrant are both phrased in conclusory language which simply mirrors the language of the pertinent Arizona statutes. More importantly, the two supporting affidavits fail to set out facts which could justify a Fourth Amendment finding of probable cause for charging [Doran] with a crime." 401 Mich., at 240–242, 258 N. W. 2d, at 408–409 (footnote omitted).

The Michigan court assumed that arrest warrants could be issued in Arizona without a preliminary showing of probable cause since this was said to happen often in Michigan. In that court's view, neither the complaint which generated the Arizona charge, the affidavits in support of the Arizona arrest warrant, nor the recitals of the Arizona judicial officer set out sufficient facts to show probable cause. We disagree and we reverse.

(3)

We turn to the question of the power of the courts of an asylum state to review the finding of probable cause made by a judicial officer in the demanding state. Article IV, § 2, cl. 2, of the United States Constitution on the subject of extradition is clear and explicit:

> "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 Au-

[5] See, *e. g., Kirkland* v. *Preston,* 128 U. S. App. D. C. 148, 385 F. 2d 670 (1967).

thority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

To implement this provision of the Constitution, see *Innes* v. *Tobin,* 240 U. S. 127, 131 (1916); *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617 (1842), Congress has provided:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled *shall* cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and *shall* cause the fugitive to be delivered to such agent when he shall appear." 18 U. S. C. § 3182 (emphasis added).[6]

The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. *Biddinger* v. *Commissioner of Police,* 245 U. S. 128, 132–133 (1917); *Appleyard* v. *Massachusetts,* 203 U. S. 222, 227 (1906). The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus "balkanize" the administration of criminal justice among the several states. It articulated, in mandatory language, the

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[6] Section 3182 remains virtually unchanged from the original version enacted in 1793. 1 Stat. 302. See also Rev. Stat. § 5278; 18 U. S. C. § 662 (1940 ed.).

concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity. Compare *Biddinger, supra,* with *McLeod* v. *Dilworth Co.,* 322 U. S. 327, 330 (1944). In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy.

Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution. *Biddinger, supra,* at 132; *In re Strauss,* 197 U. S. 324, 332 (1905); R. Hurd, A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus 598 (1858). The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

Near the turn of the century this Court, after acknowledging the possibility that persons may give false information to the police or prosecutors and that a prosecuting attorney may act "either wantonly or ignorantly," concluded:

> "While courts will always endeavor to see that no such attempted wrong is successful, on the other hand, care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt." *In re Strauss, supra,* at 332–333.

Whatever the scope of discretion vested in the governor of an asylum state, cf. *Kentucky* v. *Dennison,* 24 How. 66, 107 (1861), the courts of an asylum state are bound by Art. IV, § 2, cf. *Compton* v. *Alabama,* 214 U. S. 1, 8 (1909), by § 3182, and, where adopted, by the Uniform Criminal Extradition

Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. *Bassing* v. *Cady,* 208 U. S. 386, 392 (1908). Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

Under Arizona law, felony prosecutions may be commenced either by an indictment or by filing a complaint before a judicial officer. Ariz. Rule Crim. Proc. 2.2 (1973). The magistrate or justice of the peace before whom the criminal charge is filed must issue an arrest warrant if it is determined that there is reasonable cause to believe that an offense has been committed.[7] The inquiry the judicial officer is required to make is directed at the traditional determination of reasonable grounds or probable cause. *Erdman* v. *Superior Court,* 102 Ariz. 524, 433 P. 2d 972 (1967); *State* v. *Currier,* 86 Ariz. 394, 347 P. 2d 29 (1959). Here the Justice of the Peace in Arizona, having the complaint at hand, issued the warrant for Doran's arrest after concluding that there was "reasonable cause to believe that such offense(s) were committed and that the accused committed them."

The Supreme Court of Michigan, however, held that the conclusion was deficient because it did not recite the factual basis for the determination made by the Arizona judicial officer. This holding finds no support in the record read in

[7] The Arizona justice of the peace may, if necessary, subpoena additional witnesses before issuing a warrant. Ariz. Rev. Stat. Ann. § 22–311 (1975); Ariz. Rules Crim. Proc. 2.4, 3.1, 3.2 (1973 and Supp. 1978–1979). The Arizona Rules of Criminal Procedure require that on a finding of probable cause the judicial officer shall issue a warrant reciting the information on which it is based. Rules 3.1 and 3.2 (1973).

the light of the mandatory provisions of Art. IV, § 2, cl. 2, and Arizona law. Moreover it overlooks the "conclusory language" in which criminal charges are ordinarily cast whether by indictment or otherwise. Cf. *Ex parte Reggel,* 114 U. S. 642, 651 (1885).

Under Art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the traditional presumption of regularity. In short, when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination. Section 2, cl. 2, of Art. IV, its companion clause in § 1, and established principles of comity merge to support this conclusion. To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, § 2. See, *e. g., Sweeney* v. *Woodall,* 344 U. S. 86, 90 (1952); *Marbles* v. *Creecy,* 215 U. S. 63, 69–70 (1909); *Pierce* v. *Creecy,* 210 U. S. 387, 404–405 (1908).

We hold that once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state.

Accordingly, the judgment of the Michigan Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the result.

I am not willing, as the Court appears to me to be, to bypass so readily, and almost to ignore, the presence and significance of the Fourth Amendment in the extradition

context. That Amendment is not mentioned at all in the discussion portion (part (3)) of the Court's opinion. I therefore must assume that in the Court's view the Amendment is of little or no consequence in determining what type of habeas corpus review may be had in the asylum State. In contrast to the Court's apparent position, I feel that it is necessary to face the Fourth Amendment issue squarely in order to arrive at a principled result in this case.

I

The petition for certiorari in this case presented one, and only one, issue:

> "Did the Michigan Supreme Court misconstrue the Fourth Amendment and the Extradition clause of the United States Constitution when it held that a fugitive may challenge a demanding state's extradition documents on the basis of lack of probable cause under the Fourth Amendment, in a collateral proceeding in the asylum state's courts?" Pet. for Cert. 2.[1]

On this question the state and federal courts are deeply divided.[2] Despite the obvious importance of the issue, the

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[1] The question was rephrased, without change in substance, in petitioner's brief on the merits. Brief for Petitioner 2.

The respondent submitted a counterstatement of the question:

"The Michigan Supreme Court did not misconstrue the Fourth Amendment and the Extradition Clause by holding that the scope of a habeas corpus challenge to extradition legitimately encompasses a scrutiny by the asylum jurisdiction of the charging documents supporting the demanding State's requisition to determine whether such documents facially reflect probable cause and hence substantially charge the accused fugitive with crime." Brief for Respondent 1–2.

See also Brief in Opposition 1.

It is obvious that each side regards the Fourth Amendment to be of significance.

[2] One of the leading cases to the effect that the Fourth Amendment requires the asylum State to determine whether a demand for extradition

Court refuses the opportunity afforded by this case to clarify the requirements of the Fourth Amendment in interstate extradition. Instead, the Court avoids the question on which certiorari was granted by holding that, even if the Fourth Amendment does apply to interstate extradition, its requirements, in this case, were satisfied. *Ante*, at 285 n. 3. This convenient assumption, in my view, perpetuates confusion in an area where clarification and uniformity are urgently needed.

If, on the facts of this case, there could be no question whatsoever that the Fourth Amendment was satisfied, then one would have to agree that it would be unnecessary, strictly

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is supported by probable cause is *Kirkland* v. *Preston*, 128 U. S. App. D. C. 148, 385 F. 2d 670 (1967). A number of other courts have followed the general line of analysis set out in *Kirkland*. See, *e. g.*, *United States ex rel. Grano* v. *Anderson*, 446 F. 2d 272 (CA3 1971); *Montague* v. *Smedley*, 557 P. 2d 774 (Alaska 1976); *Pippin* v. *Leach*, 188 Colo. 385, 534 P. 2d 1193 (1975); *Brode* v. *Power*, 31 Conn. Supp. 411, 332 A. 2d 376 (Super. Ct. 1974); *Tucker* v. *Virginia*, 308 A. 2d 783 (D. C. App. 1973); *Clement* v. *Cox*, 118 N. H. 246, 385 A. 2d 841 (1978); *People ex rel. Cooper* v. *Lombard*, 45 App. Div. 2d 928, 357 N. Y. S. 2d 323 (1974); *Locke* v. *Burns*, — W. Va. —, 238 S. E. 2d 536 (1977). On the other hand, some courts have rejected *Kirkland*'s accommodation of the Fourth Amendment and the Extradition Clause. See, *e. g.*, *In re Golden*, 65 Cal. App. 3d 789, 135 Cal. Rptr. 512, app. dismissed and cert. denied *sub nom. Golden* v. *California*, 434 U. S. 805 (1977); *People ex rel. Kubala* v. *Woods*, 52 Ill. 2d 48, 284 N. E. 2d 286 (1972); *McEwen* v. *State*, 224 So. 2d 206 (Miss. 1969); *Ault* v. *Purcell*, 16 Ore. App. 664, 519 P. 2d 1285, cert. denied, 419 U. S. 858 (1974); *Commonwealth ex rel. Marshall* v. *Gedney*, 237 Pa. Super. 372, 352 A. 2d 528 (1975); *Salvail* v. *Sharkey*, 108 R. I. 63, 271 A. 2d 814 (1970). The cases on both sides exhibit a variety of theories and positions. Further, at least in Massachusetts and South Dakota, federal courts in habeas proceedings in effect have nullified decisions by state supreme courts that refused to apply the requirements of the Fourth Amendment to extradition. Compare *Ierardi* v. *Gunter*, 528 F. 2d 929 (CA1 1976), with *In re Ierardi*, 366 Mass. 640, 321 N. E. 2d 921 (1975), and *Wellington* v. *South Dakota*, 413 F. Supp. 151 (SD 1976), with *Wellington* v. *State*, 90 S. D. 153, 238 N. W. 2d 499 (1976).

speaking, for the Court to decide whether the Amendment applies. But one really cannot know whether the Fourth Amendment was satisfied without examining and determining the procedural protections the Amendment provides and without considering the Fourth Amendment interests at stake, and then weighing those interests against the ones furthered by the Extradition Clause, Art. IV, § 2, cl. 2, of the Constitution.[3]

[3] As I understand today's ruling, the Court does not decide whether and to what extent the Fourth Amendment applies in extradition proceedings. Instead, the Court for present purposes is willing to *assume* that the Amendment applies to proceedings governed by the Extradition Clause and that it requires, at a minimum, a judicial determination of probable cause prior to any significant restraint on liberty. The Court then holds that the Extradition Clause prohibits the courts of the asylum State from reviewing the adequacy of a properly certified judicial determination of probable cause made in the demanding State. Further, the Court holds that the Supreme Court of Michigan erred in finding that no such determination took place in this case. The documents certified by the Governor of Arizona and approved by the Governor of Michigan indicated on their face that such a finding had been made, and the Michigan court's conclusion to the contrary was based on its impression of procedures followed in Michigan and its own evaluation of the adequacy of the supporting affidavits.

I nevertheless find the implications of certain passages in the Court's opinion to be troublesome. The Court says, *ante,* at 290, that "once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state." This seems to imply that it is only the governor who is to review the charging papers, and that the habeas court has no role whatsoever in the matter. A like implication appears in the Court's language, *ibid.,* that "the courts of the asylum state are without power to review the determination." On the other hand, in an earlier passage, *ante,* at 289, the Court says that the grant of extradition by the governor of an asylum State "is prima facie evidence that the constitutional and statutory requirements have been met." This, for me, is a suggestion that the governor's review and determination effect only a rebuttable presumption that there has been a judicial determination in the demanding State. I also note that some passages in the Court's opinion seem to disregard the proposition that "the Full Faith and Credit Clause does not require that sister States

I would hold that the Fourth Amendment applies in the extradition context, and I would use the opportunity this case affords to articulate, for the guidance of state courts, the proper accommodation between the Fourth Amendment and the Extradition Clause.

II

The Court's analysis, I fear, rests on cases that preceded the application of Fourth Amendment standards to state criminal proceedings. The basic assumption of these early cases—that the Constitution left the States with virtually complete control over their procedures [4]—has not been tenable since the Court in *Wolf* v. *Colorado*, 338 U. S. 25, 27–28 (1949), held that the Fourth Amendment applies to the States through the Fourteenth Amendment, and in subsequent cases held that state criminal procedures must conform to the same Fourth Amendment standards that apply to federal proceedings. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963); *Beck* v. *Ohio*, 379 U. S. 89 (1964). Whatever may have been the law of extradition as propounded by this Court "[n]ear the turn of the century," *ante*, at 288, the Extradition Clause and its implementing statute, 18 U. S. C. § 3182, no longer may be considered in isolation from the Fourth Amendment.[5]

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enforce a foreign penal judgment." *Nelson* v. *George*, 399 U. S. 224, 229 (1970). See *ante*, at 287–288, and 290.

These seemingly inconsistent implications indicate that one cannot determine in a principled way what procedures are appropriate in the asylum State without first giving consideration to the Fourth Amendment values that are at stake.

[4] The Court made this assumption explicit in *In re Strauss*, 197 U. S. 324, 331 (1905), a case quoted by the Court, *ante*, at 288: "Under the Constitution each State was left with full control over its criminal procedure."

[5] It is of interest to note that when a potential conflict between the Extradition Clause and some other constitutional provision has been recognized, this Court long ago suggested that the Clause be interpreted so as to avoid the conflict. In *Kentucky* v. *Dennison*, 24 How. 66 (1861),

The Court also relies on what it describes as the "clear and explicit" language of the Extradition Clause. *Ante,* at 286. But the language of the Fourth Amendment is equally "clear and explicit":

> "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized."

The words of the Amendment provide no grounds for a distinction between "seizures" of persons for extradition and seizures of persons for any other purpose. Neither do they distinguish between an extradition warrant and the usual arrest warrant. Indeed, the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment," *Wolf* v. *Colorado,* 338 U. S., at 27, applies with undiminished force to the intrusion that occurs in the process of extradition.

The requirements of the Fourth Amendment in the context of pretrial arrest and detention were spelled out in *Gerstein* v. *Pugh,* 420 U. S. 103 (1975). The Amendment, it was said, "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." [6]

Mr. Chief Justice Taney, speaking for the Court, discussed the Extradition Clause's requirement that a person be "charged" with "Treason, Felony, or other Crime." He indicated that the general term "charged" should be construed in accord with accepted constitutional principles governing the roles of the judicial and executive departments. He concluded that the governor of the demanding State was not authorized by the Extradition Clause to demand the return of a fugitive unless the fugitive "was charged in the regular course of judicial proceedings." *Id.,* at 104.

[6] The Court noted that it has held that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States,* 287 U. S. 241, 250 (1932)." 420 U. S., at 117 n. 19.

Id., at 114. The Court there stated that extended confinement before trial "may imperil the suspect's job, interrupt his source of income, and impair his family relationships . . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." *Ibid.*

The extradition process involves an "extended restraint of liberty following arrest" even more severe than that accompanying detention within a single State. Extradition involves, at a minimum, administrative processing in both the asylum State and the demanding State, and forced transportation in between. It surely is a "significant restraint on liberty." For me, therefore, the Amendment's language and the holding in *Gerstein* mean that, even in the extradition context, where the demanding State's "charge" rests upon something less than an indictment, there must be a determination of probable cause by a detached and neutral magistrate, and that the asylum State need not grant extradition unless that determination has been made. The demanding State, of course, has the burden of so demonstrating.

Having said this, however, I recognize that it is the purpose of the Extradition Clause to secure the prompt rendition of interstate fugitives with a minimum of friction between States. See *Appleyard* v. *Massachusetts*, 203 U. S. 222, 227–228 (1906). The Constitution's concern for efficiency and comity in extradition could be seriously jeopardized if the courts of the asylum State could examine the factual basis for a probable-cause determination already made by a magistrate in the demanding State.[7] I therefore would not go so far as to

[7] Other types of review in the asylum State's courts entail less potential for friction and delay. As the Court indicates, *ante*, at 289, 18 U. S. C. § 3182 itself contemplates that the courts of the asylum State may make inquiry into "historic facts readily verifiable," such as the identity of the fugitive and the existence of a "charge." There is nothing to indicate that

permit the asylum State to delve into the niceties of the underpinnings of the demanding State's probable-cause determination, as the demanding State will be obliged to do if probable cause is made an issue when the fugitive is returned to that State. It is enough if the papers submitted by the demanding State in support of its request for extradition *facially* show that a neutral magistrate has made a finding of probable cause. If they do, it is not the province of the courts of the asylum State, subject to extended appellate review, to probe the factual sufficiency of that finding. That probe may be conducted in due course in the demanding State.[8]

III

Here the Arizona papers were facially sufficient. An arrest warrant had been issued by an Arizona Justice of the Peace, and that warrant stated specifically: "I have found reasonable cause to believe that such offense(s) were committed and that the accused [Doran] committed them." App. 26a. I equate that recital of "reasonable cause" with the "probable cause" of Fourth Amendment parlance. To be sure, the phraseology is conclusory, but this still was a judicial determination of

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this type of routine and basic inquiry has led to frustration of the extradition process.

[8] This limitation on the scope of habeas review in the asylum State's courts could perhaps be said to be a limit on the alleged fugitive's Fourth Amendment rights, since habeas review to determine the existence of probable cause justifying detention is not usually so restricted. See *Gerstein* v. *Pugh*, 420 U. S., at 115. Nevertheless, when the documents certified and approved by two governors indicate on their face that a judicial determination of probable cause has been made in the demanding State, this compromise, if it be one, limiting the scope of review in the courts of the asylum State, seems a proper accommodation of the constitutional provisions. The nature of habeas relief in the courts of the demanding State and in the federal courts is not at issue in this case. Nor does this case involve the scope of habeas relief in circumstances in which the terms of the Extradition Clause do not apply.

probable cause, and that, for me, is sufficient for Extradition Clause-Fourth Amendment purposes. The asylum State should be allowed to scrutinize the charging documents only to ascertain that a detached and neutral magistrate made a determination of probable cause. That was the case here. Any further review would create potential for frustration and obstruction of the process established by the Extradition Clause.[9]

I therefore concur only in the result.

[9] It seems obvious, of course, that Arizona's procedure is not to be measured by the fact—if it be a fact—that arrest warrants in Michigan often are issued without a preliminary showing of probable cause.

Syllabus

MARQUETTE NATIONAL BANK OF MINNEAPOLIS *v.* FIRST OF OMAHA SERVICE CORP. ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 77-1265. Argued October 31, 1978—Decided December 18, 1978*

The First National Bank of Omaha (Omaha Bank) is a national banking association chartered in Nebraska; it is enrolled in the BankAmericard plan, and solicits for that plan in Minnesota. Omaha Bank charges its Minnesota cardholders interest on their unpaid balances at a rate permitted by Nebraska law, but in excess of that permitted by Minnesota law. The Marquette National Bank of Minneapolis (Marquette), a Minnesota-chartered national banking association enrolled in the BankAmericard plan, brought suit in Minnesota against Omaha Bank and its subsidiary, respondent First of Omaha Service Corp., *inter alia,* to enjoin the operation of Omaha Bank's BankAmericard program in Minnesota until such time as it complied with the Minnesota usury law. Rejecting respondent's contention that Minnesota's usury law was preempted by the National Bank Act provision codified as 12 U. S. C. § 85, which authorizes a national banking association "to charge on any loan" interest at the rate allowed by the laws of the State "where the bank is located," the state trial court granted Marquette's motion for partial summary judgment. The Minnesota Supreme Court reversed. *Held:* Section 85 permits Omaha Bank to charge its Minnesota BankAmericard customers the higher interest rate that is sanctioned by Nebraska law. Pp. 307-319.

(a) As a national bank, Omaha Bank is a federal instrumentality whose interest rate for its BankAmericard program is governed by federal law, and under § 85 a national bank may charge interest "on any loan" at the rate allowed by the laws of the State where the bank is "located." P. 308.

(b) Apart from its BankAmericard program, Omaha Bank is located in Nebraska, where it is chartered. P. 309.

(c) Omaha Bank cannot be deprived of its Nebraska location merely because under the BankAmericard program it extends credit to residents of another State, for it is in Nebraska that credit is extended by the Bank's honoring sales drafts of Minnesota customers, unpaid-balance

*Together with No. 77-1258, *Minnesota* v. *First of Omaha Service Corp. et al.,* also on certiorari to the same court.

finance charges are assessed, payments are received, and credit cards are issued. Pp. 310–312.

(d) Nor does the statutory location of the bank change because the credit cards can be used to purchase goods and services outside Nebraska. Pp. 312–313.

(e) Congress in enacting the National Bank Act of 1864 intended to facilitate a "national banking system," whose interstate nature was fully recognized, and there was no intention to exempt interstate loans from the reach of the predecessor of 12 U. S. C. § 85. Pp. 313–318.

(f) Though the "exportation" of interest rates, such as occurred here, may impair the ability of States to maintain effective usury laws, such impairment has always been implicit in the National Bank Act and any correction of that situation would have to be achieved legislatively. Pp. 318–319.

262 N. W. 2d 358, affirmed.

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

Richard B. Allyn, Solicitor General of Minnesota, argued the cause for petitioner in No. 77–1258. With him on the briefs were *Warren Spannaus,* Attorney General, *Stephen Shakman, Jacqueline P. Taylor,* and *Barry R. Greller,* Special Assistant Attorneys General, and *Thomas R. Muck,* Assistant Attorney General. *John Troyer* argued the cause for petitioner in No. 77–1265. With him on the briefs was *J. Patrick McDavitt.*

Robert H. Bork argued the cause for respondent First of Omaha Service Corp. in both cases. On the brief was *Clay R. Moore.*†

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†Briefs of *amici curiae* urging reversal were filed by *Richard C. Turner,* Attorney General, and *Julian B. Garrett,* Assistant Attorney General, for the State of Iowa; and by *Roger A. Peterson* for the Minnesota AFL–CIO.

Peter D. Schellie filed a brief for the Consumer Bankers Assn. as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *James F. Bell* and *Calvin Davison* for the Conference of State Bank Supervisors; and by *Joseph DuCoeur* and *Alan I. Becker* for the First National Bank of Chicago.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether the National Bank Act, Rev. Stat. § 5197, as amended, 12 U. S. C. § 85,[1] authorizes a national bank based in one State to charge its out-of-state credit-card customers an interest rate on unpaid balances allowed by its home State, when that rate is greater than that permitted by the State of the bank's nonresident customers. The Minnesota Supreme Court held that the bank is allowed by § 85 to charge the higher rate. 262 N. W. 2d 358 (1977). We affirm.

I

The First National Bank of Omaha (Omaha Bank) is a national banking association with its charter address in Omaha, Neb.[2] Omaha Bank is a card-issuing member in the BankAmericard plan. This plan enables cardholders to purchase goods and services from participating merchants and to

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[1] Section 85 states in pertinent part:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." See §§ 201, 206 of Pub. L. 93–501, 88 Stat. 1558, 1560.

[2] The National Bank Act, Rev. Stat. § 5134, 12 U. S. C. § 22, provides that a national bank must create an "organization certificate" which specifically states "[t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village."

obtain cash advances from participating banks throughout the United States and the world. Omaha Bank has systematically sought to enroll in its BankAmericard program the residents, merchants, and banks of the nearby State of Minnesota. The solicitation of Minnesota merchants and banks is carried on by respondent First of Omaha Service Corp. (Omaha Service Corp.), a wholly owned subsidiary of Omaha Bank.

Minnesota residents are obligated to pay Omaha Bank interest on the outstanding balances of their BankAmericards. Nebraska law permits Omaha Bank to charge interest on the unpaid balances of cardholder accounts at a rate of 18% per year on the first $999.99, and 12% per year on amounts of $1,000 and over.[3] Minnesota law, however, fixes the permissible annual interest on such accounts at 12%.[4] To compen-

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[3] See Neb. Rev. Stat. §§ 8–815 to 8–823, 8–825 to 8–829 (1974). Omaha Bank assesses a finance charge on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed, however, on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. See Stipulation of Facts, App. 93a–94a.

[4] Minnesota Stat. § 48.185 (1978) provides in pertinent part:

"Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to Chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

. . . . .

"Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the

sate for the reduced interest, Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card.[5]

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maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank . . . .

"Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on that balance.

"Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

"(a) that the law of another state shall apply;

"(b) that the person consents to the jurisdiction of another state; and

"(c) which fixes venue;

"is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to

[*Footnote 5 is on p. 304*]

The instant case began when petitioner Marquette National Bank of Minneapolis (Marquette),[6] itself a national banking association enrolled in the BankAmericard plan,[7] brought suit in the District Court of Hennepin County, Minn., to enjoin Omaha Bank and Omaha Service Corp. from soliciting in Minnesota for Omaha Bank's BankAmericard program until such time as that program complied with Minnesota law.[8] Marquette claimed to be losing customers to Omaha Bank because, unlike the Nebraska bank, Marquette was forced by the low rate of interest permissible under Minnesota law to charge a $10 annual fee for the use of its credit cards. App. 7a–15a, 45a–48a.

Marquette named as defendants Omaha Bank, Omaha Service Corp., which is organized under the laws of Nebraska but qualified to do business and doing business in Minnesota,[9] and the Credit Bureau of St. Paul, Inc., a corporation organized under the laws of Minnesota having its principal office

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its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

"Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. . . . The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state."

[5] See Minn. Stat. § 48.185 (4)(a) (1978), *supra*, n. 4.

[6] Marquette is petitioner in No. 77–1265.

[7] The principal banking offices of Marquette are located in the County of Hennepin in the State of Minnesota. See n. 2, *supra*.

[8] Marquette also asked for compensatory and punitive damages. App. 16a.

[9] The principal offices of Omaha Service Corp. are located in Omaha, Neb.

in St. Paul, Minn. Omaha Service Corp. participates in Omaha Bank's BankAmericard program by entering into agreements with banks and merchants necessary to the operation of the BankAmericard scheme. *Id.,* at 30a. At the time Marquette filed its complaint, Omaha Service Corp. had not yet entered into any such agreements in Minnesota, although it intended to do so. *Id.,* at 30a, 92a, 94a. For its services, Omaha Service Corp. receives a fee from Omaha Bank, but it does not itself extend credit or receive interest.[10] *Id.,* at 94a, 97a–110a. It was alleged that the Credit Bureau of St. Paul, Inc., solicited prospective cardholders for Omaha Bank's BankAmericard program in Minnesota. *Id.,* at 9a, 30a.

The defendants sought to remove Marquette's action to Federal District Court. See 12 U. S. C. § 94.[11] Marquette responded by dismissing without prejudice its action against Omaha Bank, see Fed. Rule Civ. Proc. 41 (a)(1)(i), and the District Court, citing *Gully* v. *First Nat. Bank,* 299 U. S. 109 (1936), remanded the case to the District Court of Hennepin County. *Marquette Nat. Bank* v. *First Nat. Bank of Omaha,* 422 F. Supp. 1346 (Minn. 1976). Marquette thereupon moved for partial summary judgment to have Omaha Bank's BankAmericard program declared in violation of the Minnesota usury statute, Minn. Stat. § 48.185 (1978),[12] and permanently to enjoin the remaining defendants from engaging in

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[10] Omaha Service Corp. does, however, accept assignments of delinquent accounts from Omaha Bank and, as an incident to collecting these accounts, does collect interest. *Id.,* at 94a.

[11] The venue provision of the National Bank Act, Rev. Stat. § 5198, 12 U. S. C. § 94, states:

"Suits, actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

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

any activity in connection with the offering or operation of that program in further violation of Minnesota law. Defendants argued that the National Bank Act, Rev. Stat. § 5197, as amended, 12 U. S. C. § 85,[13] pre-empted Minn. Stat. § 48.185 and enforcement of that statute against Omaha Bank's Bank-Americard program. Upon being notified of this challenge to Minn. Stat. § 48.185, the Attorney General of the State of Minnesota[14] intervened as a party plaintiff and joined in Marquette's prayer for a declaratory judgment and permanent injunction.

The District Court of Hennepin County granted plaintiffs' motion for partial summary judgment, holding in an unreported opinion that "nothing contained in the National Bank Act, 12 U. S. C. § 85, precludes or preempts the application and enforcement of Minnesota Statutes, § 48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota." App. 139a–140a. The court enjoined Omaha Service Corp., "as agent of the First National Bank of Omaha," from "engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, § 48.185."[15] *Id.*, at 140a–141a.

On appeal, the Minnesota Supreme Court reversed. Noting that Marquette's dismissal of Omaha Bank was a procedural device that removed the case from the jurisdiction of the federal courts of the Eighth Circuit, and noting that a recent decision of the Court of Appeals for the Eighth Circuit had made it plain that in its judgment the usury laws of Nebraska rather than Minnesota should govern the operation of Omaha Bank's BankAmericard program in Minnesota, see *Fisher* v.

[13] See n. 1, *supra*.

[14] The State of Minnesota is petitioner in No. 77–1258.

[15] Defendant Credit Bureau of St. Paul, Inc., was not named as an addressee of the injunction, and it is not before this Court.

First Nat. Bank of Omaha, 548 F. 2d 255 (1977),[16] the Minnesota Supreme Court concluded that it would be "inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit." 262 N. W. 2d, at 365.[17] Plaintiffs filed timely petitions for writs of certiorari,[18] which we granted, 436 U. S. 916 (1978), in order to decide the appropriate application of 12 U. S. C. § 85.

II

In the present posture of this case Omaha Bank is no longer a party defendant. The federal question presented for decision is nevertheless the application of 12 U. S. C. § 85 to the operation of Omaha Bank's BankAmericard program. There is no allegation in petitioners' complaints that either Omaha Service Corp. or the Minnesota merchants and banks participating in the BankAmericard program are themselves

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[16] In its opinion the Eighth Circuit relied upon the decision of the Court of Appeals for the Seventh Circuit in *Fisher* v. *First Nat. Bank of Chicago,* 538 F. 2d 1284 (1976).

[17] The Supreme Court of Iowa has since reached a contrary conclusion. See *Iowa ex rel. Turner* v. *First of Omaha Service Corp.,* 269 N. W. 2d 409 (1978), appeal docketed, No. 78–846.

[18] We reject respondent's argument that the petitions are untimely. The opinion of the Minnesota Supreme Court was filed on November 10, 1977. Petitioners filed a timely petition for rehearing, which, under Minnesota law, defers the entry of judgment until after the disposition of the petition. See Minn. Rules Civ. App. Proc. 136.02, 140. The petition for rehearing was denied on December 8, 1977; judgment was entered on December 14, 1977, by way of a separate document stating that "the order and judgment of the Court below, herein appealed from, . . . be and the same hereby is in all things reversed." App. H to Pet. for Cert. in No. 77–1265. Petitions for certiorari were filed in this Court on March 13, 1978, within the 90 days "after the entry of such judgment or decree" allotted by 28 U. S. C. § 2101 (c). See *Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, 24–25 (1924); *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 284–288 (1945).

extending credit in violation of Minn. Stat. § 48.185 (1978), and we therefore have no occasion to determine the application of the National Bank Act in such a case.

Omaha Bank is a national bank; it is an "instrumentalit[y] of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283 (1896). The interest rate that Omaha Bank may charge in its BankAmericard program is thus governed by federal law. See *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 34 (1875). The provision of § 85 called into question states:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District *where the bank is located*, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Emphasis supplied.)

Section 85 thus plainly provides that a national bank may charge interest "on any loan" at the rate allowed by the laws of the State in which the bank is "located." The question before us is therefore narrowed to whether Omaha Bank and its BankAmericard program are "located" in Nebraska and for that reason entitled to charge its Minnesota customers the rate of interest authorized by Nebraska law.[19]

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[19] We have no occasion in this case to parse the meaning of the phrase in § 85 "associations *organized or existing* in any such State . . . ." (Emphasis added.) This phrase occurs in the "except" clause of § 85, which, at least since *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409 (1874), has been interpreted as an "enabling" clause. "If there is a rate of interest fixed by State laws for lenders generally, the banks are allowed to charge

There is no question but that Omaha Bank itself, apart from its BankAmericard program, is located in Nebraska. Petitioners concede as much. See Brief for Petitioner in No. 77–1258, p. 3; Brief for Petitioner in No. 77–1265, pp. 3, 16, 33–34. The National Bank Act requires a national bank to state in its organization certificate "[t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village." Rev. Stat. § 5134, 12 U. S. C. § 22. The charter address of Omaha Bank is in Omaha, Douglas County, Neb. The bank operates no branch banks in Minnesota, cf. *Seattle Trust & Savings Bank* v. *Bank of California,* 492 F. 2d 48 (CA9 1974), nor apparently could it under federal law.[20] See 12 U. S. C. § 36 (c).[21]

The State of Minnesota, however, contends that this con-

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that rate, but no more, except that if State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations." *Id.,* at 411. Since there is in this case no allegation or proof that Minnesota state banks are "allowed to reserve more" than the rate of interest "for lenders generally," we need not determine the relationship of the phrase "organized or existing" to the term "located."

[20] There is no contention that Omaha Bank could qualify to operate a branch bank in Minnesota under the grandfather provisions of 12 U. S. C. § 36 (a).

Although Nebraska law prohibits branch banking, it permits the establishment of not more than two "detached auxiliary teller offices" which must be maintained "within the corporate limits of the city in which such bank is located." Neb. Rev. Stat. §§ 8–157 (1) and (2) (1977). Nebraska also permits banks to operate manned or unmanned "electronic satellite facilities." § 8–157 (3). There is no contention in this case that Omaha Bank operates such facilities in the State of Minnesota.

[21] Last Term *Citizens & Southern Nat. Bank* v. *Bougas,* 434 U. S. 35 (1977), held that, with respect to the venue provision of the National Bank Act, 12 U. S. C. § 94, *supra,* n. 11, a national bank is "located" either in the place designated in its "organization certificate," 12 U. S. C. § 22, *supra,* n. 2, or in the places in which it has established authorized branches. Omaha Bank is thus also "located" in Nebraska for purposes of 12 U. S. C. § 94.

clusion must be altered if Omaha Bank's BankAmericard program is considered: "In the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants the bank must be deemed to be 'located' in Minnesota for purposes of this credit card program." Reply Brief for Petitioner in No. 77–1258, p. 7.

We disagree. Section 85 was originally enacted as § 30 of the National Bank Act of 1864,[22] 13 Stat. 108.[23] The congressional debates surrounding the enactment of § 30 were conducted on the assumption that a national bank was "located" for purposes of the section in the State named in its organization certificate. See Cong. Globe, 38th Cong., 1st Sess., 2123–2127 (1864). Omaha Bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State. Minnesota residents were always free to visit Nebraska and receive loans in that State. It has

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[22] Although the Act of June 3, 1864, ch. 106, 13 Stat. 99, was originally entitled "An Act to Provide a National Currency . . . ," its title was altered by Congress in 1874 to "the national-bank act." Ch. 343, 18 Stat. 123.

[23] Section 30 was, in its pertinent parts, virtually identical with the current § 85. Section 30 stated:

"[E]very association may take, reserve, receive, and charge on any loan, or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act."

Section 30 was preceded by § 46 of the National Currency Act of 1863, 12 Stat. 678, which provided:

"[E]very association may take, reserve, receive, and charge on any loan, or discount made, or upon any note, bill of exchange, or other evidence of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several States in which the associations are respectively located, and no more . . . ."

not been suggested that Minnesota usury laws would apply to such transactions. Although the convenience of modern mail permits Minnesota residents holding Omaha Bank's BankAmericards to receive loans without visiting Nebraska, credit on the use of their cards is nevertheless similarly extended by Omaha Bank in Nebraska by the bank's honoring of the sales drafts of participating Minnesota merchants and banks.[24] Finance charges on the unpaid balances of cardhold-

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[24] Once again, there is no allegation in these cases that either Omaha Service Corp. or any of the Minnesota merchants or banks participating in Omaha Bank's BankAmericard program are themselves extending credit in violation of Minn. Stat. § 48.185 (1978).

In their stipulation of facts, the parties describe the operation of the BankAmericard program as follows:

"III

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"While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

. . . . . .

"V

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

"VI

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance

ers are assessed by the bank in Omaha, Neb., and all payments on unpaid balances are remitted to the bank in Omaha, Neb. Furthermore, the bank issues its BankAmericards in Omaha, Neb., after credit assessments made by the bank in that city. App. 30a.

Nor can the fact that Omaha Bank's BankAmericards are used "in transactions with Minnesota merchants" be determinative of the bank's location for purposes of § 85. The bank's BankAmericard enables its holder "to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world." Stipulation of Facts, App. 91a. Minnesota residents can thus use their Omaha Bank BankAmericards to purchase services in the State of New York or mail-order goods from the State of Michigan. If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. We do not choose to invite these difficulties by rendering so elastic the term "located." The mere fact that Omaha Bank has enrolled Minnesota residents, merchants, and banks in its

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of the cardholder's account. . . . Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

"VII

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest." App. 92a–94a.

BankAmericard program thus does not suffice to "locate" that bank in Minnesota for purposes of 12 U. S. C. § 85.[25] See *Second Nat. Bank of Leavenworth* v. *Smoot,* 9 D. C. 371, 373 (1876).

III

Since Omaha Bank and its BankAmericard program are "located" in Nebraska, the plain language of § 85 provides that the bank may charge "on any loan" the rate "allowed" by the State of Nebraska. Petitioners contend, however, that this reading of the statute violates the basic legislative intent of the National Bank Act. See *Train* v. *Colorado Public Interest Research Group,* 426 U. S. 1, 9–10 (1976). At the time Congress enacted § 30 of the National Bank Act of 1864, 13 Stat. 108, so petitioners' argument runs, it intended "to insure competitive equality between state and national banks in the charging of interest." Brief for Petitioner in No. 77–1265, p. 24. This policy could best be effectuated by limiting national banks to the rate of interest allowed by the States in which the banks were located. Since Congress in 1864 was addressing a financial system in which incorporated banks were "local institutions," it did not "contemplate a national bank soliciting customers and entering loan agreements outside of the state in which it was established." Brief for Petitioner in No. 77–1258, p. 17. Therefore to interpret § 85 to apply to interstate loans such as those involved in this case would not only enlarge impermissibly the original intent of Congress, but would also undercut the basic policy

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[25] Similarly, the mere fact that a national bank "transacts business" or even violates the Securities Exchange Act of 1934 in a State other than that of its "organization certificate," see n. 2, *supra,* does not suffice to locate the bank in the foreign State for purposes of venue under the National Bank Act, 12 U. S. C. § 94, *supra,* n. 11. *Radzanower* v. *Touche Ross & Co.,* 426 U. S. 148 (1976). See *Bank of America* v. *Whitney Central Nat. Bank,* 261 U. S. 171 (1923); cf. *Cope* v. *Anderson,* 331 U. S. 461, 467 (1947).

foundations of the statute by upsetting the competitive equality now existing between state and national banks.

We cannot accept petitioners' argument. Whatever policy of "competitive equality" has been discerned in other sections of the National Bank Act, see, *e. g., First Nat. Bank* v. *Dickinson,* 396 U. S. 122, 131 (1969); *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U. S. 252, 261–262 (1966), § 30 and its descendants have been interpreted for over a century to give "advantages to National banks over their State competitors." *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 413 (1874). "National banks," it was said in *Tiffany,* "have been National favorites." [26] The policy of competitive equality between state and national banks, however, is not truly at the core of this case. Instead, we are confronted by the inequalities that occur when a national bank applies the interest rates of its home State in its dealing with residents of a foreign State. These inequalities affect both national and state banks in the foreign State. Indeed, in the instant case Marquette is a national bank claiming to be injured by the unequal interest rates charged by another national bank.[27] Whether the inequalities which thus occur when the interest rates of one State are "exported" into another violate the intent of Congress in enacting § 30 in part depends on whether Congress in 1864 was aware of the existence of a system of interstate banking in which such inequalities would seem a necessary part.

Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, contrary to the suggestion of petitioners, Congress intended

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[26] The "most favored lender" status for national banks under *Tiffany* has since been incorporated into the regulations of the Comptroller of the Currency. See 12 CFR § 7.7310 (a) (1978).

[27] We accept for purposes of argument Marquette's premise that it is injured competitively because Omaha Bank can charge higher prices for the use of its money.

to facilitate what Representative Hooper [28] termed a "national banking system." Cong. Globe, 38th Cong., 1st Sess., 1451 (1864). See also Report of the Comptroller of the Currency 4 (1864). Section 31 of the Act, for example, fully recognized the interstate nature of American banking by providing that three-fifths of the 15% of the aggregate amount of their notes in circulation that national banks were required to "have on hand, in lawful money" could

> "consist of balances due to an association available for the redemption of its circulating notes from associations approved by the comptroller of the currency, organized under this act, in the cities of Saint Louis, Louisville, Chicago, Detroit, Milwaukie [*sic*], New Orleans, Cincinnati, Cleveland, Pittsburg, Baltimore, Philadelphia, Boston, New York, Albany, Leavenworth, San Francisco, and Washington City." 13 Stat. 108, 109.[29]

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[28] Representative Hooper reported the bill that was to become the National Bank Act of 1864 to the House from the Ways and Means Committee. See Million, The Debate on the National Bank Act of 1863, 2 J. Pol. Econ. 251, 279 (1894).

[29] Section 31 also provided:

"[T]he cities of Charleston and Richmond may be added to the list of cities in the national associations of which other associations may keep three fifths of their lawful money, whenever, in the opinion of the comptroller of the currency, the condition of the southern states will warrant it." 13 Stat. 109.

See also § 32 of the National Bank Act of 1864, 13 Stat. 109.

Senator Sherman, sponsor of the Act in the Senate, described in the following terms the purpose of § 31:

"The first important provision of this bill is, that it provides centers of redemption. Under the old bill, a bank was not bound to redeem its issues except at its own counter. If it failed to redeem there, then provision was made for winding it up. Under the present bill, certain cities of the United States are designated where the banks are required to redeem their issues. Each bank is to redeem its issue at its center of redemption as prescribed by the Comptroller of the Currency. The cities named are the principal cities along the Atlantic coast, Cincinnati, Louis-

The debates surrounding the enactment of this section portray a banking system of great regional interdependence. Senator Chandler of Michigan, for example, noted:

> "[T]he banking business of the Northwest is done upon bills of exchange. The wool clip of Michigan, the wheat crop of Michigan, the hog crop of Iowa, are all purchased with drafts drawn chiefly upon [New York, Philadelphia, and Boston]. The wool clip is chiefly bought by drafts upon Boston. I put in the three cities because it is convenient to the customer, to the broker, to the merchant, to be enabled to purchase a draft upon either one of these three places." Cong. Globe, 38th Cong., 1st Sess., 2144 (1864).[30]

See also *id.*, at 1343, 1376, 2143–2145, 2152, 2181–2182. Similarly, the debates surrounding the enactment of § 41 of the Act, which provided that the shares of a national bank could be taxed as personal property "in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere," 13 Stat. 112, demon-

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ville, Chicago, Detroit, and two or three other places. That will strengthen the system very much by relieving the noteholder from the trouble of going from any part of the United States to a remote village or city, and there demanding redemption at the counter of the bank." Cong. Globe, 38th Cong., 1st Sess., 1865 (1864).

[30] Senator Chandler was proposing an amendment to the provision of § 31 which required every national bank located in the enumerated cities to "have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits." 13 Stat. 108. The amendment read:

"And one half of said twenty-five per cent. in banks organized under this act in the cities of St. Louis, Louisville, Chicago, Detroit, Milwaukee, Cincinnati, Cleveland, Pittsburg, and Portland may consist of balances due to the association available for the redemption of its circulating notes, from an association in the cities of New York, Boston, or Philadelphia." Cong. Globe, 38th Cong., 1st Sess., 2143 (1864).

strated a sensitive awareness of the possibilities of interstate ownership and control of national banks. See, *e. g.*, Cong. Globe, 38th Cong., 1st Sess., 1271, 1898–1899 (1864).

Although in the debates surrounding the enactment of § 30 there is no specific discussion of the impact of interstate loans, these debates occurred in the context of a developed interstate loan market. As early as 1839 this Court had occasion to note: "Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. . . . These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the Court cannot overlook them . . . ." *Bank of Augusta* v. *Earle,* 13 Pet. 519, 590–591 (1839). Examples of this interstate loan market have been noted by historians of American banking. See, *e. g.*, 1 F. Redlich, The Molding of American Banking 49 (1968); 1 F. James, The Growth of Chicago Banks 546 (1938); Breckenridge, Discount Rates in the United States, 13 Pol. Sci. Q. 119, 136–138 (1898). Evidence of this market is to be found in the numerous judicial decisions in cases arising out of interstate loan transactions. See, *e. g., Woodcock* v. *Campbell,* 2 Port. 456 (Ala. 1835); *Clarke* v. *Bank of Mississippi,* 10 Ark. 516 (1850); *Planters Bank* v. *Bass,* 2 La. Ann. 430 (1847); *Knox* v. *Bank of United States,* 27 Miss. 65 (1854); *Bard* v. *Poole,* 12 N. Y. 495 (1855); *Curtis* v. *Leavitt,* 15 N. Y. 9 (1857). After passage of the National Bank Act of 1864, cases involving interstate loans begin to appear with some frequency in federal courts. See, *e. g., In re Wild,* 29 F. Cas. 1211 (No. 17,645) (SDNY 1873); *Cadle* v. *Tracy,* 4 F. Cas. 967 (No. 2,279) (SDNY 1873); *Farmers' Nat. Bank* v. *McElhinney,* 42 F. 801 (SD Iowa 1890); *Second Nat. Bank of Leavenworth* v. *Smoot,* 9 D. C. 371 (1876).

We cannot assume that Congress was oblivious to the existence of such common commercial transactions. We find it implausible to conclude, therefore, that Congress meant through its silence to exempt interstate loans from the reach of § 30. We would certainly be exceedingly reluctant to read such a hiatus into the regulatory scheme of § 30 in the absence of evidence of specific congressional intent. Petitioners have adduced no such evidence.

Petitioners' final argument is that the "exportation" of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates.[31] Cf. 38 Cong. Globe, 38th Cong., 1st Sess., 2123 (1864). This impairment may in fact be accentuated by the ease with which interstate credit is available by

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[31] When the National Bank Act of 1864 originally passed the House, it imposed a uniform maximum rate of interest of 7% on all national banks. See Cong. Globe, 38th Cong., 1st Sess., 1866 (1864) (remarks of Sen. Sherman); J. Knox, A History of Banking in the United States 238–239, 248, 255–256 (1903, 1969 reprint). Such a provision, of course, would have eliminated interstate inequalities among national banks resulting from differing state usury rates.

The present § 85 provides that national banks may charge interest

"at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more . . . ."

See §§ 201, 206 of Pub. L. 93–501, 88 Stat. 1558, 1560. To the extent the enumerated federal rates of interest are greater than permissible state rates, state usury laws must, of course, give way to the federal statute.

mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Affirmed.

MOBAY CHEMICAL CORP. *v.* COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 78–308. Decided January 8, 1979

Appeal from a three-judge District Court's judgment rejecting appellant's constitutional attack on § 3 of the Federal Insecticide, Fungicide, and Rodenticide Act, governing registration of pesticides, is dismissed for want of jurisdiction, where it appears that the attack was, as a legal matter, on agency practice, not on the statute, and, thus, that the three-judge court was improperly convened.

PER CURIAM.

Appellant contends that the use of one submitter's data, filed prior to 1970, in the consideration of another person's application for registration of pesticides under § 3 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as added by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 979, and as amended, 89 Stat. 755, 7 U. S. C. § 136a, effects a taking for private use and without compensation in violation of the Fifth Amendment to the Constitution and that the Act is to that extent invalid. A three-judge court was convened under former 28 U. S. C. § 2282 (1970 ed.) and proceeded to reject these contentions. Appellant seeks to appeal directly to this Court. Having examined the Act and the papers before us, however, we are convinced that whatever may be true with respect to data submitted after January 1, 1970, the FIFRA, as amended, does not at all address the issues of the conditions under which pre-1970 data may be used in considering another application. It neither authorizes, forbids, nor requires the existing agency practice with respect to pre-1970 data. As a legal matter, then, appellant's attack is on agency practice,

not on the statute. The three-judge court was thus improperly convened, *William Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 173–174 (1939), and this Court does not have jurisdiction to entertain a direct appeal from the judgment in such case. See 28 U. S. C. § 1253; *Norton* v. *Mathews,* 427 U. S. 524, 528–530 (1976). The appeal is accordingly dismissed for want of jurisdiction.

So ordered.

MR. JUSTICE BLACKMUN, dissenting.

I am of the view that the 1975 amendments to FIFRA specifically address the practices of the EPA and permit and ratify them. The constitutionality of the statute is therefore necessarily drawn into question in this lawsuit. See *Flast* v. *Cohen,* 392 U. S. 83, 88–91, and n. 3 (1968). I therefore conclude that the three-judge District Court was properly convened. On the merits, I would affirm the judgment of the District Court.

PARKLANE HOSIERY CO., INC., ET AL. *v.* SHORE

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

No. 77–1305. Argued October 30, 1978—Decided January 9, 1979

Respondent brought this stockholder's class action in the District Court for damages and other relief against petitioners, a corporation, its officers, directors, and stockholders, who allegedly had issued a materially false and misleading proxy statement in violation of the federal securities laws and Securities and Exchange Commission (SEC) regulations. Before the action came to trial the SEC sued the same defendants in the District Court alleging that the proxy statement was materially false and misleading in essentially the same respects as respondent had claimed. The District Court after a nonjury trial entered a declaratory judgment for the SEC, and the Court of Appeals affirmed. Respondent in this case then moved for partial summary judgment against petitioners, asserting that they were collaterally estopped from relitigating the issues that had been resolved against them in the SEC suit. The District Court denied the motion on the ground that such an application of collateral estoppel would deny petitioners their Seventh Amendment right to a jury trial. The Court of Appeals reversed. *Held:*

1. Petitioners, who had a "full and fair" opportunity to litigate their claims in the SEC action, are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading. Pp. 326–333.

(a) The mutuality doctrine, under which neither party could use a prior judgment against the other unless both parties were bound by the same judgment, no longer applies. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313. Pp. 326–328.

(b) The offensive use of collateral estoppel (when, as here, the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party) does not promote judicial economy in the same manner that is promoted by defensive use (when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant), and such offensive use may also be unfair to a defendant in various ways. Therefore, the general rule should be that in cases where a plaintiff could easily have joined in the

earlier action or where the application of offensive estoppel would be unfair to a defendant, a trial judge in the exercise of his discretion should not allow the use of offensive collateral estoppel. Pp. 329–331.

(c) In this case, however, the application of offensive collateral estoppel will not reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC. Nor is there any unfairness to petitioners in such application here, since petitioners had every incentive fully and vigorously to litigate the SEC suit; the judgment in the SEC action was not inconsistent with any prior decision; and in the respondent's action there will be no procedural opportunities available to the petitioners that were unavailable in the SEC action of a kind that might be likely to cause a different result. Pp. 331–333.

2. The use of collateral estoppel in this case would not violate petitioners' Seventh Amendment right to a jury trial. Pp. 333–337.

(a) An equitable determination can have collateral-estoppel effect in a subsequent legal action without violating the Seventh Amendment. *Katchen* v. *Landy*, 382 U. S. 323. Pp. 333–335.

(b) Petitioners' contention that since the scope of the Seventh Amendment must be determined by reference to the common law as it existed in 1791, at which time collateral estoppel was permitted only where there was mutuality of parties, is without merit, for many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to violate the Seventh Amendment. See, *e. g.*, *Galloway* v. *United States*, 319 U. S. 372, 388–393. Pp. 335–337.

565 F. 2d 815, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 337.

Jack B. Levitt argued the cause for petitioners. With him on the briefs were *Irving Parker*, *Joseph N. Salomon*, and *Robert N. Cooperman*.

Samuel K. Rosen argued the cause and filed a brief for respondent.*

Solicitor General McCree, Deputy Solicitor General Easterbrook, Stephen M. Shapiro, Harvey L. Pitt, Paul Gonson, and *Michael K. Wolen-*

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents the question whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party.

The respondent brought this stockholder's class action against the petitioners in a Federal District Court. The complaint alleged that the petitioners, Parklane Hosiery Co., Inc. (Parklane), and 13 of its officers, directors, and stockholders, had issued a materially false and misleading proxy statement in connection with a merger.[1] The proxy statement, according to the complaint, had violated §§ 14 (a), 10 (b), and 20 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 891, 899, as amended, 15 U. S. C. §§ 78n (a), 78j (b), and 78t (a), as well as various rules and regulations promulgated by the Securities and Exchange Commission (SEC). The complaint sought damages, rescission of the merger, and recovery of costs.

Before this action came to trial, the SEC filed suit against the same defendants in the Federal District Court, alleging that the proxy statement that had been issued by Parklane was materially false and misleading in essentially the same respects as those that had been alleged in the respondent's complaint. Injunctive relief was requested. After a 4-day

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sky filed a brief for the United States et al. as *amici curiae* urging affirmance.

Joel D. Joseph filed a brief for the Washington Legal Foundation as *amicus curiae*.

[1] The amended complaint alleged that the proxy statement that had been issued to the stockholders was false and misleading because it failed to disclose: (1) that the president of Parklane would financially benefit as a result of the company's going private; (2) certain ongoing negotiations that could have resulted in financial benefit to Parklane; and (3) that the appraisal of the fair value of Parklane stock was based on insufficient information to be accurate.

trial, the District Court found that the proxy statement was materially false and misleading in the respects alleged, and entered a declaratory judgment to that effect. *SEC* v. *Parklane Hosiery Co.*, 422 F. Supp. 477. The Court of Appeals for the Second Circuit affirmed this judgment. 558 F. 2d 1083.

The respondent in the present case then moved for partial summary judgment against the petitioners, asserting that the petitioners were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC.[2] The District Court denied the motion on the ground that such an application of collateral estoppel would deny the petitioners their Seventh Amendment right to a jury trial. The Court of Appeals for the Second Circuit reversed, holding that a party who has had issues of fact determined against him after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact. 565 F. 2d 815. The appellate court concluded that "the Seventh Amendment preserves the right to jury trial only with respect to issues of fact, [and] once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury." *Id.*, at 819. Because of an intercircuit conflict,[3] we granted certiorari. 435 U. S. 1006.

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[2] A private plaintiff in an action under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 386–390. Since the SEC action was limited to a determination of whether the proxy statement contained materially false and misleading information, the respondent conceded that he would still have to prove these other elements of his prima facie case in the private action. The petitioners' right to a jury trial on those remaining issues is not contested.

[3] The position of the Court of Appeals for the Second Circuit is in conflict with that taken by the Court of Appeals for the Fifth Circuit in *Rachal* v. *Hill*, 435 F. 2d 59.

I

The threshold question to be considered is whether, quite apart from the right to a jury trial under the Seventh Amendment, the petitioners can be precluded from relitigating facts resolved adversely to them in a prior equitable proceeding with another party under the general law of collateral estoppel. Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the earlier proceeding.[4]

A

Collateral estoppel, like the related doctrine of res judicata,[5] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 328–329. Until relatively recently, however, the scope of collateral estoppel was limited by the doctrine of mutuality of parties. Under this mutuality doctrine, neither party could use a prior judg-

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[4] In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

[5] Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 1B J. Moore, Federal Practice ¶ 0.405 [1], pp. 622–624 (2d ed. 1974); *e. g., Lawlor* v. *National Screen Serv. Corp.,* 349 U. S. 322, 326; *Commissioner* v. *Sunnen,* 333 U. S. 591, 597; *Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353.

ment as an estoppel against the other unless both parties were bound by the judgment.[6] Based on the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound,[7] the mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

By failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost, the mutuality requirement was criticized almost from its inception.[8] Recognizing the validity of this criticism, the Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid.[9] The

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[6] *E. g., Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127 ("It is a principle of general elementary law that estoppel of a judgment must be mutual"); *Buckeye Powder Co.* v. *E. I. DuPont de Nemours Powder Co.,* 248 U. S. 55, 63; Restatement of Judgments § 93 (1942).

[7] It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 329; *Hansberry* v. *Lee,* 311 U. S. 32, 40.

[8] This criticism was summarized in the Court's opinion in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* at 332–327. The opinion of Justice Traynor for a unanimous California Supreme Court in *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.,* 19 Cal. 2d 807, 812, 122 P. 2d 892, 895, made the point succinctly:

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."

[9] In *Triplett* v. *Lowell,* 297 U. S. 638, the Court had held that a determination of patent invalidity in a prior action did not bar a plaintiff from

"broader question" before the Court, however, was "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U. S., at 328. The Court strongly suggested a negative answer to that question:

> "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' *Kerotest Mfg. Co.* v. *C–O–Two Co.*, 342 U. S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Id.*, at 329.[10]

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relitigating the validity of a patent in a subsequent action against a different defendant. This holding of the *Triplett* case was explicitly overruled in the *Blonder-Tongue* case.

[10] The Court also emphasized that relitigation of issues previously adjudicated is particularly wasteful in patent cases because of their stag-

B

The *Blonder-Tongue* case involved defensive use of collateral estoppel—a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. The present case, by contrast, involves offensive use of collateral estoppel—a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff. In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action. Nevertheless, several reasons have been advanced why the two situations should be treated differently.[11]

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.*, 19 Cal. 2d, at 813, 122 P. 2d, at 895.[12] Thus defensive collateral estoppel gives a plaintiff a strong incentive to join

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gering expense and typical length. 402 U. S., at 334, 348. Under the doctrine of mutuality of parties an alleged infringer might find it cheaper to pay royalties than to challenge a patent that had been declared invalid in a prior suit, since the holder of the patent is entitled to a statutory presumption of validity. *Id.*, at 338.

[11] Various commentators have expressed reservations regarding the application of offensive collateral estoppel. Currie, Mutuality of Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957); Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Colum. L. Rev. 1457 (1968); Note, The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty, 35 Geo. Wash. L. Rev. 1010 (1967). Professor Currie later tempered his reservations. Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25 (1965).

[12] Under the mutuality requirement, a plaintiff could accomplish this result since he would not have been bound by the judgment had the original defendant won.

all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. *E. g., Nevarov* v. *Caldwell,* 161 Cal. App. 2d 762, 767–768, 327 P. 2d 111, 115; *Reardon* v. *Allen,* 88 N. J. Super. 560, 571–572, 213 A. 2d 26, 32. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[13]

A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. *The Evergreens* v. *Nunan,* 141 F. 2d 927, 929 (CA2); cf. *Berner* v. *British Commonwealth Pac. Airlines,* 346 F. 2d 532 (CA2) (application of offensive collateral estoppel denied where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million). Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.[14] Still another situation where it might be

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[13] The Restatement (Second) of Judgments § 88 (3) (Tent. Draft No. 2, Apr. 15, 1975) provides that application of collateral estoppel may be denied if the party asserting it "could have effected joinder in the first action between himself and his present adversary."

[14] In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not

unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[15]

C

We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.[16] The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. The application of offensive collateral

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be applied so as to allow plaintiffs 27 through 50 automatically to recover. Currie, *supra,* 9 Stan. L. Rev., at 304. See Restatement (Second) of Judgments § 88 (4), *supra.*

[15] If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action. See, *id.,* § 88 (2) and Comment *d.*

[16] This is essentially the approach of *id.,* § 88, which recognizes that "the distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between 'offensive' as distinct from 'defensive' issue preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter." *Id.,* Reporter's Note, at 99.

estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired.[17] Similarly, there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously.[18] Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result.[19]

We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the

[17] *SEC* v. *Everest Management Corp.*, 475 F. 2d 1236, 1240 (CA2) ("[T]he complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues"). Moreover, consolidation of a private action with one brought by the SEC without its consent is prohibited by statute. 15 U. S. C. § 78u (g).

[18] After a 4-day trial in which the petitioners had every opportunity to present evidence and call witnesses, the District Court held for the SEC. The petitioners then appealed to the Court of Appeals for the Second Circuit, which affirmed the judgment against them. Moreover, the petitioners were already aware of the action brought by the respondent, since it had commenced before the filing of the SEC action.

[19] It is true, of course, that the petitioners in the present action would be entitled to a jury trial of the issues bearing on whether the proxy statement was materially false and misleading had the SEC action never been brought—a matter to be discussed in Part II of this opinion. But the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum.

SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

II

The question that remains is whether, notwithstanding the law of collateral estoppel, the use of offensive collateral estoppel in this case would violate the petitioners' Seventh Amendment right to a jury trial.[20]

A

"[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791." *Curtis* v. *Loether,* 415 U. S. 189, 193. At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity. *Hopkins* v. *Lee,* 6 Wheat. 109; *Smith* v. *Kernochen,* 7 How. 198, 217–218; *Brady* v. *Daly,* 175 U. S. 148, 158–159; Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal *v.* Hill, 85 Harv. L. Rev. 442, 448–458 (1971).[21]

Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of this Court's decision in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500. In that case the plaintiff sought a declaratory judgment that certain arrangements between it

[20] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved. . . ."

[21] The authors of this article conclude that the historical sources "indicates that in the late eighteenth and early nineteenth centuries, determinations in equity were thought to have as much force as determinations at law, and that the possible impact on jury trial rights was not viewed with concern. . . . If collateral estoppel is otherwise warranted, the jury trial question should not stand in the way." 85 Harv. L. Rev., at 455–456. This common-law rule is adopted in the Restatement of Judgments § 68, Comment *j* (1942).

and the defendant were not in violation of the antitrust laws, and asked for an injunction to prevent the defendant from instituting an antitrust action to challenge the arrangements. The defendant denied the allegations and counterclaimed for treble damages under the antitrust laws, requesting a trial by jury of the issues common to both the legal and equitable claims. The Court of Appeals upheld denial of the request, but this Court reversed, stating:

> "[T]he effect of the action of the District Court could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.'" *Id.*, at 504.

It is thus clear that the Court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel. To avoid this result, the Court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and "that discretion . . . must, wherever possible, be exercised to preserve jury trial." *Id.*, at 510.[22]

Both the premise of *Beacon Theatres,* and the fact that it enunciated no more than a general prudential rule were confirmed by this Court's decision in *Katchen* v. *Landy,* 382 U. S. 323. In that case the Court held that a bankruptcy court, sitting as a statutory court of equity, is empowered to adjudi-

[22] Similarly, in both *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469, and *Meeker* v. *Ambassador Oil Corp.,* 375 U. S. 160, the Court held that legal claims should ordinarily be tried before equitable claims to preserve the right to a jury trial.

cate equitable claims prior to legal claims, even though the factual issues decided in the equity action would have been triable by a jury under the Seventh Amendment if the legal claims had been adjudicated first. The Court stated:

> "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." *Id.*, at 339.

Thus the Court in *Katchen* v. *Landy* recognized that an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment.

B

Despite the strong support to be found both in history and in the recent decisional law of this Court for the proposition that an equitable determination can have collateral-estoppel effect in a subsequent legal action, the petitioners argue that application of collateral estoppel in this case would nevertheless violate their Seventh Amendment right to a jury trial. The petitioners contend that since the scope of the Amendment must be determined by reference to the common law as it existed in 1791, and since the common law permitted collateral estoppel only where there was mutuality of parties, collateral estoppel cannot constitutionally be applied when such mutuality is absent.

The petitioners have advanced no persuasive reason, however, why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present. A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding.

In either case there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action. Cf. *Ex parte Peterson*, 253 U. S. 300, 310 ("No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined").

The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. See *Galloway* v. *United States*, 319 U. S. 372, 388–393 (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 497–498 (retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315, 319–321 (summary judgment does not violate the Seventh Amendment).[23]

The *Galloway* case is particularly instructive. There the party against whom a directed verdict had been entered argued that the procedure was unconstitutional under the Seventh Amendment. In rejecting this claim, the Court said:

> "The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial accord-

[23] The petitioners' reliance on *Dimick* v. *Schiedt*, 293 U. S. 474, is misplaced. In the *Dimick* case the Court held that an increase by the trial judge of the amount of money damages awarded by the jury violated the *second* clause of the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Collateral estoppel does not involve the "re-examination" of any fact decided by a jury. On the contrary, the whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed.

> ing to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. . . .
>
> "The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 319 U. S., at 390, 392 (footnote omitted).

The law of collateral estoppel, like the law in other procedural areas defining the scope of the jury's function, has evolved since 1791. Under the rationale of the *Galloway* case, these developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791. Thus if, as we have held, the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the SEC action, nothing in the Seventh Amendment dictates a different result, even though because of lack of mutuality there would have been no collateral estoppel in 1791.[24]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE REHNQUIST, dissenting.

It is admittedly difficult to be outraged about the treatment accorded by the federal judiciary to petitioners' demand for a jury trial in this lawsuit. Outrage is an emotion all but

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[24] In reaching this conclusion, the Court of Appeals went on to state: "Were there any doubt about the [question whether the petitioners were entitled to a jury redetermination of the issues otherwise subject to col-

impossible to generate with respect to a corporate defendant in a securities fraud action, and this case is no exception. But the nagging sense of unfairness as to the way petitioners have been treated, engendered by the *imprimatur* placed by the Court of Appeals on respondent's "heads I win, tails you lose" theory of this litigation, is not dispelled by this Court's antiseptic analysis of the issues in the case. It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which *was* included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.

The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence. Today, however, the Court reduces this valued right, which Blackstone praised as "the glory of the English law," to a mere "neutral"

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lateral estoppel] it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39 (b), (c), F.R.Civ.P., to order that the issues in the SEC case be tried by a jury or before an advisory jury." 565 F. 2d, at 821–822. (Footnote omitted.)

The Court of Appeals was mistaken in these suggestions. The petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC. Moreover, an advisory jury, which might have only delayed and complicated that proceeding, would not in any event have been a Seventh Amendment jury. And the petitioners were not in a position to expedite the private action and stay the SEC action. The Securities Exchange Act of 1934 provides for prompt enforcement actions by the SEC unhindered by parallel private actions. 15 U. S. C. § 78u (g).

factor and in the name of procedural reform denies the right of jury trial to defendants in a vast number of cases in which defendants, heretofore, have enjoyed jury trials. Over 35 years ago, Mr. Justice Black lamented the "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States,* 319 U. S. 372, 397 (1943) (dissenting opinion). Regrettably, the erosive process continues apace with today's decision.[1]

I

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The history of the Seventh Amendment has been amply documented by this Court and by legal scholars,[2] and it would serve no useful purpose to attempt here to repeat all that has been written on the subject. Nonetheless, the decision of this case turns on the scope and effect of the Seventh Amendment, which, perhaps more than with any other provision of the Constitution, are determined by reference to the historical

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[1] Because I believe that the use of offensive collateral estoppel in this particular case was improper, it is not necessary for me to decide whether I would approve its use in circumstances where the defendant's right to a jury trial was not impaired.

[2] See, *e. g., Colgrove* v. *Battin,* 413 U. S. 149 (1973); *Capital Traction Co.* v. *Hof,* 174 U. S. 1 (1899); *Parsons* v. *Bedford,* 3 Pet. 433 (1830); Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966) (hereinafter Henderson); Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639 (1973) (hereinafter Wolfram). See also *United States* v. *Wonson,* 28 F. Cas. 745 (No. 16,750) (CC Mass. 1812) (Story, C. J.).

setting in which the Amendment was adopted. See *Colgrove* v. *Battin,* 413 U. S. 149, 152 (1973). It therefore is appropriate to pause to review, albeit briefly, the circumstances preceding and attending the adoption of the Seventh Amendment as a guide in ascertaining its application to the case at hand.

A

It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England. See Sources and Documents Illustrating the American Revolution 1764–1788 and the Formation of the Federal Constitution 94 (S. Morison 2d ed. 1929); R. Pound, The Development of Constitutional Guarantees of Liberty 69–72 (1957); C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution 208–211 (1960). The extensive use of vice-admiralty courts by colonial administrators to eliminate the colonists' right of jury trial was listed among the specific offensive English acts denounced in the Declaration of Independence.[3] And after

[3] The Declaration of Independence states: "For depriving us in many cases, of the benefits of Trial by Jury." Just two years earlier, in the Declaration of Rights adopted October 14, 1774, the first Continental Congress had unanimously resolved that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of the Continental Congress 69 (1904).

Holdsworth has written that of all the new methods adopted to strengthen the administration of the British laws, "the most effective, and therefore the most disliked, was the extension given to the jurisdiction of the reorganized courts of admiralty and vice-admiralty. It was the most effective, because it deprived the defendant of the right to be tried by a jury which was almost certain to acquit him." 11 W. Holdsworth, A History of English Law 110 (1966). While the vice-admiralty courts dealt

war had broken out, all of the 13 newly formed States restored the institution of civil jury trial to its prior prominence; 10 expressly guaranteed the right in their state constitutions and the 3 others recognized it by statute or by common practice.[4] Indeed, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions . . . ." L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960).[5]

One might justly wonder then why no mention of the right of jury trial in civil cases should have found its way into the Constitution that emerged from the Philadelphia Convention in 1787. Article III, § 2, cl. 3, merely provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The omission of a clause protective of the civil jury right was not for lack of trying, however. Messrs. Pinckney and Gerry proposed to provide a clause securing the right of jury trial in civil cases, but their efforts failed.[6] Several rea-

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chiefly with criminal offenses, their jurisdiction also was extended to many areas of the civil law. Wolfram 654 n. 47.

[4] Ga. Const., Art. LXI (1777), in 2 The Federal and State Constitutions Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) (hereinafter Thorpe); Md. Const., Art. III (1776), in 3 Thorpe 1686–1687; Mass. Const., Art. XV (1780), in 3 Thorpe 1891–1892; N. H. Const., Art. XX (1784), in 4 Thorpe 2456; N. J. Const., Art. XXII (1776), in 5 Thorpe 2598; N. Y. Const., Art. XLI (1777), in 5 Thorpe 2637; N. C. Const., Declaration of Rights, Art. XIV (1776), in 5 Thorpe 2788; Pa. Const., Declaration of Rights, Art. XI (1776), in 5 Thorpe 3083; S. C. Const., Art. XLI (1778), in 6 Thorpe 3257; Va. Const., Bill of Rights, § 11 (1776), in 7 Thorpe 3814. See Wolfram 655.

[5] When Congress in 1787 adopted the Northwest Ordinance for governance of the territories west of the Appalachians, it included a guarantee of trial by jury in civil cases. 2 Thorpe 960–961.

[6] The proposal was to add the following language to Art. III: "And a trial by jury shall be preserved as usual in civil cases." 2 M. Farrand, The Records of the Federal Convention of 1787, p. 628 (1911). The

sons have been advanced for this failure. The Federalists argued that the practice of civil juries among the several States varied so much that it was too difficult to draft constitutional language to accommodate the different state practices. See *Colgrove* v. *Battin, supra,* at 153.[7] Whatever the reason for the omission, however, it is clear that even before the delegates had left Philadelphia, plans were under way to attack the proposed Constitution on the ground that it failed to contain a guarantee of civil jury trial in the new federal courts. See R. Rutland, George Mason 91 (1961); Wolfram 662.

The virtually complete absence of a bill of rights in the proposed Constitution was the principal focus of the Anti-Federalists' attack on the Constitution, and the lack of a provision for civil juries featured prominently in their arguments. See *Parsons* v. *Bedford,* 3 Pet. 433, 445 (1830). Their pleas struck a responsive chord in the populace, and the price exacted in many States for approval of the Constitution was the appending of a list of recommended amendments, chief among them a clause securing the right of jury trial in civil cases.[8] Responding to the pressures for a civil jury

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debate regarding this proposal is quoted in *Colgrove* v. *Battin, supra,* at 153–155, n. 8.

[7] The objection of Mr. Gorham of Massachusetts was that "[t]he constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States." 2 M. Farrand, *supra,* at 628. Commentators have suggested several additional reasons for the failure of the convention to include a civil jury guarantee. See Henderson 294–295; ("[T]he true reason for omitting a similar provision for civil juries was at least in part that the convention members simply wanted to go home"); Wolfram 660–666.

[8] See Henderson 298; Wolfram 667–703. Virginia's recommended jury trial amendment is typical: "That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and [ought] to remain sacred

guarantee generated during the ratification debates, the first Congress under the new Constitution at its first session in 1789 proposed to amend the Constitution by adding the following language: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 Annals of Cong. 435 (1789). That provision, altered in language to what became the Seventh Amendment, was proposed by the Congress in 1789 to the legislatures of the several States and became effective with its ratification by Virginia on December 15, 1791.[9]

The foregoing sketch is meant to suggest what many of those who oppose the use of juries in civil trials seem to ignore. The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.[10] Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges

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and inviolable." 3 J. Elliot, Debates on the Federal Constitution 658 (2d ed. 1836).

[9] The Judiciary Act of September 24, 1789, which was passed within six months of the organization of the new government and on the day before the first 10 Amendments were proposed to the legislatures of the States by the First Congress, provided for a civil jury trial right. 1 Stat. 77.

[10] Thomas Jefferson stated: "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861).

was important to the founders because juries represent the layman's common sense, the "passional elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community. O. Holmes, Collected Legal Papers 237 (1920). Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.[11] It is with these values that underlie the Seventh Amendment in mind that the Court should, but obviously does not, approach the decision of this case.

B

The Seventh Amendment requires that the right of trial by jury be "preserved." Because the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards. *E. g., Curtis* v. *Loether,* 415 U. S. 189, 193 (1974); *Colgrove* v. *Battin,* 413 U. S., at 155–156; *Ross* v. *Bernhard,* 396 U. S. 531, 533 (1970); *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 8–9 (1899); *Parsons* v. *Bedford, supra,* at 446. Thus, in *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, 657 (1935), the Court stated that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."

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[11] Wolfram 671. Professor Wolfram has written:

"[T]he antifederalists were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive, decorous and productive of the same decisions that judges sitting without juries would produce. The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the day, libertarians who avowed that important areas of protection for litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases." *Id.,* at 671–672.

And in *Dimick* v. *Schiedt,* 293 U. S. 474, 476 (1935), the Court held: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." [12] If a jury would have been impaneled in a particular kind of case in 1791, then the Seventh Amendment requires a jury trial today, if either party so desires.

To be sure, it is the substance of the right of jury trial that is preserved, not the incidental or collateral effects of common-law practice in 1791. *Walker* v. *New Mexico & S. P. R. Co.,* 165 U. S. 593, 596 (1897). "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury. . . ." *Baltimore & Carolina Line* v. *Redman, supra,* at 657. Accord, *Colgrove* v. *Battin, supra,* at 156–157; *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494, 498 (1931); *Ex parte Peterson,* 253 U S. 300, 309 (1920). "The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law of 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." *Galloway* v. *United States,* 319 U. S., at 390.

To say that the Seventh Amendment does not tie federal courts to the exact procedure of the common law in 1791 does

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[12] The majority suggests that *Dimick* v. *Schiedt* is not relevant to the decision in this case because it dealt with the second clause of the Seventh Amendment. *Ante,* at 336 n. 23. I disagree. There is no intimation in that opinion that the first clause should be treated any differently from the second. The *Dimick* Court's respect for the guarantees of the Seventh Amendment applies as much to the first clause as to the second.

not imply, however, that any nominally "procedural" change can be implemented, regardless of its impact on the functions of the jury. For to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment. See *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 322 (1967); *Galloway* v. *United States, supra,* at 395; *Dimick* v. *Schiedt, supra,* at 487; *Ex parte Peterson, supra,* at 309–310. And since we deal here not with the common law *qua* common law but with the Constitution, no amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated "procedural reform."

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment. Because "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Dimick* v. *Schiedt, supra,* at 486, quoted in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500, 501 (1959).

C

Judged by the foregoing principles, I think it is clear that petitioners were denied their Seventh Amendment right to a

jury trial in this case. Neither respondent nor the Court doubts that at common law as it existed in 1791, petitioners would have been entitled in the private action to have a jury determine whether the proxy statement was false and misleading in the respects alleged. The reason is that at common law in 1791, collateral estoppel was permitted only where the parties in the first action were identical to, or in privity with, the parties to the subsequent action.[13] It was not until 1971 that the doctrine of mutuality was abrogated by this Court in certain limited circumstances. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313.[14] But developments in the judge-made doctrine of collateral estoppel, however salutary, cannot, consistent with the Seventh Amendment, contract in any material fashion the right to a jury trial that a defendant would have enjoyed in 1791. In the instant case, resort to the doctrine of collateral estoppel does more than merely contract the right to a jury trial: It eliminates the right entirely and therefore contravenes the Seventh Amendment.

The Court responds, however, that at common law "a litigant was not entitled to have a jury [in a subsequent action at law between the same parties] determine issues that had been previously adjudicated by a chancellor in equity," and that "petitioners have advanced no persuasive reason . . . why the meaning of the Seventh Amendment should depend on

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[13] See *Smith* v. *Kernochen,* 7 How. 198, 218 (1849); *Hopkins* v. *Lee,* 6 Wheat. 109, 113–114 (1821); F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius *232 (7th ed. 1817); T. Peake, A Compendium of the Law of Evidence 38 (2d ed. 1806).

[14] The Court's decision in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation* is, on its facts, limited to the defensive use of collateral estoppel in patent cases. Abandonment of mutuality is a recent development. The case of *Bernhard* v. *Bank of America Nat. Trust & Sav. Assn.,* 19 Cal. 2d 807, 122 P. 2d 892, generally considered the seminal case adopting the new approach, was not decided until 1942.

whether or not mutuality of parties is present." *Ante*, at 333, 335. But that is tantamount to saying that since a party would not be entitled to a jury trial if he brought an equitable action, there is no persuasive reason why he should receive a jury trial on virtually the same issues if instead he chooses to bring his lawsuit in the nature of a legal action. The persuasive reason is that the Seventh Amendment requires that a party's right to jury trial which existed at common law be "preserved" from incursions by the government or the judiciary. Whether this Court believes that use of a jury trial in a particular instance is necessary, or fair or repetitive is simply irrelevant. If that view is "rigid," it is the Constitution which commands that rigidity. To hold otherwise is to rewrite the Seventh Amendment so that a party is guaranteed a jury trial in civil cases unless this Court thinks that a jury trial would be inappropriate.

No doubt parallel "procedural reforms" could be instituted in the area of criminal jurisprudence, which would accomplish much the same sort of expedition of court calendars and conservation of judicial resources as would the extension of collateral estoppel in civil litigation. Government motions for summary judgment, or for a directed verdict in favor of the prosecution at the close of the evidence, would presumably save countless hours of judges' and jurors' time. It can scarcely be doubted, though, that such "procedural reforms" would not survive constitutional scrutiny under the jury trial guarantee of the Sixth Amendment. Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the fact-

finding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions. Cf. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946).

Relying on *Galloway* v. *United States, Gasoline Products Co.* v. *Champlin Refining Co.*, and *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315 (1902), the Court seems to suggest that the offensive use of collateral estoppel in this case is permissible under the limited principle set forth above that a mere procedural change that does not invade the province of the jury and a defendant's right thereto to a greater extent than authorized by the common law is permissible. But the Court's actions today constitute a far greater infringement of the defendant's rights than it ever before has sanctioned. In *Galloway*, the Court upheld the modern form of directed verdict against a Seventh Amendment challenge, but it is clear that a similar form of directed verdict existed at common law in 1791. *E. g., Beauchamp* v. *Borret*, Peake 148, 170 Eng. Rep. 110 (N. P. 1792); *Coupey* v. *Henley*, 2 Esp. 540, 542, 170 Eng. Rep. 448, 449 (C. P. 1797).[15] The modern form did not materially alter the function of the jury. Similarly, the modern device of summary judgment was found not to violate the Seventh Amendment because in 1791 a demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice. *E. g., Pawling* v. *United States*, 4 Cranch 219, 221–222 (1808).[16]

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[15] See Henderson 302–303 ("In the England of 1790 the phrase 'to direct a verdict' was common. Further, it was commonplace to instruct the jury 'that the plaintiff was entitled to recover,' or 'the plaintiff must have a verdict' "); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 686 (1918) (cases cited therein).

[16] To demur, a party would admit the truth of all the facts adduced against him and every adverse inference that could be drawn therefrom, and the court would determine which party should receive judgment on

The procedural devices of summary judgment and directed verdict are direct descendants of their common-law antecedents. They accomplish nothing more than could have been done at common law, albeit by a more cumbersome procedure. See also *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940). And while at common law there apparently was no practice of setting aside a verdict in part,[17] the Court in *Gasoline Products* permitted a partial retrial of "distinct and separable" issues because the change in procedure would not impair the substance of the right to jury trial. 283 U. S., at 498. The parties in *Gasoline Products* still enjoyed the right to have a jury determine all issues of fact.

By contrast, the development of nonmutual estoppel is a substantial departure from the common law and its use in this case completely deprives petitioners of their right to have a jury determine contested issues of fact. I am simply unwilling to accept the Court's presumption that the complete extinguishment of petitioners' right to trial by jury can be justified as a mere change in "procedural incident or detail." Over 40 years ago, Mr. Justice Sutherland observed in a not dissimilar case: "[T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." *Dimick* v. *Schiedt*, 293 U. S., at 485.

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the basis of these admitted facts and inferences. See *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 388 (1913); *Gibson* v. *Hunter*, 2 H. Bl. 187, 126 Eng. Rep. 499 (N. P. 1793); Henderson 304–305; Scott, *supra* n. 15, at 683–684.

[17] The Court in *Gasoline Products* quoted Lord Mansfield, who stated that when a verdict is correct as to one issue but erroneous as to another "'for form's sake, we must set aside the whole verdict . . . .'" *Edie* v. *East India Co.*, 1 W. Bl. 295, 298 (K. B. 1761), quoted 283 U. S., at 498.

II

Even accepting, *arguendo,* the majority's position that there is no violation of the Seventh Amendment here, I nonetheless would not sanction the use of collateral estoppel in this case. The Court today holds:

> "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Ante,* at 331.

In my view, it is "unfair" to apply offensive collateral estoppel where the party who is sought to be estopped has not had an opportunity to have the facts of his case determined by a jury. Since in this case petitioners were not entitled to a jury trial in the Securities and Exchange Commission (SEC) lawsuit,[18] I would not estop them from relitigating the issues determined in the SEC suit before a jury in the private action. I believe that several factors militate in favor of this result.

First, the use of offensive collateral estoppel in this case runs counter to the strong federal policy favoring jury trials, even if it does not, as the majority holds, violate the Seventh Amendment. The Court's decision in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 (1959), exemplifies that policy. In *Beacon Theatres* the Court held that where both equitable and legal claims or defenses are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

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[18] I agree with the Court that "petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC." *Ante,* at 338 n. 24.

Id., at 510–511.[19] And in *Jacob* v. *New York*, 315 U. S. 752, 752–753 (1942), the Court stated: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Accord, *Simler* v. *Conner*, 372 U. S. 221, 222 (1963); *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 537–539 (1958) (strong federal policy in favor of juries requires jury trials in diversity cases, regardless of state practice). Today's decision will mean that in a large number of private cases defendants will no longer enjoy the right to jury trial.[20] Neither the Court nor respondent has adverted or cited to any unmanageable problems that have resulted

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[19] *Meeker* v. *Ambassador Oil Corp.*, 375 U. S. 160 (1963) (*per curiam*), is a case where the doctrine of collateral estoppel yielded to the right to a jury trial. In *Meeker*, plaintiffs asserted both equitable and legal claims, which presented common issues, and demanded a jury trial. The trial court tried the equitable claim first, and decided that claim, and the common issues, adversely to plaintiffs. As a result, it held that plaintiffs were precluded from relitigating those same issues before a jury on their legal claim. 308 F. 2d 875, 884 (CA10 1962). Plaintiffs appealed, alleging a denial of their right to a jury trial, but the Tenth Circuit affirmed the trial court. This Court reversed the Court of Appeals on the basis of *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962), even though, unlike those cases, the equitable action in *Meeker* already had been tried and the common issues determined by the court. Thus, even though the plaintiffs in *Meeker* had received a "full and fair" opportunity to try the common issues in the prior equitable action, they nonetheless were given the opportunity to retry those issues before a jury. Today's decision is totally inconsistent with *Meeker* and the Court fails to explain this inconsistency.

[20] The Court's decision today may well extend to other areas, such as antitrust, labor, employment discrimination, consumer protection, and the like, where a private plaintiff may sue for damages based on the same or similar violations that are the subject of government actions.

from according defendants jury trials in such cases. I simply see no "imperative circumstances" requiring this wholesale abrogation of jury trials.[21]

Second, I believe that the opportunity for a jury trial in the second action could easily lead to a different result from that obtained in the first action before the court and therefore that it is unfair to estop petitioners from relitigating the issues before a jury. This is the position adopted in the Restatement (Second) of Judgments, which disapproves of the application of offensive collateral estoppel where the defendant has an opportunity for a jury trial in the second lawsuit that was not available in the first action.[22] The Court accepts the proposition that it is unfair to apply offensive collateral estoppel "where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Ante,* at 331. Differences in discovery opportunities between the two actions are cited as examples of situations where it would be unfair to permit offensive collateral estoppel. *Ante,* at 331 n. 15. But in the Court's view, the fact that petitioners would have been entitled to a jury trial in the present action is not such a "procedural opportunit[y]" because "the presence or absence of a jury as factfinder is basically *neutral,* quite unlike, for example, the

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[21] This is not to say that Congress cannot commit enforcement of statutorily created rights to an "administrative process or specialized court of equity." *Curtis* v. *Loether,* 415 U. S. 189, 195 (1974); see *Atlas Roofing Co., Inc.* v. *Occupational Safety & Health Review Comm'n,* 430 U. S. 442 (1977); *Katchen* v. *Landy,* 382 U. S. 323 (1966); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937).

[22] Restatement (Second) of Judgments § 88 (2), Comment *d* (Tent. Draft No. 2, Apr. 15, 1975). Citing *Rachal* v. *Hill,* 435 F. 2d 59 (CA5 1970), cert. denied, 403 U. S. 904 (1971), the Reporter's Note states: "The differences between the procedures available in the first and second actions, while not sufficient to deny issue preclusion between the same parties, may warrant a refusal to carry over preclusion to an action involving another party." Restatement, *supra,* at 100.

necessity of defending the first lawsuit in an inconvenient forum." *Ante,* at 332 n. 19 (emphasis added).

As is evident from the prior brief discussion of the development of the civil jury trial guarantee in this country, those who drafted the Declaration of Independence and debated so passionately the proposed Constitution during the ratification period, would indeed be astounded to learn that the presence or absence of a jury is merely "neutral," whereas the availability of discovery, a device unmentioned in the Constitution, may be controlling. It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted. And I suspect that anyone who litigates cases before juries in the 1970's would be equally amazed to hear of the supposed lack of distinction between trial by court and trial by jury. The Court can cite no authority in support of this curious proposition. The merits of civil juries have been long debated, but I suspect that juries have never been accused of being merely "neutral" factors.[23]

Contrary to the majority's supposition, juries can make a difference, and our cases have, before today at least, recognized this obvious fact. Thus, in *Colgrove* v. *Battin,* 413 U. S., at 157, we stated that "the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues, *Gasoline Products Co.* v. *Champlin Co.,* 283 U. S. 494, 498 (1931) . . . ." And in *Byrd* v. *Blue Ridge*

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[23] See, *e. g.,* Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 63–81 (1955) (thorough summary of arguments pro and con on jury trials and an extensive bibliography); H. Kalven & H. Zeisel, The American Jury 4 n. 2 (1966) (bibliography); Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U. L. Rev. 486, 502–508 (1975) (discussion of arguments for and against juries).

Rural Electrical Cooperative, supra, at 537, the Court conceded that "the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense . . . . It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury." See *Curtis* v. *Loether,* 415 U. S., at 198; cf. *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968). Jurors bring to a case their common sense and community values; their "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." H. Kalven & H. Zeisel, The American Jury 8 (1966).

The ultimate irony of today's decision is that its potential for significantly conserving the resources of either the litigants or the judiciary is doubtful at best. That being the case, I see absolutely no reason to frustrate so cavalierly the important federal policy favoring jury decisions of disputed fact questions. The instant case is an apt example of the minimal savings that will be accomplished by the Court's decision. As the Court admits, even if petitioners are collaterally estopped from relitigating whether the proxy was materially false and misleading, they are still entitled to have a jury determine whether respondent was injured by the alleged misstatements and the amount of damages, if any, sustained by respondent. *Ante,* at 325 n. 2. Thus, a jury must be impaneled in this case in any event. The time saved by not trying the issue of whether the proxy was materially false and misleading before the jury is likely to be insubstantial.[24] It is just as probable that today's decision will have the result of coercing defendants to agree to consent orders or settle-

[24] Much of the delay in jury trials is attributed to the jury selection, *voir dire,* and the charge. See H. Zeisel, H. Kalven, & B. Buchholz, Delay in the Court 79 (1959). None of these delaying factors will be avoided by today's decision.

ments in agency enforcement actions in order to preserve their right to jury trial in the private actions. In that event, the Court, for no compelling reason, will have simply added a powerful club to the administrative agencies' arsenals that even Congress was unwilling to provide them.

DUREN *v.* MISSOURI

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 77-6067. Argued November 1, 1978—Decided January 9, 1979

Petitioner was convicted of crimes in a Missouri State court notwithstanding his contention that his right to trial by a jury chosen from a fair cross section of his community was denied by provisions of Missouri law granting women who so request an automatic exemption from jury service. Under the challenged jury-selection system, before the jury wheel is filled women may claim exemption in response to a prominent notice on a jury-selection questionnaire, and, prior to the appearance of jurors for service, women are afforded an additional opportunity to decline service by returning the summons or by simply not reporting for jury duty. Petitioner established that 54% of the adults in the forum county were women; that during 8 of the 10 months immediately prior to his trial only 26.7% of those summoned from the jury wheel were women; and that only 14.5% of the persons on the postsummons weekly venires during this period were women. For the month in which petitioner's jury was chosen, the weekly venires averaged 15.5% women. Petitioner's all-male jury was selected from a panel of 53, of whom 5 were women. The Missouri Supreme Court questioned aspects of petitioner's statistics but held that the underrepresentation of women on jury venires in the forum county did not violate the fair-cross-section requirement set forth in *Taylor* v. *Louisiana,* 419 U. S. 522, under which a defendant in order to establish a prima facie violation of that requirement must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation results from systematic exclusion of the group in the jury-selection process. *Held:* The exemption on request of women from jury service under Missouri law, resulting in an average of less than 15% women on jury venires in the forum county, violates the "fair-cross-section" requirement of the Sixth Amendment as made applicable to the States by the Fourteenth. Pp. 363–370.

(a) If women, who "are sufficiently numerous and distinct from men," are systematically excluded from venires, the fair-cross-section requirement cannot be satisfied. *Taylor, supra,* at 531. P. 364.

(b) There is no evidence to show that the 1970 census data on which

petitioner relied distorted the percentage of women in the forum county at the time of trial, and the court below erred in concluding that jury venires with approximately 15% women are "reasonably representative" of the relevant community. Pp. 364–366.

(c) Petitioner's proof showed that the underrepresentation of women, generally and on his venire, was attributable to their systematic exclusion in the jury-selection process at both the jury wheel and summons stages, resulting in the low percentage (14.5%) at the final, venire, stage. Pp. 366–367.

(d) Respondent did not satisfy its burden of showing any significant state interest justifying the infringement of petitioner's constitutional right to a jury drawn from a fair cross section of the community. It did not show that exemptions other than that for women caused the underrepresentation of women. Nor does exempting all women because of preclusive domestic responsibilities of some women constitute sufficient justification for the disproportionate exclusion of women on jury venires permitted in Missouri. Pp. 367–370.

556 S. W. 2d 11, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 370.

Lee M. Nation and *Ruth Bader Ginsburg* argued the cause for petitioner. With them on the briefs was *James W. Fletcher*.

Nanette Laughrey, Assistant Attorney General of Missouri, argued the cause for respondent. With her on the brief were *John Ashcroft*, Attorney General, and *Philip M. Koppe*, Assistant Attorney General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), this Court held that systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably

Solicitor General McCree, Assistant Attorney General Days, and *Brian K. Landsberg* filed a brief for the United States as *amicus curiae* urging reversal.

representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community.[1] Under the system invalidated in *Taylor,* a woman could not serve on a jury unless she filed a written declaration of her willingness to do so.[2] As a result, although 53% of the persons eligible for jury service were women, less than 1% of the 1,800 persons whose names were drawn from the jury wheel during the year in which appellant Taylor's jury was chosen were female. *Id.,* at 524.

At the time of our decision in *Taylor,* no other State provided that women could not serve on a jury unless they volunteered to serve.[3] However, five States, including Missouri, provided an automatic exemption from jury service for any women requesting not to serve.[4] Subsequent to *Taylor,*

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[1] See *Taylor* v. *Louisiana,* 419 U. S., at 526–531, 538; *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class. See *Taylor, supra,* at 526.

[2] See La. Const., Art. VII, § 41 (1921), and La. Code Crim. Proc., Art 402 (West 1967), reproduced in 419 U. S., at 523 nn. 1 and 2.

[3] Two other States, New Hampshire and Florida, had recently abolished similar provisions requiring otherwise qualified women to volunteer for jury service. See N. H. Rev. Stat. Ann. § 500:1 (1955), repealed by 1967 N. H. Laws. ch. 100, § 1; Fla. Stat. § 40.01 (1) (1961), repealed by 1967 Fla. Laws, ch. 67–154, § 1. The current provisions are at N. H. Rev. Stat. Ann. § 500–A:2 (Supp. 1977) (providing exemption for women caring for children under age 12); Fla. Stat. § 40.01 (1) (1977) (providing exemption for pregnant women and women with children under age 15).

[4] Ga. Code § 59–124 (1965); Mo. Const., Art. 1, § 22 (b), Mo. Rev. Stat. § 494.031 (2) (Supp. 1978); N. Y. Jud. Law §§ 507 (7), 599 (7), 665 (7) (McKinney 1964); R. I. Gen. Laws § 9–9–11 (1969); Tenn. Code Ann. § 22–101 (Supp. 1978), § 22–108 (1955). In addition, Alabama did not allow women to serve on juries until 1966, see Ala. Code, Tit. 30, § 21 (1958), in which year they were provided an exemption "for good cause shown." 1966 Ala. Acts, p. 429, § 4; Ala. Code, Tit. 30, § 21 (Supp. 1973).

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three of these States eliminated this exemption.[5] Only Missouri, respondent in this case, and Tennessee[6] continue to exempt women from jury service upon request.[7] Today we hold that such systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement.

I

Petitioner Duren was indicted in 1975 in the Circuit Court of Jackson County, Mo., for first-degree murder and first-degree robbery. In a pretrial motion to quash his petit jury panel, and again in a post-conviction motion for a new trial, he contended that his right to trial by a jury chosen from a fair cross section of his community was denied by provisions of Missouri law granting women who so request an automatic exemption from jury service.[8] Both motions were denied.

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[5] 1975 Ga. Laws, pp. 779–780; 1975 N. Y. Laws, chs. 4, 21; 1975 R. I. Pub. Laws, ch. 233, § 1. The current provisions relating to qualification for jury service are at Ga. Code Ann. § 59–112 (Supp. 1978); N. Y. Jud. Law § 512 (McKinney Supp. 1978); R. I. Gen. Laws §§ 9–9–1, 9–9–11 (Supp. 1977). Alabama has replaced its exemption of women for cause, see n. 4, *supra,* with a general provision setting out qualifications for jury service. Ala. Code § 12–16–43 (1975).

[6] The Tennessee Supreme Court has stated that the constitutionality of the exemption for women is "highly suspect" but has declined to test the exemption "pursuant to the principles announced in *Taylor* until a record is presented that reflects the consequences of [its] operation," *Scharff* v. *State,* 551 S. W. 2d 671, 676 (1977). On at least one occasion, the Tennessee House of Representatives has passed a bill that would repeal that State's exemption for women, see H. R. 105, 89th Assembly, 1st Sess. (1975). See generally Daughtrey, Cross Sectionalism in Jury-Selection Procedures After *Taylor* v. *Louisiana,* 43 Tenn. L. Rev. 1, 49–50 (1975).

[7] In Massachusetts, the court may excuse any woman requesting not to serve in a case involving sex crimes. Mass. Gen. Laws Ann., ch. 234, § 1A (West 1959).

[8] Missouri Const., Art. 1, § 22 (b), provides:

"No citizen shall be disqualified from jury service because of sex, but the

At hearings on these motions, petitioner established that the jury-selection process in Jackson County begins with the annual mailing of a questionnaire to persons randomly selected from the Jackson County voter registration list. Approximately 70,000 questionnaires were mailed in 1975. The questionnaire contains a list of occupations and other categories which are the basis under Missouri law for either disqualification [9] or exemption [10] from jury service.[11] Included on the questionnaire is a paragraph prominently addressed "TO WOMEN" that states in part:

> "Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once." [12]

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court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

This constitutional mandate is implemented by Mo. Rev. Stat. § 494.031 (2) (Supp. 1978), providing:

"The following persons, shall, upon their timely application to the court, be excused from service as a juror, either grand or petit:

. . . . . .

"(2) Any woman who requests exemption before being sworn as a juror."

See also § 497.030 (Supp. 1978) and n. 11, *infra*.

[9] Felons, illiterates, attorneys, judges, members of the Armed Forces, and certain others are ineligible for jury service. Mo. Rev. Stat. § 494.020 (Supp. 1978).

[10] In addition to women, the following are exempted from jury service upon request: persons over age 65, medical doctors, clergy, teachers, persons who performed jury service within the preceding year, "any person whose absence from his regular place of employment would, in the judgment of the court, tend materially and adversely to affect the public safety, health, welfare or interest," and "[a]ny person upon whom service as a juror would in the judgment of the court impose an undue hardship." § 494.031 (Supp. 1978).

[11] The use and form of this questionnaire are prescribed by a state statute applicable only to Jackson County. § 497.130 (Supp. 1978).

[12] *Ibid.*; App. 43.

A similar paragraph is addressed "TO MEN OVER 65 YEARS OF AGE," who are also statutorily exempt upon request.[13]

The names of those sent questionnaires are placed in the master jury wheel for Jackson County, except for those returning the questionnaire who indicate disqualification or claim an applicable exemption. Summonses are mailed on a weekly basis to prospective jurors randomly drawn from the jury wheel. The summons, like the questionnaire, contains special directions to men over 65 and to women, this time advising them to return the summons by mail if they desire not to serve. The practice also is that even those women who do not return the summons are treated as having claimed exemption if they fail to appear for jury service on the appointed day.[14] Other persons seeking to claim an exemption at this stage must make written or personal application to the court.

Petitioner established that according to the 1970 census, 54% of the adult inhabitants of Jackson County were women. He also showed that for the periods June–October 1975 and January–March 1976,[15] 11,197 persons were summoned and that 2,992 of these, or 26.7%, were women. Of those summoned, 741 women and 4,378 men appeared for service. Thus, 14.5% (741 of 5,119) of the persons on the postsummons weekly venires during the period in which petitioner's jury was chosen were female.[16] In March 1976, when petitioner's

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[13] See n. 10, *supra*.

[14] This practice in Jackson County with respect to women not appearing for service is not authorized by statute, and persons failing to report for jury service are subject to contempt of court, Mo. Rev. Stat. § 494.080 (1952). However, Mo. Const., Art. 1, § 22 (b), allows a woman to claim exemption at any time "before being sworn as a juror," n. 8, *supra*.

[15] The record does not reveal whether any summonses were mailed in November or December 1975.

[16] The smallest percentage of women appearing on a jury venire, 7.3%, occurred the first week in January 1976 (12 women of 164 appearing), and the largest percentage of women appearing, 21.8%, occurred in March 1976 (32 women of 147 appearing). App. 8, 45.

trial began, 15.5% of those on the weekly venires were women (110 of 707).[17] Petitioner's jury was selected from a 53-person panel on which there were 5 women; all 12 jurors chosen were men.[18] None of the foregoing statistical evidence was disputed.

In affirming petitioner's conviction, the Missouri Supreme Court questioned two aspects of his statistical presentation. First, it considered the census figures inadequate because they were six years old and might not precisely mirror the percentage of women registered to vote. Second, petitioner had not unequivocally demonstrated the extent to which the low percentage of women appearing for jury service was due to the automatic exemption for women, rather than to sex-neutral exemptions such as that for persons over age 65.

The court went on to hold, however, that even accepting petitioner's statistical proof, "the number of female names in the wheel, those summoned and those appearing were well above acceptable constitutional standards." 556 S. W. 2d 11, 15–17 (1977).[19] We granted certiorari, 435 U. S. 1006 (1978), because of concern that the decision below is not consistent with our decision in *Taylor*.

II

We think that in certain crucial respects the Missouri Supreme Court misconceived the nature of the fair-cross-section inquiry set forth in *Taylor*. In holding that "petit juries must be drawn from a source fairly representative of the community," 419 U. S., at 538, we explained that

> "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude

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[17] 556 S. W. 2d 11, 16 (Mo. 1977).

[18] Brief for Respondent 5.

[19] The decision below also rejected petitioner's challenge under the Equal Protection Clause of the Fourteenth Amendment. This challenge has not been renewed before this Court.

distinctive groups in the community and thereby fail to be reasonably representative thereof." *Ibid.*[20]

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

A

With respect to the first part of the prima facie test, *Taylor* without doubt established that women "are sufficiently numerous and distinct from men" so that "if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." *Id.*, at 531.

B

The second prong of the prima facie case was established by petitioner's statistical presentation. Initially, the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement. In *Taylor*, the State had stipulated that 53% of the population eligible for jury service[21] was female, while petitioner Duren has relied upon a census

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[20] We further explained that this requirement does not mean "that petit juries actually chosen must mirror the community," 419 U. S., at 538.

[21] Under Louisiana law at the time of appellant Taylor's trial, all persons not indicted for or convicted of a felony, who were 21 years of age or older, and who were literate in English and physically and mentally capable were eligible for jury duty. La. Code Crim. Proc., Art. 401 (West 1967).

measurement of the actual percentage of women in the community (54%). In the trial court, the State of Missouri never challenged these data. Although the Missouri Supreme Court speculated that changing population patterns between 1970 and 1976 and unequal voter registration by men and women [22] rendered the census figures a questionable frame of reference,[23] there is no evidence whatsoever in the record to suggest that the 1970 census data significantly distorted the percentage of women in Jackson County at the time of trial. Petitioner's presentation was clearly adequate prima facie evidence of population characteristics for the purpose of making a fair-cross-section violation.[24]

Given petitioner's proof that in the relevant community slightly over half of the adults are women, we must disagree with the conclusion of the court below that jury venires containing approximately 15% women are "reasonably rep-

[22] This speculation is belied by the U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports: Voting and Registration in the Election of November 1976, Table 5 (1978), showing that 69.9% of the women and 71.1% of the men in Missouri are registered to vote.

[23] The opinion below found additional fault with the census data in that voter registration lists include persons aged 18 to 21, while the census data included only persons 21 years of age and older. See 556 S. W. 2d, at 16. However, the 1970 census data not only included a summary row showing that 54% of persons 21 years of age and older were women, but also included data showing that an even greater percentage of persons between the ages of 18 and 21 were women. App. 39. In any event, the fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the *community*, not of voter registration lists.

[24] We have previously accepted 6-year-old census data as adequate proof of the percentage of eligible jurors who are black. *Alexander* v. *Louisiana*, 405 U. S. 625, 627 (1972). That case involved an equal protection challenge to a jury-selection process. Although proof of such a claim is in certain respects not analogous to proof of a cross-section violation, see n. 26, *infra*, *Alexander*, like the case at hand, involved establishing as a benchmark the percentage of the excluded group in the relevant population.

resentative" of this community. If the percentage of women appearing on jury pools in Jackson County had precisely mirrored the percentage of women in the population, more than one of every two prospective jurors would have been female. In fact, less than one of every six prospective jurors was female; 85% of the average jury was male. Such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn in Jackson County.

C

Finally, in order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury-selection process. Petitioner's proof met this requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.

Petitioner Duren's statistics and other evidence also established when in the selection process the systematic exclusion took place. There was no indication that underrepresentation of women occurred at the first stage of the selection process—the questionnaire canvass of persons randomly selected from the relevant voter registration list. The first sign of a systematic discrepancy is at the next stage—the construction of the jury wheel from which persons are randomly summoned for service. Less than 30% of those summoned were female, demonstrating that a substantially larger number of women answering the questionnaire claimed either ineligibility or exemption from jury service. Moreover, at the summons stage women were not only given another opportunity to

claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons. Thus, the percentage of women at the final, venire, stage (14.5%) was much lower than the percentage of women who were summoned for service (26.7%).

The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria—whether the automatic exemption for women or other statutory exemptions—as implemented in Jackson County. Women were therefore systematically underrepresented within the meaning of *Taylor*.[25]

III

The demonstration of a prima facie fair-cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred. We have explained that "States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." *Taylor,* 419 U. S., at 538. However, we cautioned that "[t]he right to a proper jury cannot be overcome on merely rational grounds," *id.*, at 534. Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the

[25] The Federal District Court encompassing Jackson County does not have an automatic exemption for women, but does provide occupational exemptions similar to those provided by the State of Missouri, and also has a child-care exemption—albeit, one limited to women. See Amended Plans of the United States District Court for the Western District of Missouri for Random Selection and Service of Grand and Petit Jurors § 14 (1972). Fifty-three percent of the persons on the master jury wheel and 39.8% of actual jurors are women. See 556 S. W. 2d, at 24, and nn. 3, 4 (Seiler, J., dissenting).

jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.[26]

The Supreme Court of Missouri suggested that the low percentage of women on jury venires in Jackson County may have been due to a greater number of women than of men qualifying for or claiming permissible exemptions, such as those for persons over 65, teachers, and government workers. 556 S. W. 2d, at 16. Respondent further argues that petitioner has not proved that the exemption for women had "any effect" on or was responsible for the underrepresentation of women on venires. Brief for Respondent 15.

However, once the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest. See *Taylor,* 419 U. S., at 533–535. Assuming, *arguendo,* that the exemptions mentioned

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[26] In arguing that the reduction in the number of women available as jurors from approximately 54% of the community to 14.5% of jury venires is prima facie proof of "unconstitutional underrepresentation," petitioner and the United States, as *amicus curiae,* cite *Castaneda* v. *Partida,* 430 U. S. 482, 496 (1977); *Alexander* v. *Louisiana, supra,* at 629; *Turner* v. *Fouche,* 396 U. S. 346, 359 (1970); and *Whitus* v. *Georgia,* 385 U. S. 545, 552 (1967). Those equal protection challenges to jury selection and composition are not entirely analogous to the case at hand. In the cited cases, the significant discrepancy shown by the statistics not only indicated discriminatory effect but also was one form of evidence of another essential element of the constitutional violation—discriminatory purpose. Such evidence is subject to rebuttal evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect. See *Castaneda, supra,* at 493–495; *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, 287 (1977). In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement.

by the court below would justify failure to achieve a fair community cross section on jury venires, the State must demonstrate that these exemptions caused the underrepresentation complained of. The record contains no such proof, and mere suggestions or assertions to that effect are insufficient.

The other possible cause of the disproportionate exclusion of women on Jackson County jury venires is, of course, the automatic exemption for women. Neither the Missouri Supreme Court nor respondent in its brief has offered any substantial justification for this exemption. In response to questioning at oral argument, counsel for respondent ventured that the only state interest advanced by the exemption is safeguarding the important role played by women in home and family life.[27] But exempting all women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires. What we stated in *Taylor* with respect to the system there challenged under which women could "opt in" for jury service is equally applicable to Missouri's "opt out" exemption:

> "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.
>
> . . . . .
>
> "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long

[27] Tr. of Oral Arg. 28.

since passed." 419 U. S., at 534–535, 537 (footnote omitted).

We recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge. We stress, however, that the constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service. Although most occupational and other reasonable exemptions may inevitably involve some degree of overinclusiveness or underinclusiveness, any category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement. We also repeat the observation made in *Taylor* that it is unlikely that reasonable exemptions, such as those based on special hardship, incapacity, or community needs, "would pose substantial threats that the remaining pool of jurors would not be representative of the community." *Id.*, at 534.

The judgment of the Missouri Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court steadfastly maintained in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), when it "distinguished" *Hoyt* v. *Florida*, 368 U. S. 57 (1961), that its holding rested on the jury trial requirement of the Sixth and Fourteenth Amendments and not on the Equal Protection Clause of the Fourteenth Amendment. Today's decision makes a halfhearted effort to con-

tinue that fiction in footnotes 1 and 26, declaring that cases based on the Equal Protection Clause, such as *Alexander* v. *Louisiana,* 405 U. S. 625 (1972), are not "entirely analogous" to the case at hand. The difference apparently lies in the fact, among others, that under equal protection analysis prima facie challenges are rebuttable by proof of absence of intent to discriminate, while under Sixth Amendment analysis intent is irrelevant, but the State may show "adequate justification" for the disproportionate representation of the classes being compared. We are reminded, however, that disproportionality may not be justified "on merely rational grounds" and that justification requires that "a *significant* state interest be *manifestly* and *primarily* advanced" by the exemption criteria resulting in the disproportionate representation. *Ante,* at 367 (emphasis supplied). That this language has strong overtones of equal protection is demonstrated in this Court's most recent application of the Equal Protection Clause to distinctions between men and women: " '[C]lassifications by gender must serve *important* governmental objectives and must be *substantially related* to the achievement of those objectives.' " *Califano* v. *Goldfarb,* 430 U. S. 199, 210–211 (1977) (plurality opinion), quoting *Craig* v. *Boren,* 429 U. S. 190, 197 (1976) (emphasis supplied). The Constitution does not require, and our jurisprudence is ill served, by a hybrid doctrine such as that developed in *Taylor,* and in this case.*

*That the majority is in truth concerned with the equal protection rights of women to participate in the judicial process rather than with the Sixth Amendment right of a criminal defendant to be tried by an "impartial jury" is vividly demonstrated by the Court's crablike movement from the equal protection analysis of its early jury composition cases to the internally inconsistent "fair-cross-section" rationale of today's due process decision. As early as 1880, this Court recognized that blacks as a class are no less qualified to sit on juries than whites and that a State cannot, consistent with the Equal Protection Clause, compel a criminal defendant "to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of *his* race, because of color alone,

Even if I were able to reconcile the Court's agile amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment in deciding this case

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however well qualified in other respects . . . ." *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (emphasis added). Likewise, as the majority recognizes, *ante*, at 369–370, women as a class are every bit as qualified as men to serve as jurors. If, then, men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex on the jury or the venire infringes on a defendant's right to have his fate decided by an impartial tribunal. Counsel for petitioner, when asked at oral argument to explain the difference, from the defendant's point of view, between men and women jurors, offered: "It is that indefinable something— . . . I think that we perhaps all understand it when we see it and when we feel it, but it is not that easy to describe; yes, there is a difference." Tr. of Oral Arg. 15.

This Court resorted to similar mystical incantations in *Peters* v. *Kiff*, 407 U. S. 493 (1972). Because the white defendant lacked standing to raise an equal protection challenge to the systematic exclusion of blacks from jury duty, the Court was forced to turn to the Due Process Clause of the Fourteenth Amendment. Noting that the effect of excluding any large and identifiable segment of the community from jury service "is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable," the Court held that a criminal defendant, whatever his race, has standing to raise a due process challenge to the systematic exclusion of any race from jury service. *Id.*, at 503. Similarly, in *Taylor* v. *Louisiana*, 419 U. S. 522, 532 (1975), the Court based its reversal of a male defendant's conviction largely on the transcendental notion that "a flavor, a distinct quality" was absent from his jury panel due to the underrepresentation of women.

Lacking the Court's omniscience, I would be willing to accept its assurances as to the existence of "unknowable" qualities of human nature, "flavor[s]," and "indefinable something[s]." But close analysis of the fair-cross-section doctrine demonstrates that the Court itself does not really believe in such mysticism. For if "that indefinable something" were truly an essential element of the due process right to trial by an impartial jury, a defendant would be entitled to a jury composed of men and women in perfect proportion to their numbers in the community. Yet in *Taylor*, *supra*, at 538, the majority stressed: "Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of

and *Taylor,* I have no little concern about where the road upon which the Court has embarked will ultimately lead. In *Taylor,* the Court relied upon cases dealing with outright *exclusion* of racial groups, *Smith* v. *Texas,* 311 U. S. 128 (1940), and of women, *Ballard* v. *United States,* 329 U. S. 187 (1946), from jury service. Although in *Smith,* the exclusion had been covert, in *Ballard* the exclusion had been overt. The Court in *Taylor* concluded, I assume on the basis of these cases, that "women cannot be systematically excluded from jury panels from which petit juries are drawn." 419 U. S., at 533.

In *Taylor,* as in *Hoyt* v. *Florida,* 368 U. S. 57 (1961),

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names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Thus, a defendant's constitutional right to an impartial jury is protected so long as "that indefinable something" supposedly crucial to impartiality is adequately represented on the jury venire; that the petit jury ultimately struck is composed of one sex is irrelevant. Indeed, under the majority's fair-cross-section analysis, the underrepresentation of women on jury venires in Jackson County, Mo., would entitle petitioner Duren to reversal of his conviction even if the jury chosen in his case had been composed of all women.

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to be tried by an impartial jury. If impartiality is not lost because a particular class or group represented in the community is *unrepresented* on the petit jury, it is certainly not lost because the class or group is *underrepresented* on the jury venire. It is therefore clear that the majority's fair-cross-section rationale is not concerned with the defendant's due process right to an impartial jury at all. Instead, the requirement that distinct segments of the community be represented on jury venires is concerned with the equal protection right of the excluded class to participate in the judicial process through jury service. The reversal of concededly fair convictions returned by concededly impartial juries is, to say the least, an irrational means of vindicating the equal protection rights of those unconstitutionally excluded from jury service. Nor is it a necessary means to achieve that end, for in *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970), this Court recognized that injunctive relief is available to members of a class unconstitutionally excluded from jury service.

women had not been actually prohibited or excluded from serving on juries. But requirements, inapplicable to men, that they affirmatively make known to the jury commissioner their desire to serve had for all practical purposes had that effect. Indeed, in *Taylor* not one woman appeared on a venire of 175 persons drawn for jury service in the parish in question. 419 U. S., at 524. *Taylor,* by its language and on its facts, was an "exclusion" case.

Here, on the other hand, the Court in one sentence both asserts that it can, and admits that it cannot, treat the system used in Jackson County, Mo., as one which "excludes" women, saying: "Today we hold that such systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement." *Ante,* at 360. If there are indeed 15% women on the jury panels in Jackson County, the Court uses the word "exclusion" contrary to any use of the word with which I am familiar. Women are undoubtedly *underrepresented* as compared to men on Jackson County juries, but therein lies the difference between this case and *Taylor.*

Eventually the Court either will insist that women be treated identically to men for purposes of jury selection (which is intimated in dicta, *ante,* at 365–366, 370), or in some later sequel to this line of cases will discover some peculiar magic in the number 15 that will enable it to distinguish between such a percentage and higher percentages less than 50. But whichever of these routes the Court chooses to travel when the question is actually presented, its decision today puts state legislators and local jury commissioners at a serious disadvantage wholly unwarranted by the constitutional provisions upon which it relies. If the Court ultimately concludes that men and women must be treated exactly alike for purposes of jury service, it will have imposed substantial burdens upon many women, particularly in less populated areas, without necessarily producing any corresponding increase in the repre-

sentative character of jury panels. If it ultimately concludes that a percentage of women on jury panels greater than 15 but substantially less than 50 is permissible even though the State's jury selection system permits women but not men to "opt out" of jury service, it is simply playing a constitutional numbers game.

The attorneys general and prosecuting attorneys in the various States, sensibly concluding that a 15% representation of women on jury venires cannot in any rational legal system be materially different from a 20% representation, will press legislators and jury commissioners to abolish all distinctions between men and women for purposes of jury service. Understandably unhappy with the prospect of having still more convictions for armed robbery or murder set aside at the behest of male defendants claiming that women were insufficiently represented on their jury panel, these state attorneys will make their informed but inevitably parochial views known in the halls of their respective legislatures. These views will presumably be in harmony with those of the organized women's groups that have appeared as *amici curiae* in similar cases, asserting that the Constitution prohibits women from being given a choice as to whether they will serve on juries when men are required to serve.

Nor are distinctions between men and women in jury selections likely to be the only casualties to result from today's opinion. Apparently realizing the desirability of some predictability if otherwise fairly tried defendants are to be freed on the basis of such a constitutional numbers game, the Court ventures the view that an "exemption appropriately tailored" to the State's interest in ensuring that those members of the family responsible for the care of children are available to perform such care would "survive a fair-cross-section challenge." *Ante*, at 370. It also repeats the "observation" made in *Taylor* that it is "unlikely that reasonable exemptions, such as those based on special hardship, inca-

pacity, or community needs, 'would pose substantial threats that the remaining pool of jurors would not be representative of the community.' " *Ibid.* But the States are warned that the Constitution requires them to "exercise proper caution in exempting broad categories of persons from jury service," even though "most occupational and other reasonable exemptions may inevitably involve some degree of overinclusiveness or underinclusiveness . . . ." *Ibid.*

The lot of a legislator or judge attempting to conform a State's jury selection process to the dictates of today's opinion, and yet recognize what may be very valid state interests in excusing some individuals or classes of individuals from jury service, is surely not a happy one. Will the Court's above-quoted dicta soon meet the same fate that the decision in *Hoyt* v. *Florida, supra,* met in *Taylor,* or will they survive longer?

There is more than adequate documentation for the proposition that jury service is not a pleasant experience in many jurisdictions and that it tends to be time consuming and often seemingly useless from the point of view of the prospective juror. To the extent that States may engage in the process of jury selection by broad classifications, and by a system of exemptions which require a minimum of administrative effort, the frustrations of jury service will be at least in part alleviated, and perhaps the Court's stated goal of a "fair cross section" actually advanced. On the other hand, to the extent that such forms of selection are deemed constitutionally impermissible, and case-by-case "opting out" required with respect to each prospective juror, the ordeal of the prospective juror becomes more burdensome, and the State's administrative task more time consuming. Since most States will undoubtedly wish to immunize otherwise valid criminal convictions against reversal on the basis of the Court's most recent exegesis of the Fourteenth Amendment's requirements on the jury selection process, their natural tendency will be

to impose these burdens on citizen jurors and judicial administrators in order to avoid any possibility of a successful constitutional attack on the composition of the jury.

The probability, then, is that today's decision will cause States to abandon not only gender-based but also occupation-based classifications for purposes of jury service. Doctors and nurses, though virtually irreplaceable in smaller communities, may ultimately be held by the Court to bring their own "flavor" or "indefinable something" to a jury venire. See *supra,* at 372 n. If so, they could then be exempted from jury service only on a case-by-case basis, and would join others with skills much less in demand whiling away their time in jury rooms of countless courthouses.

No one but a lawyer could think that this was a managerially sound solution to an important problem of judicial administration, and no one but a lawyer thoroughly steeped in the teachings of cases such as *Taylor, Goldfarb,* and *Craig* could think that such a solution was mandated by the United States Constitution. No large group of people can be conscripted to serve on juries nationwide, any more than in armies, without the use of broad general classifications which may not fit in every case the purpose for which the classification was designed. The alternative is case-by-case treatment which entails administrative burdens out of all proportion to the end sought to be achieved.

The short of it is that the only winners in today's decision are those in the category of petitioner, now freed of his conviction of first-degree murder. They are freed not because of any demonstrable unfairness at any stage of their trials, but because of the Court's obsession that criminal venires represent a "fair cross section" of the community, whatever that may be. The losers are the remaining members of that community—men and women seeking to do their duty as jurors and yet minimize the inconvenience that such service entails, judicial administrators striving to make

the criminal justice system function, and the citizenry in general seeking the incarceration of those convicted of serious crimes after a fair trial. I do not believe that the Fourteenth Amendment was intended or should be interpreted to produce such a quixotic result.

Syllabus

COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 77–891. Argued October 3, 1978—Decided January 9, 1979

Section 5 (a) of the Pennsylvania Abortion Control Act requires every person who performs an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health. The Act, in § 5 (d), also imposes a penal sanction for a violation of § 5 (a). Appellees brought suit claiming, *inter alia,* that § 5 (a) is unconstitutionally vague, and a three-judge District Court upheld their claim. *Held:*

1. The viability-determination requirement of § 5 (a) is void for vagueness. Pp. 390–397.

(a) Though apparently the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence," it is ambiguous whether that subjective language applies to the second condition that activates the duty to the fetus, *viz.*, "sufficient reason to believe that the fetus may be viable." Pp. 391–392.

(b) The intended distinction between "is viable" and "may be viable" is elusive. Apparently those phrases refer to distinct conditions, one of which indeterminately differs from the definition of viability set forth in *Roe* v. *Wade,* 410 U. S. 113, and *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52. Pp. 392–394.

(c) The vagueness of the viability-determination requirement is compounded by the fact that § 5 (d) subjects the physician to potential criminal liability without regard to fault. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the Act is little more than "a trap for those who act in good faith," *United States* v. *Ragen,* 314 U. S. 513, 524, and the perils of strict criminal liability are particularly

acute here because of the uncertainty of the viability determination itself. Pp. 394–397.

2. The standard-of-care provision is likewise impermissibly vague. It is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the patient's health and increased chances of fetal survival. Where conflicting duties of such magnitude are involved, there must be greater statutory precision before a physician may be subjected to possible criminal sanctions. Pp. 397–401.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 401.

Carol Los Mansmann, Special Assistant Attorney General of Pennsylvania, argued the cause for appellants. With her on the brief was *J. Jerome Mansmann,* Special Assistant Attorney General.

Roland Morris argued the cause and filed a brief for appellees.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

At issue here is the constitutionality of subsection (a) of § 5 [1] of the Pennsylvania Abortion Control Act, 1974 Pa. Laws,

**Burt Neuborne* and *Sylvia Law* filed a brief for the American Public Health Assn. et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *George E. Reed* and *Patrick F. Geary* for the United States Catholic Conference; and by *Dennis J. Horan, John D. Gorby, Victor G. Rosenblum,* and *Dolores V. Horan* for Americans United for Life, Inc.

[1] Section 5 reads in pertinent part:

"(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional

Act No. 209, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon 1977). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus "is viable" or when there is "sufficient reason to believe that the fetus may be viable." A three-judge Federal District Court [2] declared § 5 (a) unconstitutionally vague and overbroad and enjoined its enforcement. App. 239a–244a. Pursuant to 28 U. S. C. § 1253, we noted probable jurisdiction *sub nom. Beal* v. *Franklin,* 435 U. S. 913 (1978).

I

The Abortion Control Act was passed by the Pennsylvania Legislature, over the Governor's veto, in the year following this Court's decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973). It was a comprehensive statute.

Section 1 gave the Act its title. Section 2 defined, among other terms, "informed consent" and "viable." The latter was specified to mean "the capability of a fetus to live outside the

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skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

. . . . . .

"(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

[2] The three-judge court was designated in September 1974 pursuant to 28 U. S. C. § 2281 (1970 ed.). This statute was repealed by Pub. L. 94-381, § 1, 90 Stat. 1119, but the repeal did not apply to any action commenced on or before August 12, 1976. § 7.

mother's womb albeit with artificial aid." See *Roe* v. *Wade*, 410 U. S., at 160.

Section 3 (a) proscribed the performance of an abortion "upon any person in the absence of informed consent thereto by such person." Section 3 (b)(i) prohibited the performance of an abortion in the absence of the written consent of the woman's spouse, provided that the spouse could be located and notified, and the abortion was not certified by a licensed physician "to be necessary in order to preserve the life or health of the mother." Section 3 (b)(ii), applicable if the woman was unmarried and under the age of 18, forbade the performance of an abortion in the absence of the written consent of "one parent or person in loco parentis" of the woman, unless the abortion was certified by a licensed physician "as necessary in order to preserve the life of the mother." Section 3 (e) provided that whoever performed an abortion without such consent was guilty of a misdemeanor of the first degree.

Section 4 provided that whoever, intentionally and willfully, took the life of a premature infant aborted alive, was guilty of murder of the second degree. Section 5 (a), set forth in n. 1, *supra*, provided that if the fetus was determined to be viable, or if there was sufficient reason to believe that the fetus might be viable, the person performing the abortion was required to exercise the same care to preserve the life and health of the fetus as would be required in the case of a fetus intended to be born alive, and was required to adopt the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique was not necessary in order to preserve the life or health of the mother. Section 5 (d), also set forth in n. 1, imposed a penal sanction for a violation of § 5 (a).

Section 6 specified abortion controls. It prohibited abortion during the stage of pregnancy subsequent to viability, except where necessary, in the judgment of a licensed physician, to preserve the life or health of the mother. No abortion

was to be performed except by a licensed physician and in an approved facility. It required that appropriate records be kept, and that quarterly reports be filed with the Commonwealth's Department of Health. And it prohibited solicitation or advertising with respect to abortions. A violation of § 6 was a misdemeanor of the first or third degrees, as specified.

Section 7 prohibited the use of public funds for an abortion in the absence of a certificate of a physician stating that the abortion was necessary in order to preserve the life or health of the mother. Finally, § 8 authorized the Department of Health to make rules and regulations with respect to performance of abortions and the facilities in which abortions were performed. See Pa. Stat. Ann., Tit. 35, §§ 6601–6608 (Purdon 1977).

Prior to the Act's effective date, October 10, 1974, the present suit was filed in the United States District Court for the Eastern District of Pennsylvania challenging, on federal constitutional grounds, nearly all of the Act's provisions.[3]

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[3] The plaintiffs named in the complaint, as amended, were Planned Parenthood Association of Southeastern Pennsylvania, Inc., a nonprofit corporation; appellee John Franklin, M. D., a licensed and board-certified obstetrician and gynecologist and medical director of Planned Parenthood; Concern for Health Options: Information, Care and Education, Inc. (CHOICE), a nonprofit corporation; and Clergy Consultation Service of Northeastern Pennsylvania, a voluntary organization. Later, appellee Obstetrical Society of Philadelphia intervened as a party plaintiff. Named as original defendants were F. Emmett Fitzpatrick, Jr., District Attorney of Philadelphia County, and Helene Wohlgemuth, the then Secretary of Welfare of the Commonwealth of Pennsylvania. Subsequently, the Commonwealth's Attorney General and the Commonwealth itself intervened as parties defendant.

The District Court, in a ruling not under challenge here, eventually dismissed Planned Parenthood, CHOICE, and Clergy Consultation as plaintiffs. *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554, 562, 593–594 (1975).

The present posture of the case, as a consequence, is a suit between Dr. Franklin and the Obstetrical Society, as plaintiffs-appellees, and Aldo

The three-judge court on October 10 issued a preliminary injunction restraining the enforcement of a number of those provisions.[4] Each side sought a class-action determination; the plaintiffs', but not the defendants', motion to this effect was granted.[5]

The case went to trial in January 1975. The court received extensive testimony from expert witnesses on all aspects of abortion procedures. The resulting judgment declared the Act to be severable, upheld certain of its provisions, and held other provisions unconstitutional. *Planned Parenthood Assn.* v. *Fitzpatrick,* 401 F. Supp. 554 (1975).[6] The court sustained the definition of "informed consent" in § 2; the facility-approval requirement and certain of the reporting requirements of § 6; § 8's authorization of rules and regulations; and, by a divided vote, the informed consent requirement of § 3 (a). It overturned § 3 (b)(i)'s spousal-consent require-

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Colautti, the present Secretary of Welfare, the Attorney General, the Commonwealth, and the District Attorney, as defendants-appellants.

We agree with the District Court's ruling in the cited 1975 opinion, 401 F. Supp., at 561–562, 594, that under *Doe* v. *Bolton,* 410 U. S. 179, 188 (1973), the plaintiff physicians have standing to challenge § 5 (a), and that their claims present a justiciable controversy. See *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 62 (1976).

[4] The court preliminarily enjoined the enforcement of the spousal- and parental-consent requirements, § 3 (b); the penal provisions of § 3 (e); the requirements of §§ 5 (a) and (d); the restriction on abortions subsequent to viability, § 6 (b); the facility-approval requirement, § 6 (c); the reporting provisions, § 6 (d); most of the penal provisions of § 6 (i); the restrictions on funding of abortions, § 7; and the definitions of "viable" and "informed consent" in § 2. Record, Doc. No. 16; see *Planned Parenthood Assn.* v. *Fitzpatrick,* 401 F. Supp., at 559.

[5] The court ruled that "the present action is determined to be a class action on behalf of the class of Pennsylvania physicians who perform abortions and/or counsel their female patients with regard to family planning and pregnancy including the option of abortion, and the sub-class of members of the Obstetrical Society of Philadelphia who practice in Pennsylvania." Record, Doc. No. 57.

[6] See also *Doe* v. *Zimmerman,* 405 F. Supp. 534 (MD Pa. 1975).

ment and, again by a divided vote, § 3 (b)(ii)'s parental-consent requirement; § 6's reporting requirements relating to spousal and parental consent; § 6's prohibition of advertising; and § 7's restriction on abortion funding. The definition of "viable" in § 2 was declared void for vagueness and, because of the incorporation of this definition, § 6's proscription of abortions after viability, except to preserve the life or health of the woman, was struck down. Finally, in part because of the incorporation of the definition of "viable," and in part because of the perceived overbreadth of the phrase "may be viable," the court invalidated the viability-determination and standard-of-care provisions of § 5 (a). 401 F. Supp., at 594.

Both sides appealed to this Court. While the appeals were pending, the Court decided *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976); *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52 (1976); and *Singleton* v. *Wulff,* 428 U. S. 106 (1976). *Virginia State Board* shed light on the prohibition of advertising for abortion services. *Planned Parenthood* had direct bearing on the patient-, spousal-, and parental-consent issues and was instructive on the definition-of-viability issue. *Singleton* concerned the issue of standing to challenge abortion regulations. Accordingly, that portion of the three-judge court's judgment which was the subject of the plaintiffs' appeal was summarily affirmed. *Franklin* v. *Fitzpatrick,* 428 U. S. 901 (1976). And that portion of the judgment which was the subject of the defendants' appeal was vacated and remanded for further consideration in the light of *Planned Parenthood, Singleton,* and *Virginia State Board. Beal* v. *Franklin,* 428 U. S. 901 (1976).

On remand, the parties entered into a stipulation which disposed of all issues except the constitutionality of §§ 5 (a) and 7. Relying on this Court's supervening decisions in *Beal* v. *Doe,* 432 U. S. 438 (1977), and *Maher* v. *Roe,* 432 U. S. 464 (1977), the District Court found, contrary to its original view,

see 401 F. Supp., at 594, that § 7 did not violate either Tit. XIX of the Social Security Act, as added, 79 Stat. 343, and amended, 42 U. S. C. § 1396 *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment. App. 241a. The court, however, declared: "After reconsideration of section 5 (a) in light of the most recent Supreme Court decisions, we adhere to our original view and decision that section 5 (a) is unconstitutional." *Id.*, at 240a–214a. Since the plaintiffs-appellees have not appealed from the ruling with respect to § 7, the only issue remaining in this protracted litigation is the validity of § 5 (a).

II

Three cases in the sensitive and earnestly contested abortion area provide essential background for the present controversy.

In *Roe* v. *Wade,* 410 U. S. 113 (1973), this Court concluded that there is a right of privacy, implicit in the liberty secured by the Fourteenth Amendment, that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. This right, we said, although fundamental, is not absolute or unqualified, and must be considered against important state interests in the health of the pregnant woman and in the potential life of the fetus. "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.*, at 162–163. For both logical and biological reasons, we indicated that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy.[7] But after viability, the

[7] In *Maher* v. *Roe,* 432 U. S. 464, 471–477 (1977), the Court ruled that a State may withhold funding to indigent women even though such withholding influences the abortion decision prior to viability. The Court, however, reaffirmed that a State during this period may not impose direct

State, if it chooses, may regulate or even prohibit abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the pregnant woman. *Id.*, at 163–164.

We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that, in the medical and scientific communities, a fetus is considered viable if it is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.*, at 160. We added that there must be a potentiality of "meaningful life," *id.*, at 163, not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.*, at 160. We thus left the point flexible for anticipated advancements in medical skill.

Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision," *id.*, at 166, and we added that if this privilege were abused, "the usual remedies, judicial and intra-professional, are available." *Ibid.*

Roe's companion case, *Doe* v. *Bolton*, 410 U. S. 179 (1973), underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment. After the Court there reiterated that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand," *id.*, at 189, the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment." The Court found it critical that that

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obstacles—such as criminal penalties—to further its interest in the potential life of the fetus.

judgment "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.*, at 192.

The third case, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), stressed similar themes. There a Missouri statute that defined viability was challenged on the ground that it conflicted with the discussion of viability in *Roe* and that it was, in reality, an attempt to advance the point of viability to an earlier stage in gestation. The Court rejected that argument, repeated the *Roe* definition of viability, 428 U. S., at 63, and observed again that viability is "a matter of medical judgment, skill, and technical ability, and we preserved [in *Roe*] the flexibility of the term." *Id.*, at 64. The Court also rejected a contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id.*, at 65. It said:

> "In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Id.*, at 64.

In these three cases, then, this Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering

into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

With these principles in mind, we turn to the issues presented by the instant controversy.

III

The attack mounted by the plaintiffs-appellees upon § 5 (a) centers on both the viability-determination requirement and the stated standard of care. The former provision, requiring the physician to observe the care standard when he determines that the fetus is viable, or when "there is sufficient reason to believe that the fetus may be viable," is asserted to be unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises, and because it does not make the physician's good-faith determination of viability conclusive. This provision is also said to be unconstitutionally overbroad, because it carves out a new time period prior to the stage of viability, and could have a restrictive effect on a couple who wants to abort a fetus determined by genetic testing to be defective.[8] The standard of care, and in particular the requirement that the physician employ the abortion technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother," is said to be void for vagueness and to be unconstitutionally restrictive in failing to afford

[8] The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism). Such testing, however, often cannot be completed until after 18–20 weeks' gestation. App. 53a–56a (testimony of Hope Punnett, Ph. D.).

the physician sufficient professional discretion in determining which abortion technique is appropriate.

The defendants-appellants, in opposition, assert that the Pennsylvania statute is concerned only with post-viability abortions and with prescribing a standard of care for those abortions. They assert that the terminology "may be viable" correctly describes the statistical probability of fetal survival associated with viability; that the viability-determination requirement is otherwise sufficiently definite to be interpreted by the medical community; and that it is for the legislature, not the judiciary, to determine whether a viable but genetically defective fetus has a right to life. They contend that the standard-of-care provision preserves the flexibility required for sound medical practice, and that it simply requires that when a physician has a choice of procedures of equal risk to the woman, he must select the procedure least likely to be fatal to the fetus.

IV

We agree with plaintiffs-appellees that the viability-determination requirement of § 5 (a) is ambiguous, and that its uncertainty is aggravated by the absence of a scienter requirement with respect to the finding of viability. Because we conclude that this portion of the statute is void for vagueness, we find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5 (a).

A

It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss,* 347 U. S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou* v. *Jacksonville,* 405 U. S. 156, 162 (1972), is void for vagueness. See generally *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972).

This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id.*, at 109; *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603–604 (1967).

Section 5 (a) requires every person who performs or induces an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus is viable, or if "there is sufficient reason to believe that the fetus may be viable," then he must adhere to the prescribed standard of care. See n. 1, *supra*. This requirement contains a double ambiguity. First, it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard. Second, it is uncertain whether the phrase "may be viable" simply refers to viability, as that term has been defined in *Roe* and in *Planned Parenthood*, or whether it refers to an undefined penumbral or "gray" area prior to the stage of viability.

The statute requires the physician to conform to the prescribed standard of care if one of two conditions is satisfied: if he determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable." Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts. The latter, obviously, portends not an inconsequential hazard for the typical private practitioner who may not

have the skills and technology that are readily available at a teaching hospital or large medical center.

The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." Brief for Appellants 28. The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning of, "viable."[9]

Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).

Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute, in § 2, already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act.[10] In this respect, it is significant

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[9] Appellants do not argue that federal-court abstention is required on this issue, nor is it appropriate, given the extent of the vagueness that afflicts § 5 (a), for this Court to abstain *sua sponte*. See *Bellotti* v. *Baird*, 428 U. S. 132, 143 n. 10 (1976).

[10] The statute says that viable "means," not "includes," the capability of a fetus "to live outside the mother's womb albeit with artificial aid." As a rule, "[a] definition which declares what a term 'means' . . . excludes

that § 6 (b) of the Act speaks only of the limited availability of abortion during the stage of a pregnancy "subsequent to viability." The concept of viability is just as important in § 6 (b) as it is in § 5 (a). Yet in § 6 (b) the legislature found it unnecessary to explain that a "viable" fetus includes one that "may be viable."

Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, as appellees urge and as the District Court found, see 401 F. Supp., at 572, it may be that "may be viable" carves out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability. On the other hand, although appellants do not argue this, it may be that "may be viable" refers to viability as physicians understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in *Planned Parenthood*.[11]

Because of the double ambiguity in the viability-determination requirement, this portion of the Pennsylvania statute is readily distinguishable from the requirement that an abortion must be "necessary for the preservation of the mother's life or health," upheld against a vagueness challenge in *United*

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any meaning that is not stated." 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

[11] Since our ruling today is confined to the conclusion that the viability-determination requirement of § 5 (a) is impermissibly vague, there is no merit in the dissenting opinion's suggestion, *post*, at 406, that the Court has "tacitly disown[ed]" the definition of viability as set forth in *Roe* and *Planned Parenthood*. On the contrary, as noted above, *supra*, at 388, we *reaffirm* what was said in those decisions about this critical concept.

States v. *Vuitch*, 402 U. S. 62, 69–72 (1971), and the requirement that a physician determine, on the basis of his "best clinical judgment," that an abortion is "necessary," upheld against a vagueness attack in *Doe* v. *Bolton*, 410 U. S., at 191–192. The contested provisions in those cases had been interpreted to allow the physician to make his determination in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead, it conditions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.

B

The vagueness of the viability-determination requirement of § 5 (a) is compounded by the fact that the Act subjects the physician to potential criminal liability without regard to fault. Under § 5 (d), see n. 1, *supra*, a physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subject "to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." To be sure, the Pennsylvania law of criminal homicide, made applicable to the physician by § 5 (d), conditions guilt upon a finding of scienter. See Pa. Stat. Ann., Tit. 18, §§ 2501–2504 (Purdon 1973 and Supp. 1978). The required mental state, however, is that of "intentionally, knowingly, recklessly or negligently caus[ing] the death of another human being." § 2501 (1973). Thus, the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus. But neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the

physician be culpable in failing to find sufficient reason to believe that the fetus may be viable.[12]

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.* See, for example, *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 434–446 (1978); *Papachristou* v. *Jacksonville,* 405 U. S., at 163; *Boyce Motor Lines* v. *United States,* 342 U. S. 337, 342 (1952).[13] Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States* v. *Ragen,* 314 U. S. 513, 524 (1942).

The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the

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[12] Section 5 (a) does provide that the determination of viability is to be based on the physician's "experience, judgment or professional competence." A subjective standard keyed to the physician's individual skill and abilities, however, is different from a requirement that the physician be culpable or blameworthy for his performance under such a standard. Moreover, as noted above, it is ambiguous whether this subjective language applies to the second condition that activates the duty to the fetus, namely, "sufficient reason to believe that the fetus may be viable."

[13] "[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States,* 325 U. S. 91, 101–102 (1945) (plurality opinion).

quality of the available medical facilities; and other factors.[14] Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all.[15] In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Because we hold that the viability-determination provision of § 5 (a) is void on its face, we need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri* v.

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[14] See App. 5a–6a, 10a, 17a (testimony of Louis Gerstley III, M. D.); *id.*, at 77a–78a, 81a (testimony of Thomas W. Hilgers, M. D.); *id.*, at 93a–101a, 109a, 112a (testimony of William J. Keenan, M. D.).

[15] See *id.*, at 8a (testimony of Dr. Gerstley) (viability means 5% chance of survival, "certainly at least two to three percent"); *id.*, at 104a (testimony of Dr. Keenan) (10% chance of survival would be viable); *id.*, at 144a (deposition of John Franklin, M. D.) (viability means "ten percent or better" probability of survival); *id.*, at 132a (testimony of Arturo Hervada, M. D.) (it is misleading to be obsessed with a particular percentage figure).

Danforth, 428 U. S., at 64. State regulation that impinges upon this determination, if it is to be constitutional, must allow the attending physician "the room he needs to make his best medical judgment." *Doe* v. *Bolton,* 410 U. S., at 192.

V

We also conclude that the standard-of-care provision of § 5 (a) is impermissibly vague.[16] The standard-of-care provision, when it applies, requires the physician to

> "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother."

Plaintiffs-appellees focus their attack on the second part of the standard, requiring the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother.[17]

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[16] The dissenting opinion questions whether the alleged vagueness of the standard-of-care provision is properly before us, since it is said that this issue was not reached by the District Court. That court, however, declared § 5 (a) unconstitutional in its entirety, including both the viability-determination requirement and the standard-of-care provision. App. 243a. Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, "whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams,* 397 U. S. 471, 475 n. 6 (1970).

[17] In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 81–84 (1976), the Court struck down a provision similar to the first part of the standard-of-care provision of § 5 (a), on the ground that it applied at all stages of gestation and not just to the period subsequent to

The District Court took extensive testimony from various physicians about their understanding of this requirement. That testimony is illuminating. When asked what method of abortion they would prefer to use in the second trimester in the absence of § 5 (a), the plaintiffs' experts said that they thought saline amnio-infusion was the method of choice.[18] This was described as a method involving removal of amniotic fluid and injection of a saline or other solution into the amniotic sac. See *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S., at 75–79. All physicians agreed, however, that saline amnio-infusion nearly always is fatal to the fetus,[19] and it was commonly assumed that this method would be prohibited by the statute.

When the plaintiffs' and defendants' physician-experts respectively were asked what would be the method of choice under § 5 (a), opinions differed widely. Preferences ranged from no abortion, to prostaglandin infusion, to hysterotomy, to oxytocin induction.[20] Each method, it was generally conceded, involved disadvantages from the perspective of the woman. Hysterotomy, a type of Caesarean section procedure, generally was considered to have the highest incidence of fetal survival of any of the abortifacients. Hysterotomy, however, is associated with the risks attendant upon any operative procedure involving anesthesia and incision of

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viability. Except to the extent that § 5 (a) is also alleged to apply prior to the point of viability, a contention we do not reach, see *supra,* at 390, appellees do not challenge the standard-of-care provision on overbreadth grounds.

[18] App. 11a (testimony of Dr. Gerstley); *id.,* at 28a (testimony of Dr. Franklin).

[19] See, *e. g., id.,* at 28a (testimony of Dr. Franklin); *id.,* at 36a (testimony of Fred Mecklenburg, M. D.).

[20] There was testimony that dilation and curettage and dilation and suction, two of the more common methods of abortion in the first trimester, normally are not used in the second trimester. *Id.,* at 39a–40a (testimony of Dr. Mecklenburg).

tissue.[21] And all physicians agreed that future children born to a woman having a hysterotomy would have to be delivered by Caesarean section because of the likelihood of rupture of the scar.[22]

Few of the testifying physicians had had any direct experience with prostaglandins, described as drugs that stimulate uterine contractibility, inducing premature expulsion of the fetus. See *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S., at 77–78. It was generally agreed that the incidence of fetal survival with prostaglandins would be significantly greater than with saline amnio-infusion.[23] Several physicians testified, however, that prostaglandins have undesirable side effects, such as nausea, vomiting, headache, and diarrhea, and indicated that they are unsafe with patients having a history of asthma, glaucoma, hypertension, cardiovascular disease, or epilepsy.[24] See *Wynn* v. *Scott,* 449 F. Supp. 1302, 1326 (ND Ill. 1978). One physician recommended oxytocin induction. He doubted, however, whether the procedure would be fully effective in all cases, and he indicated that the procedure was prolonged and expensive.[25]

The parties acknowledge that there is disagreement among medical authorities about the relative merits and the safety of different abortion procedures that may be used during the second trimester. See Brief for Appellants 24. The appellants submit, however, that the only legally relevant considerations are that alternatives exist among abortifacients,

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[21] *Id.,* at 23a (testimony of Dr. Franklin); *id.,* at 43a (testimony of Dr. Mecklenburg); *id.,* at 73a (testimony of Dr. Hilgers).

[22] See, *e. g., id.,* at 13a (testimony of Dr. Gerstley); *id.,* at 28a (testimony of Dr. Franklin).

[23] See, *e. g., id.,* at 11a–12a (testimony of Dr. Gerstley); *id.,* at 28a (testimony of Dr. Franklin).

[24] See *id.,* at 11a (testimony of Dr. Gerstley); *id.,* at 37a–38a (testimony of Dr. Mecklenburg); *id.,* at 72a (testimony of Dr. Hilgers).

[25] *Id.,* at 12a (testimony of Dr. Gerstley).

"and that the physician, mindful of the state's interest in protecting viable life, must make a competent and good faith medical judgment on the feasibility of protecting the fetus' chance of survival in a manner consistent with the life and health of the pregnant woman." *Id.*, at 25. We read § 5 (a), however, to be much more problematical.

The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus; they are mentioned only in the second part which deals with the choice of abortion procedures. Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health—not merely desirable—before it may be adopted. And "the life or health of the mother," as used in § 5 (a), has not been construed by the courts of the Commonwealth to mean, nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision. Cf. *United States* v. *Vuitch,* 402 U. S., at 71–72; *Doe* v. *Bolton,* 410 U. S., at 191.

Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties of this magnitude are involved, the

State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

Appellants' further suggestion that § 5 (a) requires only that the physician make a good-faith selection of the proper abortion procedure finds no support in either the language or an authoritative interpretation of the statute.[26] Certainly, there is nothing to suggest a *mens rea* requirement with respect to a decision whether a particular abortion method is necessary in order to preserve the life or health of the woman. The choice of an appropriate abortion technique, as the record in this case so amply demonstrates, is a complex medical judgment about which experts can—and do—disagree. The lack of any scienter requirement exacerbates the uncertainty of the statute. We conclude that the standard-of-care provision, like the viability-determination requirement, is void for vagueness.

The judgment of the District Court is affirmed.

It is so ordered.

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

Because the Court now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe* v. *Wade,* 410 U. S. 113 (1973), and reaffirmed in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52 (1976), I file this dissent.

I

In *Roe* v. *Wade,* the Court defined the term "viability" to signify the stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This is the point at which the State's interest in protecting fetal

[26] Appellants, again, do not argue or suggest that we should abstain from passing on this issue. See n. 9, *supra.*

life becomes sufficiently strong to permit it to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U. S., at 163–164.

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. Potential ability is not actual ability. It is ability "[e]xisting in possibility, not in actuality." Webster's New International Dictionary (2d ed. 1958). The Court's definition of viability in *Roe* v. *Wade* reaches an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb.

It was against this background that the Pennsylvania statute at issue here was adopted and the District Court's judgment was entered. Insofar as *Roe* v. *Wade* was concerned, Pennsylvania could have defined viability in the language of that case—"potentially able to live outside the mother's womb"—and could have forbidden all abortions after this stage of any pregnancy. The Pennsylvania Act, however, did not go so far. It forbade entirely only those abortions where the fetus had attained viability as defined in § 2 of the Act, that is, where the fetus had "the *capability* . . . to live outside the mother's womb albeit with artificial aid." Pa. Stat. Ann., Tit. 35, § 6602 (Purdon 1977) (emphasis added). But the State, understanding that it also had the power under *Roe* v. *Wade* to regulate where the fetus was only "potentially able" to exist outside the womb, also sought to regulate, but not forbid, abortions where there was sufficient reason to believe that the fetus "may be viable"; this language was reasonably

believed by the State to be equivalent to what the Court meant in 1973 by the term "potentially able to live outside the mother's womb." Under § 5 (a), abortionists must not only determine whether the fetus is viable but also whether there is sufficient reason to believe that the fetus may be viable. If either condition exists, the method of abortion is regulated and a standard of care imposed. Under § 5 (d), breach of these regulations exposes the abortionist to the civil and criminal penalties that would be applicable if a live birth rather than an abortion had been intended.

In the original opinion and judgment of the three-judge court, *Planned Parenthood Assn.* v. *Fitzpatrick,* 401 F. Supp. 554 (ED Pa. 1975), § 5 (a) was invalidated on two grounds: first, because it required a determination of viability and because that term, as defined in § 2, was held to be unenforceably vague; and second, because the section required a determination of when a fetus may be viable, it was thought to regulate a period of time prior to viability and was therefore considered to be invalid under this Court's cases. The District Court was not disturbed by the fact that its opinion declared the term "viability" as used in this Court's opinion in *Roe* v. *Wade* to be hopelessly vague since it understood that opinion also to have given specific content to that term and to have held that a State could not consider any fetus to be viable prior to the 24th week of pregnancy. This was concrete guidance to the States, and because the "may be viable" provision of § 5 (a) "tend[ed] to carve out a . . . period of time of potential viability [which might cover a period of] 20 to 26 weeks gestation," 401 F. Supp., at 572, the State was unlawfully regulating the second trimester. Because it sought to enforce § 5 (a), § 5 (d) was also invalidated. Section 6 (b), which forbade all abortions after viability, also fell to the challenge of vagueness.

The District Court's judgment was pending on appeal here when *Planned Parenthood of Central Missouri* v. *Danforth,*

supra, was argued and decided. There, the state Act defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." 428 U. S., at 63. This definition was attacked as impermissibly expanding the *Roe* v. *Wade* definition of viability; the "mere possibility of momentary survival," it was argued, was not the proper standard under the Court's cases. 428 U. S., at 63. It was also argued in this Court that the "may be" language of the Missouri statute was vulnerable for the same reasons that the "may be" provision of the Pennsylvania statute had been invalidated by the District Court in the case now before us. Brief for Appellants, O. T. 1975, No. 74–1151, pp. 65–66, quoting *Planned Parenthood Assn.* v. *Fitzpatrick, supra,* at 571–572. This Court, however, rejected these arguments and sustained the Missouri definition as consistent with *Roe,* "even when read in conjunction with" another section of the Act that proscribed all abortions not necessary to preserve the life or health of the mother "unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable," that is, that it has not reached that stage at which it may exist indefinitely outside the mother's womb. 428 U. S., at 63–64. The Court noted that one of the appellant doctors "had no particular difficulty with the statutory definition" and added that the Missouri definition might well be considered more favorable to the complainants than the *Roe* definition since the "point when life can be 'continued indefinitely outside the womb' may well occur later in pregnancy than the point where the fetus is 'potentially able to live outside the mother's womb.' " 428 U. S., at 64. The Court went on to make clear that it was not the proper function of the legislature or of the courts to place viability at a specific point in the gestation period. The "flexibility of the term," which was essentially a medical concept, was to be preserved. *Ibid.* The Court plainly reaffirmed what it had held

in *Roe* v. *Wade:* Viability refers not only to that stage of development when the fetus actually has the capability of existing outside the womb but also to that stage when the fetus *may have* the ability to do so. The Court also reaffirmed that at any time after viability, as so understood, the State has the power to prohibit abortions except when necessary to preserve the life or health of the mother.

In light of *Danforth,* several aspects of the District Court's judgment in the *Fitzpatrick* case were highly questionable, and that judgment was accordingly vacated and remanded to the District Court for reconsideration. *Beal* v. *Franklin,* 428 U. S. 901 (1976). A drastically modified judgment eventuated. The term "viability" could not be deemed vague in itself, and hence the definition of that term in § 2 and the proscription of § 6 (b) against post-viability abortions were sustained. The District Court, however, in a conclusory opinion adhered to its prior view that § 5 (a) was unconstitutional, as was § 5 (d) insofar as it related to § 5 (a).

Affirmance of the District Court's judgment is untenable. The District Court originally thought § 5 (a) was vague because the term "viability" was itself vague. The Court scotched that notion in *Danforth,* and the District Court then sustained the Pennsylvania definition of viability. In doing so, it necessarily nullified the major reason for its prior invalidation of § 5 (a), which was that it incorporated the supposedly vague standard of § 2. But the District Court had also said that the "may be viable" standard was invalid as an impermissible effort to regulate a period of "potential" viability. This was the sole remaining articulated ground for invalidating § 5 (a). But this is the very ground that was urged and rejected in *Danforth,* where this Court sustained the Missouri provision defining viability as the stage at which the fetus "may" have the ability to survive outside the womb and reaffirmed the flexible concept of viability announced in *Roe.*

In affirming the District Court, the Court does not in so many words agree with the District Court but argues that it is too difficult to know whether the Pennsylvania Act simply intended, as the State urges, to go no further than *Roe* permitted in protecting a fetus that is potentially able to survive or whether it intended to carve out a protected period prior to viability as defined in *Roe*. The District Court, although otherwise seriously in error, had no such trouble with the Act. It understood the "may be viable" provision as an attempt to protect a period of potential life, precisely the kind of interest that *Roe* protected but which the District Court erroneously thought the State was not entitled to protect.[1] *Danforth,* as I have said, reaffirmed *Roe* in this respect. Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law as well as the "potential ability"

[1] The District Court observed:

"*Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably *has the capability* of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and the period after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5 (a) tends to carve out a third period of time of *potential* viability." *Planned Parenthood Assn.* v. *Fitzpatrick,* 401 F. Supp. 554, 572 (ED Pa. 1975) (emphasis added).

Thus, the court interpreted the term "viability" more restrictively than *Roe,* read in its entirety, permitted but coextensively with the definition in § 2. Based on its misapprehension of *Roe,* the court condemned § 5 (a) essentially for reaching the period when the fetus has the *potential* "capability of meaningful life outside the mother's womb." *Ibid.*

component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the States.

II

Apparently uneasy with its work, the Court has searched for and seized upon two additional reasons to support affirmance, neither of which was relied upon by the District Court. The Court first notes that under § 5 (d), failure to make the determinations required by § 5 (a), or otherwise to comply with its provisions, subjects the abortionist to criminal prosecution under those laws that "would pertain to him had the fetus been a child who was intended to be born and not aborted." Although concededly the Pennsylvania law of criminal homicide conditions guilt upon a finding that the defendant intentionally, knowingly, recklessly, or negligently caused the death of another human being, the Court nevertheless goes on to declare that the abortionist could be successfully prosecuted for criminal homicide without any such fault or omission in determining whether or not the fetus is viable or may be viable. This alleged lack of a scienter requirement, the Court says, fortifies its holding that § 5 (a) is void for vagueness.

This seems to me an incredible construction of the Pennsylvania statutes. The District Court suggested nothing of the sort, and appellees focus entirely on § 5 (a), ignoring the homicide statutes. The latter not only define the specified degrees of scienter that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction. Pa. Stat. Ann., Tit. 18, § 304 (Purdon 1973). Given this background, I do not see how it can be seriously argued that a doctor who makes a good-faith mistake about whether a fetus is or is not viable could be successfully prose-

cuted for criminal homicide. This is the State's submission in this Court; the court below did not address the matter; and at the very least this is something the Court should not decide without hearing from the Pennsylvania courts.

Secondly, the Court proceeds to find the standard-of-care provision in § 5 (a) to be impermissibly vague, particularly because of an asserted lack of a *mens rea* requirement. I am unable to agree. In the first place, the District Court found fault with § 5 (a) only because of its viability and "may be viable" provisions. It neither considered nor invalidated the standard-of-care provision. Furthermore, the complaint did not expressly attack § 5 (a) on this ground, and plaintiffs' request for findings and conclusions challenged the section only on the grounds of the overbreadth and vagueness of the viability and the "may be viable" provisions. There was no request to invalidate the standard-of-care provision. Also, the plaintiffs' post-trial brief dealt with the matter in only the most tangential way. Appellees took no cross-appeal; and although they argue the matter in their brief on the merits in this Court, I question whether they are entitled to have still another provision of the Pennsylvania Act declared unconstitutional in this Court in the first instance, thereby and to that extent expanding the relief they obtained in the court below.[2] *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166 n. 8 (1977).

In any event, I cannot join the Court in its determined attack on the Pennsylvania statute. As in the case with a mistaken viability determination under § 5 (a), there is no basis for asserting the lack of a scienter requirement in a prosecution for violating the standard-of-care provision. I agree with the State that there is not the remotest chance that any abortionist will be prosecuted on the basis of a good-

[2] Unquestionably, rehabilitating § 5 (a) to satisfy this Court's opinion will be a far more extensive and more difficult task than that which the State faced under the District Court's ruling.

faith mistake regarding whether to abort, and if he does, with respect to which abortion technique is to be used. If there is substantial doubt about this, the Court should not complain of a lack of an authoritative state construction, as it does, but should direct abstention and permit the state courts to address the issues in the light of the Pennsylvania homicide laws with which those courts are so much more familiar than are we or any other federal court.

III

Although it seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth,* the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother. Nor has it yet ruled that the abortionist's determination of viability under such a standard must be final and is immune to civil or criminal attack. Sections 2 and 6 (b) of the Pennsylvania law, for example, remain undisturbed by the District Court's judgment or by the judgment of this Court.

What the Court has done is to issue a warning to the States, in the name of vagueness, that they should not attempt to forbid or regulate abortions when there is a chance for the survival of the fetus, but it is not sufficiently large that the abortionist considers the fetus to be viable. This edict has no constitutional warrant, and I cannot join it.

GIVHAN *v.* WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.

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

No. 77–1051. Argued November 7, 1978—Decided January 9, 1979

After petitioner was dismissed from her employment as a teacher, she intervened in a desegregation action against respondent School District, seeking reinstatement on the ground, *inter alia,* that her dismissal infringed her right of free speech under the First and Fourteenth Amendments. In an effort to justify the dismissal, the School District introduced evidence of, *inter alia,* a series of private encounters between petitioner and the school principal in which petitioner allegedly made "petty and unreasonable demands" in a manner variously described by the principal as "insulting," "hostile," "loud," and "arrogant." Concluding that the primary reason for the dismissal was petitioner's criticism of the School District's practices and policies, which she conceived to be racially discriminatory, the District Court held that the dismissal violated petitioner's First Amendment rights and ordered her reinstatement. The Court of Appeals reversed, holding that under *Pickering* v. *Board of Education,* 391 U. S. 563; *Perry* v. *Sindermann,* 408 U. S. 593; and *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, petitioner's complaints and opinions were not protected by the First Amendment because they were expressed privately to the principal, and because there is no constitutional right to "press even 'good' ideas on an unwilling recipient." *Held:* A public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. Pp. 413–417.

(a) *Pickering, Perry,* and *Mt. Healthy* do not support the Court of Appeals' conclusion that private expression is unprotected by the First Amendment. The fact that each of those cases involved public expression by the employee was not critical to the decision. Pp. 414–415.

(b) Nor is the Court of Appeals' view supported by the "captive audience" rationale, since the principal, having opened his office door to petitioner, was hardly in a position to argue that he was the "*unwilling* recipient" of her views. P. 415.

(c) Respondents' *Mt. Healthy* claim, rejected by the Court of Appeals, that the decision to terminate petitioner would have been made

even if her encounters with the principal had never occurred called for a factual determination that could not, on the record, be resolved by that court, since it was not presented to the District Court, *Mt. Healthy* having been decided after the trial in this case. Pp. 416–417.

555 F. 2d 1309, vacated in part and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 417.

David Rubin argued the cause for petitioner. With him on the briefs were *Stephen J. Pollak, Richard M. Sharp,* and *Fred L. Banks.*

J. Robertshaw argued the cause and filed a brief for respondents.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Bessie Givhan was dismissed from her employment as a junior high English teacher at the end of the 1970–1971 school year.[1] At the time of petitioner's termination, respondent Western Line Consolidated School District was the subject of a desegregation order entered by the United States District Court for the Northern District of Mississippi. Petitioner filed a complaint in intervention in the desegregation action, seeking reinstatement on the dual grounds that

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*Briefs of *amici curiae* urging reversal were filed by *David M. Rabban* and *William Van Alstyne* for the American Association of University Professors, and by *William A. Dobrovir* and *Andra N. Oakes* for the Fund for Constitutional Government and the Government Accountability Project.

[1] In a letter to petitioner, dated July 28, 1971, District Superintendent C. L. Morris gave the following reasons for the decision not to renew her contract:

"(1) [A] flat refusal to administer standardized national tests to the pupils in your charge; (2) an announced intention not to co-operate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year."

nonrenewal of her contract violated the rule laid down by the Court of Appeals for the Fifth Circuit in *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (1969), rev'd and remanded *sub nom. Carter* v. *West Feliciana Parish School Board,* 396 U. S. 290 (1970), on remand, 425 F. 2d 1211 (1970), and infringed her right of free speech secured by the First and Fourteenth Amendments of the United States Constitution. In an effort to show that its decision was justified, respondent School District introduced evidence of, among other things,[2] a series of private encounters between petitioner and the school principal in which petitioner allegedly made "petty and unreasonable demands" in a manner variously described by the principal as "insulting," "hostile," "loud," and "arrogant." After a two-day bench trial, the District Court held that petitioner's termination had violated the First Amendment. Finding that petitioner had made "demands" on but two occasions and that those demands

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[2] In addition to the reasons set out in the District Superintendent's termination letter to petitioner, n. 1, *supra,* the School District advanced several other justifications for its decision not to rehire petitioner. The Court of Appeals dealt with these allegations in a footnote:

"Appellants also sought to establish these other bases for the decision not to rehire: (1) that Givhan 'downgraded' the papers of white students; (2) that she was one of a number of teachers who walked out of a meeting about desegregation in the fall of 1969 and attempted to disrupt it by blowing automobile horns outside the gymnasium; (3) that the school district had received a threat by Givhan and other teachers not to return to work when schools reopened on a unitary basis in February, 1970; and (4) that Givhan had protected a student during a weapons shakedown at Riverside in March, 1970, by concealing a student's knife until completion of a search. The evidence on the first three of these points was inconclusive and the district judge did not clearly err in rejecting or ignoring it. Givhan admitted the fourth incident, but the district judge properly rejected that as a justification for her not being rehired, as there was no evidence that [the principal] relied on it in making his recommendation." *Ayers* v. *Western Line Consol. School Dist.,* 555 F. 2d 1309, 1313 n. 7 (CA5 1977).

"were neither 'petty' nor 'unreasonable,' insomuch as all the complaints in question involved employment policies and practices at [the] school which [petitioner] conceived to be racially discriminatory in purpose or effect," the District Court concluded that "the primary reason for the school district's failure to renew [petitioner's] contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." App. to Pet. for Cert. 35a. Accordingly, the District Court held that the dismissal violated petitioner's First Amendment rights, as enunciated in *Perry* v. *Sindermann,* 408 U. S. 593 (1972), and *Pickering* v. *Board of Education,* 391 U. S. 563 (1968), and ordered her reinstatement.

The Court of Appeals for the Fifth Circuit reversed. *Ayers* v. *Western Line Consol. School Dist.,* 555 F. 2d 1309 (1977). Although it found the District Court's findings not clearly erroneous, the Court of Appeals concluded that because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment. Support for this proposition was thought to be derived from *Pickering, supra, Perry, supra,* and *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274 (1977), which were found to contain "[t]he strong implication . . . that private expression by a public employee is not constitutionally protected." 555 F. 2d, at 1318. The Court of Appeals also concluded that there is no constitutional right to "press even 'good' ideas on an unwilling recipient," saying that to afford public employees the right to such private expression "would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions." *Id.,* at 1319. We are unable to agree that private expression of one's views is beyond constitutional protection, and therefore reverse the Court of Appeals' judgment and remand the case so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment.

This Court's decisions in *Pickering, Perry,* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.

In *Pickering* a teacher was discharged for publicly criticizing, in a letter published in a local newspaper, the school board's handling of prior bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. Noting that the free speech rights of public employees are not absolute, the Court held that in determining whether a government employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568. The Court concluded that under the circumstances of that case "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.,* at 573. Here the opinion of the Court of Appeals may be read to turn in part on its view that the working relationship between principal and teacher is significantly different from the relationship between the parties in *Pickering,*[3] as is evidenced by

[3] The *Pickering* Court's decision upholding a teacher's First Amendment claim was influenced by the fact that the teacher's public statements had not adversely affected his working relationship with the objects of his criticism:

"The statements [were] in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by

its reference to its own opinion in *Abbott* v. *Thetford,* 534 F. 2d 1101 (1976) (en banc), cert. denied, 430 U. S. 954 (1977). But we do not feel confident that the Court of Appeals' decision would have been placed on that ground notwithstanding its view that the First Amendment does not require the same sort of *Pickering* balancing for the private expression of a public employee as it does for public expression.[4]

Perry and *Mt. Healthy* arose out of similar disputes between teachers and their public employers. As we have noted, however, the fact that each of these cases involved public expression by the employee was not critical to the decision. Nor is the Court of Appeals' view supported by the "captive audience" rationale. Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the "*unwilling* recipient" of her views.

The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather

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immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U. S., at 569–570.

[4] Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.,* at 572–573. Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

than to spread his views before the public. We decline to adopt such a view of the First Amendment.

While this case was pending on appeal to the Court of Appeals, *Mt. Healthy City Bd. of Ed.* v. *Doyle, supra,* was decided. In that case this Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial" part in the employer's decision to terminate. Such a rule would require reinstatement of employees that the public employer would have dismissed even if the constitutionally protected conduct had not occurred and, consequently, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U. S., at 285. Thus, the Court held that once the employee has shown that his constitutionally protected conduct played a "substantial" role in the employer's decision not to rehire him, the employer is entitled to show "by a preponderance of the evidence that it would have reached the same decision as to [the employee's] re-employment even in the absence of the protected conduct." *Id.,* at 287.

The Court of Appeals in the instant case rejected respondents' *Mt. Healthy* claim that the decision to terminate petitioner would have been made even if her encounters with the principal had never occurred:

> "The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. . . . Therefore [respondents] failed to make a successful 'same decision anyway' defense." 555 F. 2d, at 1315.

Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her "demands." Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented to this Court. And while the District Court found that petitioner's "criticism" was the "primary" reason for the School District's failure to rehire her, it did not find that she would have been rehired *but for* her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which could not, on this record, be resolved by the Court of Appeals.[5]

Accordingly, the judgment of the Court of Appeals is vacated insofar as it relates to petitioner, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEVENS, concurring.

Because this Court's opinion in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, had not been announced when the District Court decided this case, it did not expressly find that respondents would have rehired petitioner if she had not engaged in constitutionally protected conduct. The District Court did find, however, that petitioner's protected conduct was the "primary" reason for respondents' decision.* The

[5] We cannot agree with the Court of Appeals that the record in this case does not admit of the argument that petitioner would have been terminated regardless of her "demands." Even absent consideration of petitioner's private encounters with the principal, a decision to terminate based on the reasons detailed at nn. 1 and 2, *supra*, would hardly strike us as surprising. Additionally, in his letter to petitioner setting forth the reasons for her termination, District Superintendent Morris makes no mention of petitioner's "demands" and "criticism." See n. 1, *supra*.

*App. to Pet. for Cert. 35a. See also *id.*, at 36a, where the District Court stated that petitioner's protected activity was "almost entirely" responsible for her termination.

Court of Appeals regarded that finding as foreclosing respondents' *Mt. Healthy* claim. In essence, the Court of Appeals concluded that the District Court would have made an appropriate finding on the issue if it had had access to our *Mt. Healthy* opinion.

My understanding of the District Court's finding is the same as the Court of Appeals'. Nevertheless, I agree that the District Court should have the opportunity to decide whether there is any need for further proceedings on the issue. If that court regards the present record as adequate to enable it to supplement its original findings without taking additional evidence, it is free to do so. On that understanding, I join the Court's opinion.

ARIZONA *v.* CALIFORNIA ET AL.

ON JOINT MOTION FOR ENTRY OF SUPPLEMENTAL DECREE AND MOTIONS FOR LEAVE TO INTERVENE

No. 8, Orig. Decided June 3, 1963—Decree entered March 9, 1964—Amended decree entered February 28, 1966—Argued October 10, 1978—Decided and supplemental decree entered January 9, 1979

Joint motion for entry of a supplemental decree is granted and a supplemental decree is entered; motions to intervene denied in part and otherwise referred to Special Master.

Opinion reported: 373 U. S. 546; decree reported: 376 U. S. 340; amended decree reported: 383 U. S. 268.

Ralph E. Hunsaker argued the cause for complainant.

Douglas B. Noble, Deputy Attorney General of California, argued the cause for defendant State of California et al. *Robert P. Will* argued the cause for defendant Metropolitan Water District of Southern California et al.

With Messrs. *Hunsaker, Noble,* and *Will* on the responses of the State of Arizona et al. to both motions to intervene were *Evelle J. Younger,* Attorney General of California, *Sanford N. Gruskin,* Chief Assistant Attorney General, *R. H. Connett* and *N. Gregory Taylor,* Assistant Attorneys General, *Edwin J. Dubiel, Emil Stipanovich, Jr.,* and *Anita E. Ruud,* Deputy Attorneys General, *Roy H. Mann, Maurice C. Sherrill, R. L. Knox, Jr., Burt Pines, Gilbert W. Lee, John W. Witt, C. M. Fitzpatrick, Joseph Kase, Jr., Robert List,* Attorney General of Nevada, *Lyle Rivera,* Chief Deputy Attorney General, *Brian McKay,* Deputy Attorney General, and *Thomas G. Nelson.*

With Mr. *Noble* on the response of the State of California et al. to the motion to intervene of the Colorado River Indian Tribes et al. were Messrs. *Younger, Gruskin, Connett, Taylor,*

Dubiel, Stipanovich, Ms. *Ruud,* Messrs. *Sherrill, Knox, List, Rivera, McKay,* and *Nelson.*

With Mr. *Will* on the response of the Metropolitan Water District of Southern California et al. to the motion to intervene of the Colorado River Indian Tribes et al. were Messrs. *Pines, Lee, Witt, Fitzpatrick,* and *Kase.*

Raymond C. Simpson argued the cause and filed briefs for the Fort Mojave Indian Tribe et al.

Lawrence D. Aschenbrenner argued the cause for the Cocopah Indian Tribe.

Terry Noble Fiske argued the cause for the Colorado River Indian Tribes.

Louis F. Claiborne argued the cause for the United States. On the memorandums for the United States were *Solicitor General McCree, Assistant Attorney General Moorman,* and *Myles E. Flint.**

PER CURIAM AND SUPPLEMENTAL DECREE.

The United States of America, Intervenor, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervenor, pursuant to Art. VI of the Decree entered in the case on March 9, 1964, at 376 U. S. 340, and amended on February 28, 1966, at 383 U. S. 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that the joint motion of the United States, the State of Arizona, the California Defendants, and the State of Nevada to enter a supplemental decree is granted and that said present

**Donald D. Stark* filed a brief as *amicus curiae.*

perfected rights in each State and their priority dates are determined to be as set forth below, subject to the following:

(1) The following listed present perfected rights relate to the quantity of water which may be used by each claimant and the list is not intended to limit or redefine the type of use otherwise set forth in said Decree.

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Art. II (D)(5) of said Decree.

(3) Article IX of said Decree is not affected by this list of present perfected rights.

(4) Any water right listed herein may be exercised only for beneficial uses.

(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Art. II (B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7–21 and 29–80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Art. II (D)(1)–(5) of said Decree, provided that the quantities fixed in paragraphs (1) through (5) of Art. II (D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to

supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

Indian Reservation	Unit Diversion Quantity Acre-Feet Per Irrigable Acre
Cocopah	6.37
Colorado River	6.67
Chemehuevi	5.97
Ft. Mojave	6.46
Ft. Yuma	6.67

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Art. II (D) of said Decree, shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application, the total consumptive use, as that term is defined in Art. I (A) of said Decree, for said Reservation shall not exceed the consumptive use that would have resulted if the diversions listed in subparagraph (i) of paragraphs (1) through (5) of Art. II (D) of said Decree and the equivalent portions of any supplement thereto had been used for irrigation of the number of acres specified for that Reservation in said paragraphs and supplement and

for the satisfaction of related uses. Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (numbered 7–21 and 29–80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

I

ARIZONA

A. Federal Establishments' Present Perfected Rights

The federal establishments named in Art. II, subdivision (D), paragraphs (2), (4), and (5) of the Decree entered March 9, 1964, in this case, such rights having been decreed in Art. II:

Defined Area of Land	Annual Diversions (acre-feet) [1]	Net Acres [1]	Priority Date
1) Cocopah Indian Reservation	2,744	431	Sept. 27, 1917
2) Colorado River Indian Reservation	358,400	53,768	Mar. 3, 1865
	252,016	37,808	Nov. 22, 1873
	51,986	7,799	Nov. 16, 1874
3) Fort Mojave Indian Reservation	27,969	4,327	Sept. 18, 1890
	68,447	10,589	Feb. 2, 1911

B. Water Projects' Present Perfected Rights

(4) *The Valley Division, Yuma Project* in annual quantities not to exceed (i) 254,200 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of

[1] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for the satisfaction of related uses, whichever of (i) or (ii) is less.

43,562 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

(5) *The Yuma Auxiliary Project, Unit B* in annual quantities not to exceed (i) 6,800 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,225 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

(6) *The North Gila Valley Unit, Yuma Mesa Division, Gila Project* in annual quantities not to exceed (i) 24,500 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 4,030 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed acre-feet of diversion from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
7) 160 acres in Lots 21, 24, and 25, Sec. 29 and Lots 15, 16, 17 and 18, and the SW¼ of the SE¼, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona. (Powers) [2]	960	1915
8) Lots 11, 12, 13, 19, 20, 22 and S½ of SW¼, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona. (United States) [3]	1,140	1915

Footnotes to table items 7 through 25 are on p. 428.

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
9) 60 acres within Lot 2, Sec. 15 and Lots 1 and 2, Sec. 22, T.10N., R.19W, G&SRBM. (Graham) [2]	360	1910
10) 180 acres within the N½ of the S½ and the S½ of the N½ of Sec. 13 and the SW¼ of the NE¼ of Sec. 14, T.18N., R.22W., G&SRBM. (Hulet) [2]	1,080	1902
11) 45 acres within the NE¼ of the SW¼, the SW¼ of the SW¼ and the SE¼ of the SW¼ of Sec. 11, T.18N., R.22W., G&SRBM. 80 acres within the N½ of the SW¼ of Sec. 11, T.18N., R.22W., G&SRBM. 10 acres within the NW¼ of the NE¼ of the NE¼ of Sec. 15, T.18N., R.22W., G&SRBM. 40 acres within the SE¼ of the SE¼ of Sec. 15, T.18N., R.22W., G&SRBM. (Hurschler) [2]	1,050	1902
12) 40 acres within Sec. 13, T.17N., R.22W., G&SRBM. (Miller) [2]	240	1902
13) 120 acres within Sec. 27, T.18N., R.21W., G&SRBM. 15 acres within the NW¼ of the NW¼, Sec. 23, T.18N., R.22W., G&SRBM. (McKellips and Granite Reef Farms) [4]	810	1902
14) 180 acres within the NW¼ of the NE¼, the SW¼ of the NE¼, the NE¼ of the SW¼, the NW¼ of the SE¼, the NE¼ of the SE¼, and the SW¼ of the SE¼, and the SE¼ of the SE¼, Sec. 31, T.18N., R.21W., G&SRBM. (Sherrill & Lafollette) [4]	1,080	1902

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
15) 53.89 acres as follows: Beginning at a point 995.1 feet easterly of the NW corner of the NE¼ of Sec. 10, T.8S., R.22W., Gila and Salt River Base and Meridian; on the northerly boundary of the said NE¼, which is the true point of beginning, then in a southerly direction to a point on the southerly boundary of the said NE¼ which is 991.2 feet E. of the SW corner of said NE¼ thence easterly along the S. line of the NE¼, a distance of 807.3 feet to a point, thence N. 0°7′ W., 768.8 feet to a point, thence E. 124.0 feet to a point, thence northerly 0°14′ W., 1,067.6 feet to a point, thence E. 130 feet to a point, thence northerly 0°20′ W., 405.2 feet to a point, thence northerly 63°10′ W., 506.0 feet to a point, thence northerly 90°15′ W., 562.9 feet to a point on the northerly boundary of the said NE¼, thence easterly along the said northerly boundary of the said NE¼, 116.6 feet to the true point of the beginning containing 53.89 acres. All as more particularly described and set forth in that survey executed by Thomas A. Yowell, Land Surveyor on June 24, 1969. (Molina) [4]	318	1928
16) 60 acres within the NW¼ of the NW¼ and the north half of the SW¼ of the NW¼ of Sec. 14, T.8S., R.22W., G&SRBM. 70 acres within the S½ of the SW¼ of the SW¼, and the W½ of the SW¼, Sec. 14, T.8S., R.22W., G&SRBM. (Sturges) [4]	780	1925
17) 120 acres within the N½ NE¼, NE¼ NW¼, Section 23, T.18N., R.22W., G&SRBM. (Zozaya) [4]	720	1912

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
18) 40 acres in the W½ of the NE¼ of Section 30, and 60 acres in the W½ of the SE¼ of Section 30, and 60 acres in the E½ of the NW¼ of Section 31, comprising a total of 160 acres all in Township 18 North, Range 21 West of the G&SRBM. (Swan) [4]	960	1902
19) 7 acres in the East 300 feet of the W½ of Lot 1 (Lot 1, being the SE¼ SE¼, 40 acres more or less), Section 28, Township 16 South, Range 22 East, San Bernardino Meridian, lying North of U. S. Bureau of Reclamation levee right of way. EXCEPT that portion conveyed to the United States of America by instrument recorded in Docket 417, page 150 EXCEPTING any portion of the East 300 feet of W½ of Lot 1 within the natural bed of the Colorado River below the line of ordinary high water and also EXCEPTING any artificial accretions waterward of said line of ordinary high water, all of which comprises approximately seven (7) acres. (Milton and Jean Phillips) [4]	42	1900

2. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
20) City of Parker [2]	630	400	1905
21) City of Yuma [2]	2,333	1,478	1893

II

CALIFORNIA

A. Federal Establishments' Present Perfected Rights

The federal establishments named in Art. II, subdivision (D), paragraphs (1), (3), (4), and (5) of the Decree entered March 9, 1964, in this case such rights having been decreed by Art. II:

Defined Area of Land	Annual Diversions (acre-feet) [5]	Net Acres [5]	Priority Date
22)			
Chemehuevi Indian Reservation	11,340	1,900	Feb. 2, 1907
23)			
Yuma Indian Reservation	51,616	7,743	Jan. 9, 1884
24)			
Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	3,760	564	May 15, 1876
25)			
Fort Mojave Indian Reservation	13,698	2,119	Sept. 18, 1890

B. Water Districts' and Projects' Present Perfected Rights

26)

The Palo Verde Irrigation District in annual quantities not to exceed (i) 219,780 acre-feet of diversions from the

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[2] The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the Claimants identified with a parcel in Arizona's 1967 list submitted to this Court.

[3] Included as a part of the Powers' claim in Arizona's 1967 list submitted to this Court. Subsequently, the United States and Powers agreed to a Stipulation of Settlement on land ownership whereby title to this property was quieted in favor of the United States.

[4] The names in parentheses following the description of the "Defined Area of Land" are the names of claimants, added since the 1967 list, upon whose water use these present perfected rights are predicated.

[5] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 33,604 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1877.

27)

The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

28)

The Reservation Division, Yuma Project, California (non-Indian portion) in annual quantities not to exceed (i) 38,270 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 6,294 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of diversions from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
29)		
130 acres within Lots 1, 2, and 3, SE¼ of NE¼ of Section 27, T.16S., R.22E., S.B.B. & M. (Wavers) [6]	780	1856

Footnotes to table items 29 through 80 are on p. 435.

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
30)		
40 acres within W½, W½ of E½ of Section 1, T.9N., R.22E., S.B.B. & M. (Stephenson) [6]	240	1923
31)		
20 acres within Lots 1 and 2, Sec. 19, T.13S., R.23E., and Lots 2, 3, and 4 of Sec. 24, T.13S., R.22E., S.B.B. & M. (Mendivil) [6]	120	1893
32)		
30 acres within NW¼ of SE¼, S½ of SE¼, Sec. 24, and NW¼ of NE¼, Sec. 25, all in T.9S., R.21E., S.B.B. & M. (Grannis) [6]	180	1928
33)		
25 acres within Lot 6, Sec. 5; and Lots 1 and 2, SW¼ of NE¼, and NE¼ of SE¼ of Sec. 8, and Lots 1 & 2 of Sec. 9, all in T.13S., R.22E., S.B.B. & M. (Morgan) [6]	150	1913
34)		
18 acres within E½ of NW¼ and W½ of NE¼ of Sec. 14, T.10S., R.21E., S.B.B. & M. (Milpitas) [6]	108	1918
35)		
10 acres within N½ of NE¼, SE¼ of NE¼, and NE¼ of SE¼, Sec. 30, T.9N., R.23E., S.B.B. & M. (Simons) [6]	60	1889
36)		
16 acres within E½ of NW¼ and N½ of SW¼, Sec. 12, T.9N., R.22E., S.B.B. & M. (Colo. R. Sportsmen's League) [6]	96	1921
37)		
11.5 acres within E½ of NW¼, Sec. 1, T.10S., R.21E., S.B.B. & M. (Milpitas) [6]	69	1914
38)		
11 acres within S½ of SW¼, Sec. 12, T.9N., R.22E., S.B.B. & M. (Andrade) [6]	66	1921
39)		
6 acres within Lots 2, 3, and 7 and NE¼ of SW¼, Sec. 19, T.9N., R.23E., S.B.B. & M. (Reynolds) [6]	36	1904

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
40)		
10 acres within N½ of NE¼, SE¼ of NE¼ and NE¼ of SE¼, Sec. 24, T.9N., R.22E., S.B.B. & M. (Cooper) [6]	60	1905
41)		
20 acres within SW¼ of SW¼ (Lot 8), Sec. 19, T.9N., R.23E., S.B.B. & M. (Chagnon) [7]	120	1925
42)		
20 acres within NE¼ of SW¼, N½ of SE¼, SE¼ of SE¼, Sec. 14, T.9S., R.21E., S.B.B. & M. (Lawrence) [7]	120	1915

2. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
43)			
City of Needles [6]	1,500	950	1885
44)			
Portions of: Secs. 5, 6, 7 & 8, T.7N., R.24E.; Sec. 1, T.7N., R.23E.; Secs. 4, 5, 9, 10, 15, 22, 23, 25, 26, 35, & 36, T.8N., R.23E.; Secs. 19, 29, 30, 32 & 33, T.9N., R.23E., S.B.B. & M. (Atchison, Topeka and Santa Fe Railway Co.) [6]	1,260	273	1896
45)			
Lots 1, 2, 3, 4, 5, & SW¼ NW¼ of Sec. 5, T.13S., R.22E., S.B.B. & M. (Conger) [7]	1.0	0.6	1921

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
46) Lots 1, 2, 3, 4 of Sec. 32, T.11S., R.22E., S.B.B. & M. (G. Draper) [7]	1.0	0.6	1923
47) Lots 1, 2, 3, 4, and SE¼ SW¼ of Sec. 20, T.11S., R.22E., S.B.B. & M. (McDonough) [7]	1.0	0.6	1919
48) SW¼ of Sec. 25, T.8S., R.22E., S.B.B. & M. (Faubion) [7]	1.0	0.6	1925
49) W½ NW¼ of Sec. 12, T.9N., R.22E., S.B.B. & M. (Dudley) [7]	1.0	0.6	1922
50) N½ SE¼ and Lots 1 and 2 of Sec. 13, T.8S., R.22E., S.B.B. & M. (Douglas) [7]	1.0	0.6	1916
51) N½ SW¼, NW¼ SE¼, Lots 6 and 7, Sec. 5, T.9S., R.22E., S.B.B. & M. (Beauchamp) [7]	1.0	0.6	1924
52) NE¼ SE¼, SE¼ NE¼, and Lot 1, Sec. 26, T.8S., R.22E., S.B.B. & M. (Clark) [7]	1.0	0.6	1916
53) N½ SW¼, NW¼ SE¼, SW¼ NE¼, Sec. 13, T.9S., R.21E., S.B.B. & M. (Lawrence) [7]	1.0	0.6	1915
54) N½ NE¼, E½ NW¼, Sec. 13, T.9S., R.21E., S.B.B. & M. (J. Graham) [7]	1.0	0.6	1914
55) SE¼, Sec. 1, T.9S., R.21E., S.B.B. & M. (Geiger) [7]	1.0	0.6	1910

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
56) Fractional W½ of SW¼ (Lot 6) Sec. 6, T.9S., R.22E., S.B.B. & M. (Schneider) [7]	1.0	0.6	1917
57) Lot 1, Sec. 15; Lots 1 & 2, Sec. 14; Lots 1 & 2, Sec. 23; all in T.13S., R.22E., S.B.B. & M. (Martinez) [7]	1.0	0.6	1895
58) NE¼, Sec. 22, T.9S., R.21E., S.B.B. & M. (Earle) [7]	1.0	0.6	1925
59) NE¼ SE¼, Sec. 22, T.9S., R.21E., S.B.B. & M. (Diehl) [7]	1.0	0.6	1928
60) N½ NW¼, N½ NE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Reid) [7]	1.0	0.6	1912
61) W½ SW¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Graham) [7]	1.0	0.6	1916
62) S½ NW¼, NE¼ SW¼, SW¼ NE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (Cate) [7]	1.0	0.6	1919
63) SE¼ NE¼, N½ SE¼, SE¼ SE¼, Sec. 23, T.9S., R.21E., S.B.B. & M. (McGee) [7]	1.0	0.6	1924
64) SW¼ SE¼, SE¼ SW¼, Sec. 23, NE¼ NW¼, NW¼ NE¼, Sec. 26; all in T.9S., R.21E., S.B.B. & M. (Stallard) [7]	1.0	0.6	1924
65) W½ SE¼, SE¼ SE¼, Sec. 26, T.9S., R.21E., S.B.B. & M. (Randolph) [7]	1.0	0.6	1926

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
66) E½ NE¼, SW¼ NE¼, SE¼ NW¼, Sec. 26, T.9S., R.21E., S.B.B. & M. (Stallard) [7]	1.0	0.6	1928
67) S½ SW¼, Sec. 13, N½ NW¼, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Keefe) [7]	1.0	0.6	1926
68) SE¼ NW¼, NW¼ SE¼, Lots 2, 3 & 4, Sec. 25, T.13S., R.23E., S.B.B. & M. (C. Ferguson) [7]	1.0	0.6	1903
69) Lots 4 & 7, Sec. 6; Lots 1 & 2, Sec. 7; all in T.14S., R.24E., S.B.B. & M. (W. Ferguson) [7]	1.0	0.6	1903
70) SW¼ SE¼, Lots 2, 3, and 4, Sec. 24, T.12S., R.21E., Lot 2, Sec. 19, T.12S., R.22E., S.B.B. & M. (Vaulin) [7]	1.0	0.6	1920
71) Lots 1, 2, 3 and 4, Sec. 25, T.12S., R.21E., S.B.B. & M. (Salisbury) [7]	1.0	0.6	1920
72) Lots 2, 3, SE¼ SE¼, Sec. 15, NE¼ NE¼, Sec. 22; all in T.13S., R.22E., S.B.B. & M. (Hadlock) [7]	1.0	0.6	1924
73) SW¼ NE¼, SE¼ NW¼, and Lots 7 & 8, Sec. 6, T.9S., R.22E., S.B.B. & M. (Streeter) [7]	1.0	0.6	1903
74) Lot 4, Sec. 5; Lots 1 & 2, Sec. 7; Lots 1 & 2, Sec. 8; Lot 1, Sec. 18; all in T.12S., R.22E., S.B.B. & M. (J. Draper) [7]	1.0	0.6	1903

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
75) SW¼ NW¼, Sec. 5; SE¼ NE¼ and Lot 9, Sec. 6; all in T.9S., R.22E., S.B.B. & M. (Fitz) [7]	1.0	0.6	1912
76) NW¼ NE¼, Sec. 26; Lots 2 & 3, W½ SE¼, Sec. 23; all in T.8S., R.22E., S.B.B. & M. (Williams) [7]	1.0	0.6	1909
77) Lots 1, 2, 3, 4, & 5, Sec. 25, T.8S., R.22E., S.B.B. & M. (Estrada) [7]	1.0	0.6	1928
78) S½ NW¼, Lot 1, frac. NE¼ SW¼, Sec. 25, T.9S., R.21E., S.B.B. & M. (Whittle) [7]	1.0	0.6	1925
79) N½ NW¼, Sec. 25; S½ SW¼, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Corington) [7]	1.0	0.6	1928
80) S½ NW¼, N½ SW¼, Sec. 24, T.9S., R.21E., S.B.B. & M. (Tolliver) [7]	1.0	0.6	1928

III

NEVADA

A. Federal Establishments' Present Perfected Rights

The federal establishments named in Art. II, subdivision (D), paragraphs (5) and (6) of the Decree entered on

[6] The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the claimant identified with a parcel in California's 1967 list submitted to this Court.

[7] The names in parentheses following the description of the "Defined Area of Land" are the names of the homesteaders upon whose water use these present perfected rights, added since the 1967 list submitted to this Court, are predicated.

March 9, 1964, in this case, such rights having been decreed by Art. II:

Defined Area of Land	Annual Diversions (acre-feet)	Net Acres	Priority Date
81)			
Fort Mojave Indian Reservation	12,534 [8]	1,939 [8]	Sept. 18, 1890
82)			
Lake Mead National Recreation Area (The Overton Area of Lake Mead N.R.A. provided in Executive Order 5105)	500	300 [9]	May 3, 1929 [10]

It is ordered that Judge Elbert P. Tuttle be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE

[8] The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

[9] Refers to acre-feet of annual consumptive use, not to net acres.

[10] Article II (D)(6) of said Decree specifies a priority date of March 3, 1929. Executive Order 5105 is dated May 3, 1929 (see C. F. R. 1964 Cumulative Pocket Supplement, p. 276, and the Findings of Fact and Conclusions of Law of the Special Master's Report in this case, pp. 294–295).

CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

It is further ordered that the motion of Fort Mojave Indian Tribe et al. for leave to intervene, insofar as it seeks intervention to oppose entry of the supplemental decree, is denied. In all other respects, this motion and the motion of Colorado River Indian Tribes et al. for leave to intervene are referred to the Special Master.

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

LEIS ET AL. *v.* FLYNT ET AL.

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

No. 77-1618. Decided January 15, 1979

The interest of out-of-state attorneys, who were not admitted to practice law in Ohio, in representing defendants in an Ohio criminal prosecution *held* not to be a cognizable property or liberty interest within the terms of the Fourteenth Amendment, absent any showing of an independent state- or federal-law source for the interest. Hence, the Constitution did not obligate the Ohio courts to accord such attorneys procedural due process on their application for permission to appear *pro hac vice*.

Certiorari granted; 574 F. 2d 874, reversed and remanded.

PER CURIAM.

Petitioners, the judges of the Court of Common Pleas of Hamilton County, Ohio, and the Hamilton County prosecutor, seek relief from a decision of the United States Court of Appeals for the Sixth Circuit. The Court of Appeals upheld a Federal District Court injunction that forbids further prosecution of respondents Larry Flynt and Hustler Magazine, Inc., until respondents Herald Fahringer and Paul Cambria are tendered a hearing on their applications to appear *pro hac vice* in the Court of Common Pleas on behalf of Flynt and Hustler Magazine. Petitioners contend that the asserted right of an out-of-state lawyer to appear *pro hac vice* in an Ohio court does not fall among those interests protected by the Due Process Clause of the Fourteenth Amendment. Because we agree with this contention, we grant the petition for certiorari and reverse the judgment of the Sixth Circuit.[1]

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[1] Petitioners also contend that the injunction violates principles of abstention embodied in our decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951); and *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943). Because of our disposition of the merits of this case, we think it unnecessary to consider that issue.

Flynt and Hustler Magazine were indicted on February 8, 1977, for multiple violations of Ohio Rev. Code Ann. § 2907.31 (1975), which prohibits the dissemination of harmful material to minors. At the arraignment on February 25, local counsel for Flynt and Hustler presented an entry of counsel form that listed Fahringer and Cambria as counsel for both defendants. Neither lawyer was admitted to practice law in Ohio.[2] The form was the one used by members of the Ohio Bar, and it neither constituted an application for admission *pro hac vice* nor alerted the court that Fahringer and Cambria were not admitted to practice in Ohio. The judge presiding at the arraignment routinely endorsed the form but took no other action with respect to the two out-of-state lawyers.[3]

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[2] The practice of law in Ohio is governed by Ohio Rev. Code Ann. § 4705.01 (1977), which provides in pertinent part:

"No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of another person, unless he has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules."

Rule I, § 8 (C), of the Supreme Court Rules for the Government of the Bar of Ohio determines when out-of-state attorneys may appear *pro hac vice* in Ohio courts:

"Admission Without Examination.

. . . . .

"(C) An applicant under this section shall not engage in the practice of law in this state prior to the filing of his application. To do so constitutes the unauthorized practice of law and will result in a denial of the application. This paragraph (C) does not apply to participation by a nonresident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."

[3] The District Court found that Fahringer and Cambria had appeared on behalf of Flynt and Hustler Magazine in other criminal proceedings before the Hamilton County Court of Common Pleas, apparently without being required to do more than they did here. 434 F. Supp. 481, 483 (SD Ohio

The case was transferred as a matter of course to Judge Morrissey, who had before him another active indictment against Flynt and Hustler Magazine. Fahringer and Cambria made no application for admission *pro hac vice* to him or any other judge. At a pretrial conference on March 9 Judge Morrissey advised local counsel that neither out-of-state lawyer would be allowed to represent Flynt or Hustler Magazine. Fahringer and Cambria appeared in person before Judge Morrissey for the first time at a motions hearing on April 8, where they expressed their interest in representing the defendants. Judge Morrissey summarily dismissed the request. Respondents then commenced a mandamus action in the Ohio Supreme Court seeking to overturn the denial of admission. They also filed an affidavit of bias and prejudice seeking to remove Judge Morrissey from the case. The Ohio court dismissed the mandamus action but did remove Judge Morrissey, stating that while it found no evidence of bias or prejudice, trial before a different judge would avoid even the appearance of impropriety. The new trial judge ruled that the Ohio Supreme Court's dismissal of the mandamus action bound him to deny Fahringer and Cambria permission to represent Flynt and Hustler Magazine, but he did allow both of them to work with in-state counsel in preparing the case.

Respondents next filed this suit in the United States District Court for the Southern District of Ohio to enjoin further

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1977). This prior experience might explain why the local lawyer did not alert the court that Fahringer and Cambria were not admitted to practice in Ohio, but it does not indicate that the first judge's endorsement of the entry form, without more, constituted leave for a *pro hac vice* appearance. Although the District Court found that the manner in which Fahringer and Cambria sought leave for an appearance comported with the "customary" procedures of the court, *ibid.*, it made no finding that these lawyers justifiably relied on any official explanation of these procedures or had any other ground for believing they actually had received leave of the court to appear.

prosecution of the criminal case until the state trial court held a hearing on the contested *pro hac vice* application. The court ruled that the lawyers' interest in representing Flynt and Hustler Magazine was a constitutionally protected property right which petitioners had infringed without according the lawyers procedural due process. 434 F. Supp. 481 (1977). Further prosecution of Flynt and Hustler Magazine therefore was enjoined until petitioners tendered Fahringer and Cambria the requested hearing. The Sixth Circuit affirmed, holding that the lawyers could not be denied the privilege of appearing *pro hac vice* "without a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion." 574 F. 2d 874, 879 (1978).

As this Court has observed on numerous occasions, the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests "that stem from an independent source such as state law." *Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972); see *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 9 (1978); *Bishop* v. *Wood,* 426 U. S. 341, 344 (1976); *Paul* v. *Davis,* 424 U. S. 693, 709–710 (1976); *Goss* v. *Lopez,* 419 U. S. 565, 572–574 (1975); *Perry* v. *Sindermann,* 408 U. S. 593, 602 n. 7 (1972). The Court of Appeals evidently believed that an out-of-state lawyer's interest in appearing *pro hac vice* in an Ohio court stems from some such independent source. It cited no state-law authority for this proposition, however, and indeed noted that "Ohio has no specific standards regarding *pro hac vice* admissions . . . ." 574 F. 2d, at 879. Rather the court referred to the prevalence of *pro hac vice* practice in American courts and instances in our history where counsel appearing *pro hac vice* have rendered distinguished service. We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member

of the local bar. In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is a practice to be encouraged. But it is not a right granted either by statute or the Constitution. Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.[4]

A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding. See *Perry, supra,* at 601–602. The record here is devoid of any indication that an out-of-state lawyer may claim such an entitlement in Ohio,

[4] The dissenting opinion relies heavily on dictum in *Spanos* v. *Skouras Theatres Corp.,* 364 F. 2d 161 (CA2 1966). The facts of that case were different from those here, and the precise holding of the court was quite narrow. The court ruled that where a client sought to defend on the ground of illegality against an out-of-state attorney's action for his fee, and where the illegality stemmed entirely from the failure of the client's in-state attorneys to obtain leave for the out-of-state attorney to appear in Federal District Court, the client would not be allowed to escape from the contract through his own default. *Id.,* at 168–169. The balance of the opinion, which declared that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state," *id.,* at 170, must be considered to have been limited, if not rejected entirely, by *Norfolk & Western R. Co.* v. *Beatty,* 423 U. S. 1009 (1975).

The dissenting opinion also suggests that a client's interest in having out-of-state counsel is implicated by this decision. *Post,* at 445–446, n. 2. The court below, however, "did not reach the issue of whether the constitutional rights of Flynt and Hustler Magazine had also been violated," 574 F. 2d 874, 877 (CA6 1978), recognizing as it did that a federal-court injunction enjoining a state criminal prosecution on a ground that could be asserted by the defendant in the state proceeding would conflict with this Court's holding in *Younger* v. *Harris,* 401 U. S. 37 (1971).

where the rules of the Ohio Supreme Court expressly consign the authority to approve a *pro hac vice* appearance to the discretion of the trial court. N. 2, *supra.* Even if, as the Court of Appeals believed, respondents Fahringer and Cambria had "reasonable expectations of professional service," 574 F. 2d, at 879, they have not shown the requisite *mutual* understanding that they would be permitted to represent their clients in any particular case in the Ohio courts. The speculative claim that Fahringer's and Cambria's reputation might suffer as the result of the denial of their asserted right cannot by itself make out an injury to a constitutionally protected interest. There simply was no deprivation here of some right previously held under state law. *Id.,* at 708–709.

Nor is there a basis for the argument that the interest in appearing *pro hac vice* has its source in federal law. See *Paul* v. *Davis, supra,* at 699–701. There is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis. See *Norfolk & Western R. Co.* v. *Beatty,* 423 U. S. 1009 (1975), summarily aff'g 400 F. Supp. 234 (SD Ill.); *Brown* v. *Supreme Court of Virginia,* 414 U. S. 1034 (1973), summarily aff'g 359 F. Supp. 549 (ED Va.). Cf. *Hicks* v. *Miranda,* 422 U. S. 332, 343–345 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another. See *Ginsburg* v. *Kovrak,* 392 Pa. 143, 139 A. 2d 889, appeal dismissed for want of substantial federal question, 358 U. S. 52 (1958). Accordingly, because Fahringer and Cambria did not possess a cognizable property interest within the terms of the Fourteenth Amendment, the Constitution does not obligate the Ohio courts to accord them procedural due process in passing on their application for permission to

appear *pro hac vice* before the Court of Common Pleas of Hamilton County.[5]

The petition for writ of certiorari is granted, the judgment

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[5] The dissenting opinion of MR. JUSTICE STEVENS argues that a lawyer's right to "pursu[e] his calling is protected by the Due Process Clause . . . when he crosses the border" of the State that licensed him, *post*, at 445. MR. JUSTICE STEVENS identifies two "protected" interests that "reinforce" each other. These are said to be "the 'nature' of the interest in *pro hac vice* admissions [and] the 'implicit promise' inhering in Ohio custom." *Post*, at 456.

The first of these lawyer's "interests" is described as that of "discharging [his] responsibility for the fair administration of justice in our adversary system." *Post*, at 453. As important as this interest is, the suggestion that the Constitution assures the right of a lawyer to practice in the court of every State is a novel one, not supported by any authority brought to our attention. Such an asserted right flies in the face of the traditional authority of state courts to control who may be admitted to practice before them. See *Norfolk & Western R. Co.* v. *Beatty*, *supra*; ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 13–14 (Final Draft 1970). If accepted, the constitutional rule advanced by the dissenting opinion would prevent those States that have chosen to bar all *pro hac vice* appearances from continuing to do so, see, *e. g.*, Cal. Bus. & Prof. Code Ann. §§ 6062, 6068 (West 1974 and Supp. 1978); and would undermine the policy of those States which do not extend reciprocity to out-of-state lawyers, see, *e. g.*, Ariz. Sup. Ct. Rule 28 (c) I; Fla. Rules of the Sup. Ct. Relating to Admissions to the Bar, Art. I, § 1.

The second ground for due process protection identified in the dissenting opinion is the "implicit promise" inherent in Ohio's past practice in "assur[ing] out-of-state practitioners that they are welcome in Ohio's courts. . . ." *Post*, at 456, 453. We recall no other claim that a constitutional right can be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past. That some courts, in setting the standards for admission *within their jurisdiction*, have required a showing of cause before denying leave to appear *pro hac vice* provides no support for the proposition that the Constitution imposes this "cause" requirement on state courts that have chosen to reject it.

of the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE would grant certiorari and set the case for oral argument.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

A lawyer's interest in pursuing his calling is protected by the Due Process Clause of the Fourteenth Amendment.[1] The question presented by this case is whether a lawyer abandons that protection when he crosses the border of the State which issued his license to practice.

The Court holds that a lawyer has no constitutionally protected interest in his out-of-state practice. In its view, the interest of the lawyer is so trivial that a judge has no obligation to give any consideration whatsoever to the merits of a *pro hac vice* request, or to give the lawyer any opportunity to advance reasons in support of his application. The Court's square holding is that the Due Process Clause of the Fourteenth Amendment simply does not apply to this kind of ruling by a state trial judge.[2]

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[1] *Konigsberg* v. *State Bar*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239, and n. 5.

[2] Although the Court does not address it, this case also presents the question whether a defendant's interest in representation by nonresident counsel is entitled to any constitutional protection. The clients, as well as the lawyers, are parties to this litigation. Moreover, the Ohio trial judge made it perfectly clear that his ruling was directed at the defendants, and not merely their counsel. After striking the appearances of Fahringer and Cambria, the trial judge stated:

"I will tell you this then, Mr. Flynt. [T]he case is set for the 2d of May, 1977. . . . *The only thing is that you will be restricted to having an attorney that's admitted to practice in the State of Ohio.*" Tr. of

The premises for this holding can be briefly stated. A nonresident lawyer has no right, as a matter of either state or federal law, to appear in an Ohio court. Absent any such enforceable entitlement, based on an explicit rule or mutual understanding, the lawyer's interest in making a *pro hac vice* appearance is a mere "privilege" that Ohio may grant or withhold in the unrestrained discretion of individual judges. The conclusion that a lawyer has no constitutional protection against a capricious exclusion [3] seems so obvious to the major-

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Proceedings in Common Pleas Court, Hamilton County, Ohio, in No. B77–0341 on Apr. 8, 1977, p. 5 (emphasis added).

A defendant's interest in adequate representation is "perhaps his most important privilege" protected by the Constitution. *Powell* v. *Alabama*, 287 U. S. 45, 70. Whatever the scope of a lawyer's interest in practicing in other States may be, Judge Friendly is surely correct in stating that the client's interest in representation by out-of-state counsel is entitled to some measure of constitutional protection:

"We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F. 2d 280, 285 (5 Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication." *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d 161, 170 (en banc) (CA2 1966).

[3] In this case there is no dispute about the capricious character of the Ohio court's action. Notwithstanding the unblemished professional careers of Fahringer and Cambria—in Ohio and elsewhere—their adherence to the same application procedures that they had followed successfully in the past, and their demonstrated familiarity with the issues involved in the litigation, Judge Morrissey refused to allow them to appear *pro hac vice*.

In full, Judge Morrissey ruled: "Mr. Fahringer and Mr. Cambria are not attorneys of record in this case and will not be permitted to try this case." Tr. of Apr. 8, 1977, *supra*, at 3. So far as the record shows,

ity that argument of the question is unnecessary. Summary reversal is the order of the day.

A few years ago the Court repudiated a similar syllogism which had long supported the conclusion that a parolee has no constitutionally protected interest in his status.[4] Accepting

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this was the second official action taken with respect to the *pro hac vice* applications of Fahringer and Cambria. In the first, Judge Rupert A. Doan, who presided at Flynt's arraignment, issued two orders designating both lawyers counsel "of record" in case No. B77–0341, the case eventually assigned to Judge Morrissey for trial. According to Rule 10 (E) of the Rules of Local Practice of the Court of Common Pleas, Hamilton County, Ohio, under which Judges Doan and Morrissey were operating, once a designation order is filed, "such attorney shall become attorney of record . . . and shall not be permitted to withdraw except upon written motion and for good cause shown." Despite Rule 10 (E), no objection to the appearance of Fahringer and Cambria, nor any argument either for or against their request, was heard in advance of the final ruling. In point of fact, nothing in the record identifies a legitimate reason for the judge's action.

The record does suggest, and in any case the Court's broad holding would certainly encompass, one explanation for Judge Morrissey's unusual ruling, but it can hardly be characterized as legitimate. This is an obscenity case. Conceivably Judge Morrissey has strong views about the distribution of pornographic materials to minors and about lawyers who specialize in defending such activity. Perhaps these are not the kind of lawyers that he wants practicing in his courtroom. That Judge Morrissey reportedly referred to Fahringer as a "fellow traveler" of pornographers is at least consistent with these speculations. Cincinnati Post, Feb. 9, 1977, p. 13. Indeed, after denying respondents' request to have Judge Morrissey removed from the case for bias, the Supreme Court of Ohio without explanation ordered that another judge of the Hamilton County Court of Common Pleas try the case.

[4] That syllogism had its adherents well into this century. See *Curtis* v. *Bennett,* 351 F. 2d 931, 933 (CA8 1965), quoted in *Morrissey* v. *Brewer,* 443 F. 2d 942, 946 (CA8 1971): "A parole is a matter of grace, not a vested right. . . . [D]iscretion is left to the States as to the manner and terms upon which paroles may be granted and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard." See also *Hyser* v. *Reed,* 115 U. S. App. D. C. 254, 266, 318 F. 2d 225, 237 (1963), cert. denied *sub nom. Jamison*

the premise that the parolee has no "right" to preserve his contingent liberty, the Court nevertheless concluded that the nature of his status, coupled with the State's "implicit promise" that it would not be revoked arbitrarily, was sufficient to require constitutional protection. *Morrissey* v. *Brewer*, 408 U. S. 471, 481–482.[5] As the Court observed, it "is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.'" *Id.*, at 482. In my judgment, it is equally futile to try to deal with the problem presented by this case in terms of whether the out-of-state pursuit of a lawyer's calling is based on an "explicit," or an "enforceable" "entitlement" rather than a so-called "privilege." Instead, we should examine the nature of the activity and the implicit promise Ohio has made to these petitioners.

I

The notion that a state trial judge has arbitrary and unlimited power to refuse a nonresident lawyer permission to appear in his courtroom is nothing but a remnant of a bygone

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v. *Chappell*, 375 U. S. 957 ("In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege").

[5] "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. . . .

"The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

"We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." 408 U. S., at 481–482.

era. Like the body of rules that once governed parole, the nature of law practice has undergone a metamorphosis during the past century. Work that was once the exclusive province of the lawyer is now performed by title companies, real estate brokers, corporate trust departments, and accountants. Rules of ethics that once insulated the local lawyer from competition are now forbidden by the Sherman Act [6] and by the First Amendment to the Constitution of the United States.[7] Interstate law practice and multistate law firms are now commonplace.[8] Federal questions regularly arise in state criminal trials and permeate the typical lawyer's practice. Because the assertion of federal claims or defenses is often unpopular,

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[6] Because the "transactions which create the need for the particular legal services in question frequently are interstate transactions," the practice of law is now regarded as a commercial activity subject to the strictures of the Sherman Act. *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 783–784.

[7] Lawyers now have a constitutional right to advertise because "significant societal interests are served by such speech." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 364.

[8] "Multistate or interstate practice by attorneys in this country is an expanding phenomenon. While no published quantitative data specifically support that assertion, a variety of established or verifiable facts exist that make the inference virtually indisputable. First is the increased mobility . . . of legal problem-solvers, problem-bringers and hence the legal problems themselves. Second, an outgrowth of the first set of facts is the increasing degree of uniformity of our laws, to a point where we are now commonly confronted with model codes, uniform state acts, federal practice rules (often copied by states) and similar substantive and procedural developments. Third, partly a response to the first two sets of facts and partly a reflection of the growing general complexity of our society, is the gradual change in the character of law practice from a generalist skill to an increasingly specialized one; hence the emergence of lawyers regarded and operating as . . . specialists . . . equipped to cope with problems that transcend jurisdictional boundaries and the legal competence of local generalists." Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699, 699–700 (1975) (footnote omitted). See also 19 Stan. L. Rev. 856, 869 (1967).

"advice and assistance by an out-of-state lawyer may be the only means available for vindication." [9] The "increased specialization and high mobility" [10] of today's Bar is a consequence of the dramatic change in the demand for legal services that has occurred during the past century.

History attests to the importance of *pro hac vice* appearances. As Judge Merritt, writing for the Court of Appeals, explained:

> "Nonresident lawyers have appeared in many of our most celebrated cases. For example, Andrew Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York in 1735 in colonial America's most famous freedom-of-speech case. Clarence Darrow appeared in many states to plead the cause of an unpopular client, including the famous *Scopes* trial in Tennessee where he opposed another well-known, out-of-state lawyer, William Jennings Bryan. Great lawyers from Alexander Hamilton and Daniel Webster to Charles Evans Hughes and John W. Davis were specially admitted for the trial of important cases in other states. A small group of lawyers appearing *pro hac vice* inspired and initiated the civil rights movement in its early stages. In a series of cases brought in courts throughout the South, out-of-state lawyers Thurgood Marshall, Constance Motley and Spottswood Robinson, before their appointments to the federal bench, developed the legal principles which gave rise to the civil rights movement.
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> "There are a number of reasons for this tradition. 'The demands of business and the mobility of our society' are the reasons given by the American Bar Association in Canon 3 of the Code of Professional Responsibility. That Canon discourages 'territorial limitations' on the

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[9] *Spanos* v. *Skouras Theatres Corp.*, 364 F. 2d, at 170.

[10] *Ibid.*

practice of law, including trial practice. There are other reasons in addition to business reasons. A client may want a particular lawyer for a particular kind of case, and a lawyer may want to take the case because of the skill required. Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense. These are important values, both for lawyers and clients, and should not be denied arbitrarily." 574 F. 2d 874, 878–879 (CA6 1978) (footnotes omitted).[11]

The modern examples identified by Judge Merritt, though more illustrious than the typical *pro hac vice* appearance, are not rare exceptions to a general custom of excluding nonresident lawyers from local practice. On the contrary, appearances by out-of-state counsel have been routine throughout the country for at least a quarter of a century.[12] The custom is so well recognized that, as Judge Friendly observed in 1966, there "is not the slightest reason to suppose" that a qualified lawyer's *pro hac vice* request will be denied.[13]

This case involves a *pro hac vice* application by qualified legal specialists;[14] no legitimate reason for denying their

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[11] See also Judge Soper's discussion in *In re Ades*, 6 F. Supp. 467, 475–476 (Md. 1934).

[12] Brakel & Loh, *supra* n. 8, at 702, and n. 9; Note, Attorneys: Interstate and Federal Practice, 80 Harv. L. Rev. 1711, 1716 (1967).

[13] *Spanos* v. *Skouras Theatres Corp.*, *supra*, at 168.

[14] Both Fahringer and Cambria are members of the Bar of New York, who specialize in criminal defense and obscenity law. In 1975, the former received the Outstanding Practitioner of the Year award from the New York State Bar Association. The latter received his legal education in Ohio at the University of Toledo Law School where he graduated first in his class. While in law school, he was admitted by the State of Ohio as a legal intern and practiced as such in the Municipal Prosecutor's office in Toledo.

request is suggested by the record.[15] They had been retained to defend an unpopular litigant in a trial that might be affected by local prejudices and attitudes.[16] It is the classic situation in which the interests of justice would be served by allowing the defendant to be represented by counsel of his choice.

The interest these lawyers seek to vindicate is not merely the pecuniary goal that motivates every individual's attempt to pursue his calling.[17] It is the profession's interest in

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[15] "No evidence of any disciplinary action against [Fahringer and Cambria] by any bar association has been presented to the Court, nor is there reason to believe that any such action is presently contemplated. Both are competent, experienced and qualified in the representation of persons charged with crimes." 434 F. Supp. 481, 483 (SD Ohio 1977).

[16] Ohio charged that respondent Flynt's publication entitled "War, The Real Obscenity," is harmful to youth contrary to Ohio Rev. Code Ann. § 2907.31 (1975). Among his defenses are several based on the Federal Constitution. He claims that § 2907.31 is "void for vagueness and overbreadth, impos[es] an impermissible prior restraint on the publication and circulation of materials protected by the First and Fourteenth Amendments to the Constitution," and "bears no rational or reasonable relationship to a legitimate state interest." Complaint for Preliminary and Permanent Injunction and Declaratory Judgment, in Civ. Act. No. C-1-77-319 (SD Ohio, June 14, 1977), pp. 19–21.

[17] In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth*, 408 U. S. 564, 572. Although the boundaries of the "liberty" protected by the Fourteenth Amendment have never been conclusively surveyed, it is clear that they encompass "not merely [the] freedom from bodily restraint" and the rights conferred by specific provisions of the Constitution, *Meyer* v. *Nebraska*, 262 U. S. 390, 399, but also the " 'privileges long recognized at common law as essential to the orderly pursuit of happiness.' " *Ingraham* v. *Wright*, 430 U. S. 651, 673, quoting *Meyer* v. *Nebraska*, *supra*, at 399. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 845. Among those privileges is "the right to hold specific private employment and to follow a chosen profession," *Greene* v. *McElroy*, 360 U. S. 474, 492, including "the practice of law." *Schware* v. *Board of Bar Examiners*, 353 U. S., at 238.

Fahringer and Cambria in no way rely on the fact that the denial of

discharging its responsibility for the fair administration of justice in our adversary system. The nature of that interest is surely worthy of the protection afforded by the Due Process Clause of the Fourteenth Amendment.

II

In the past, Ohio has implicitly assured out-of-state practitioners that they are welcome in Ohio's courts unless there is a valid, articulable reason for excluding them. Although the Ohio Supreme Court dismissed respondents' petition for an extraordinary writ of mandamus in this case, it has not dispelled that assurance because it did not purport to pass on the merits of their claim.[18] In my opinion the State's assurance is adequate to create an interest that qualifies as "property" within the meaning of the Due Process Clause.

The District Court found as a fact that Ohio trial judges routinely permit out-of-state counsel to appear *pro hac vice*.[19] This regular practice is conducted pursuant to the Rules of the Supreme Court of Ohio,[20] Ohio's Code of Professional

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their applications "might make them somewhat less attractive" to clients and might otherwise compromise their professional reputations. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 348–350.

[18] The only record of the Ohio Supreme Court's actions in this case is a journal notation that it was "dismissed." The record indicates that petitioners argued to the Supreme Court in their written submissions that the court could not entertain an extraordinary writ in this matter but that respondents' remedy lay in a post-trial appeal—assuming Flynt was convicted. The newly assigned trial judge in Flynt's case, the only Ohio court of which we are aware that has interpreted the Ohio Supreme Court's actions in this matter, concluded that the dismissal was *not* on the merits of respondents' claim of a right to an explanation before being denied admission. It instead concluded that the claim "apparently is an issue that you will have to resolve in the normal appellate procedures if and when the opportunity presents itself." Tr. of May 10, 1977, p. 16.

[19] 434 F. Supp., at 483. See *State* v. *Ross*, 36 Ohio App. 2d 185, 188, 304 N. E. 2d 396, 399 (1973), cert. denied, 415 U. S. 904.

[20] Rule I, § 8 (C), of the Supreme Court of Ohio Rules for the Government of the Bar of Ohio allows "participation by a nonresident of Ohio

Responsibility,[21] rules of each local court,[22] and a leading opinion of the Ohio Court of Appeals identifying criteria that should inform a trial judge's discretion in acting on *pro hac vice* applications.[23] While it is unquestionably true that an Ohio trial judge has broad discretion in determining whether or not to allow nonresident lawyers to appear in his court, it is also true that the Ohio rules, precedents, and practice give out-of-state lawyers an unequivocal expectation that the exercise of that discretion will be based on permissible reasons.[24]

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in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."

[21] Canon 3 of Ohio's Code of Professional Responsibility recognizes the indispensability to many modern attorneys of the ability to pursue their clients' interests across state lines:

"[T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

[22] Rule 10(E) of the Rules of Local Practice of the Court of Common Pleas, Hamilton County, Ohio, requires "[a]ny attorney who accepts private employment in any criminal case" to file a specified form. Once that form is endorsed by a judge, as occurred here, the attorney becomes "attorney of record" who "shall not be permitted to withdraw except upon written motion and for good cause shown." See n. 3, *supra*.

[23] *State* v. *Ross*, *supra*.

[24] "It has, however, been generally recognized that an attorney not admitted to practice in Ohio, but in good standing in another state, may be specially admitted for the purpose of representing a person in a particular case, be it civil or criminal. Whether or not so to specially permit an attorney not admitted to practice in Ohio, but admitted to practice and in good standing in another state, to represent a party in a particular action, is a matter lying within the sound discretion of the trial court. Thus, we must determine whether there has been an abuse of discretion in this instance." *State* v. *Ross*, *supra*, at 188, 304 N. E. 2d, at 399.

Other appellate courts have held or stated in dicta that admission *pro hac vice* to trial courts within their jurisdiction may not be denied without

In *State* v. *Ross,* 36 Ohio App. 2d 185, 304 N. E. 2d 396 (1973), the leading Ohio case in this area, the Ohio Court of Appeals entertained an appeal from a trial judge's order denying an out-of-state attorney's *pro hac vice* application. The appellate court exhaustively inquired into the basis for the trial court's action and identified the specific misdeeds of the attorney that justified his exclusion, before concluding that the trial judge had acted properly.[25] The only inference that can be drawn from that opinion is that an arbitrary ruling by the trial judge would have constituted reversible error; in this area of Ohio law, at least, the authority to exercise discretion does not include the power to act arbitrarily.[26] Having made this implicit promise to respondent attorneys,[27] Ohio may not nullify the substance of that promise

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cause. *In re Evans,* 524 F. 2d 1004, 1007 (CA5 1975) (denial inappropriate except upon showing of unethical conduct); *McKenzie* v. *Burris,* 255 Ark. 330, 344, 500 S. W. 2d 357, 366 (1973) (trial court may not impose "arbitrary numerical limitation on the number of [*pro hac vice*] appearances by an attorney" with expertise in the relevant area). See also *Munoz* v. *United States District Court,* 446 F. 2d 434 (CA9 1971); *Atchison, T. & S. F. R. Co.* v. *Jackson,* 235 F. 2d 390, 393 (CA10 1956); *Brown* v. *Wood,* 257 Ark. 252, 258, 516 S. W. 2d 98, 102 (1974). The requirement of cause has even greater support where, as here, see n. 3, *supra,* an out-of-state attorney in a criminal case has previously been made counsel of record by order of a trial court. *Cooper* v. *Hutchinson,* 184 F. 2d 119, 123 (CA3 1950); *State* v. *Kavanaugh,* 52 N. J. 7, 18, 243 A. 2d 225, 231 (1968); *Smith* v. *Brock,* 532 P. 2d 843, 850 (Okla. 1975).

[25] 36 Ohio App. 2d, at 190–201, 304 N. E. 2d, at 401–406.

[26] This "holding as a matter of state law" that out-of-state lawyers are entitled to have a trial judge exercise his discretion—that is to say, to have a permissible reason for his ruling—before he denies an application to appear, "necessarily establishes that [Fahringer and Cambria had a] property interest" protected by the Fourteenth Amendment. See *Bishop* v. *Wood,* 426 U. S., at 345 n. 8.

[27] "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of*

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by providing no procedures to safeguard its meaning. A state requirement that a judge's action in a contested matter be predicated on a permissible reason inevitably gives rise to a procedural requirement that the affected litigants have some opportunity to reason with the judge. See *Arnett* v. *Kennedy*, 416 U. S. 134, 167 (POWELL, J., concurring in part).[28]

III

Either the "nature" of the interest in *pro hac vice* admissions or the "implicit promise" inhering in Ohio custom with respect to those admissions is sufficient to create an interest protected by the Due Process Clause. Moreover, each of these conclusions reinforces the other.

The mode of analysis employed by the Court in recent years has treated the Fourteenth Amendment concepts of "liberty" and "property" as though they defined mutually exclusive, and closed categories of interests, with neither shedding any light on the meaning of the other. Indeed, in some of the Court's recent opinions it has implied that not only property but liberty itself does not exist apart from specific state authorization or an express guarantee in the Bill of Rights.[29]

Regents v. *Roth*, 408 U. S., at 577. In this case, the state action that lies at the source of the relevant "understanding" or implied promise is multifaceted. In addition to the consistent past practice of Ohio trial judges, which is analogous to the course of administrative conduct found sufficient in *Morrissey*, that promise is supported by state and local rules and case law.

[28] "[T]he right to procedural due process . . . is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Arnett*, 416 U. S., at 167 (POWELL, J., concurring in part) (footnote omitted).

[29] See *Paul* v. *Davis*, 424 U. S. 693; *Meachum* v. *Fano*, 427 U. S. 215. I continue to adhere to the view that "neither the Bill of Rights nor the

In my judgment this is not the way the majestic language of the Fourteenth Amendment should be read.

As is demonstrated by cases like *Meyer* v. *Nebraska,* 262 U. S. 390, 399; *Morrissey* v. *Brewer,* 408 U. S. 471; *Bell* v. *Burson,* 402 U. S. 535, 539, and Mr. Justice Frankfurter's classic concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162, judicial construction of the words "life, liberty, or property" is not simply a matter of applying the precepts of logic to accepted premises. Rather, it is experience and judgment that have breathed life into the Court's process of constitutional adjudication. It is not only Ohio's experience with out-of-state practitioners, but that of the entire Nation as well, that compels the judgment that no State may arbitrarily reject a lawyer's legitimate attempt to pursue this aspect of his calling.

IV

It is ironic that this litigation should end as it began—with a judicial ruling on the merits before the parties have been heard on the merits. Pursuant to Rules 19, 23, and 24 of this Court, the only issue discussed in the petition for certiorari and in respondents' brief memorandum in reply is whether "a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit in this matter." Pet. for Cert. 19. This surely is not a case that should be decided before respondents have been given an opportunity to address the merits. Summary reversal "should be reserved for palpably clear cases of . . . error." *Eaton* v. *Tulsa,* 415 U. S. 697, 707

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laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source." *Id.,* at 230 (STEVENS, J., dissenting).

(REHNQUIST, J., dissenting). Such reversals are egregiously improvident when the Court is facing a "novel constitutional question." *Pennsylvania* v. *Mimms*, 434 U. S. 106, 124 (STEVENS, J., dissenting).[30] Accordingly, I respectfully dissent from the Court's summary disposition of a question of great importance to the administration of justice.

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[30] Although the Court cites three previous summary dispositions by this Court in favor of its decision, two have nothing whatsoever to do with *pro hac vice* admissions. Both are concerned with rules preventing out-of-state lawyers from setting up *permanent* practices in States where they were not licensed. *Brown* v. *Supreme Court of Virginia*, 414 U. S. 1034, summarily aff'g 359 F. Supp. 549 (ED Va. 1973); *Kovrak* v. *Ginsburg*, 358 U. S. 52, dismissing, for want of substantial federal question, appeal from 392 Pa. 143, 139 A. 2d 889 (1958). The third case involved a challenge on *substantive* due process grounds to a rule of the Supreme Court of Illinois that placed decisions on *pro hac vice* applications in the trial court's discretion. *Norfolk & Western R. Co.* v. *Beatty*, 423 U. S. 1009, summarily aff'g 400 F. Supp. 234 (SD Ill. 1975). So far as the opinion in the District Court in that case indicates, however, there was no claim that the rule had been applied arbitrarily or discriminatorily.

HARLIN *v.* MISSOURI

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

No. 77–6062. Decided January 15, 1979

Missouri Supreme Court's judgment rejecting petitioner's constitutional challenge, on appeal of his conviction, to the Missouri statute allowing any woman who so elects to be excused from jury service is vacated, and the case is remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357.

Certiorari granted; 556 S. W. 2d 42, vacated and remanded.

PER CURIAM.

On appeal of his criminal conviction to the Supreme Court of Missouri, petitioner contended that his constitutional right to a jury drawn from a fair cross section of the community had been denied by provisions of Missouri law allowing any woman who so elects to be excused from jury service. See Mo. Const., Art. 1, § 22 (b); Mo. Rev. Stat. § 494.031 (2) (Supp. 1975). The record did not reflect that petitioner had raised this objection in timely fashion in the trial court, but because the trial court had considered and rejected the contention on its merits in connection with petitioner's motion for a new trial, the Missouri Supreme Court reviewed the issue under its "plain error" rule. Relying on its decision in *State* v. *Duren,* 556 S. W. 2d 11 (1977), that court rejected petitioner's contention that the challenged provisions are invalid because they systematically exclude women from the jury-selection process. 556 S. W. 2d 42, 44 (1977). The highest state court having reached and decided this issue, its judgment is subject to review in this Court. See *Jenkins* v. *Georgia,* 418 U. S. 153, 157 (1974). The petition for certiorari is granted. The motion for leave to proceed *in forma pauperis* is granted. The

judgment below is vacated, and the case is remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357.

So ordered.

MR. JUSTICE REHNQUIST dissents.

MR. JUSTICE POWELL, concurring in the judgments.*

As I noted in my concurrence in *Hankerson* v. *North Carolina,* 432 U. S. 233, 246 (1977), the Court's attempt to fashion a satisfactory retroactivity doctrine in the years since *Linkletter* v. *Walker,* 381 U. S. 618 (1965), has not succeeded. I adhere to the view expressed in *Hankerson* that the wisest approach to this problem is that outlined by Mr. Justice Harlan in *Mackey* v. *United States,* 401 U. S. 667, 675–702 (1971). That approach "contemplates, in rough outline, that courts apply a new rule retroactively in cases still pending on direct review, whereas cases on collateral review ordinarily would be considered in light of the rule as it stood when the conviction became final." *Hankerson, supra,* at 248. As all of these cases are before us on direct review, the application to them of the principles announced in *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), and *Duren* v. *Missouri, ante,* p. 357, is proper. Accordingly, I concur in the judgments of the Court.

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*[This opinion applies also to No. 77–6066, *Lee* v. *Missouri;* No. 77–6068, *Minor* v. *Missouri;* No. 77–6553, *Arrington* v. *Missouri;* No. 77–6701, *Burnfin* v. *Missouri;* and No. 77–7012, *Combs* v. *Missouri,* all *post,* p. 461.]

LEE *v.* MISSOURI

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

No. 77–6066. Decided January 15, 1979*

Judgments of Missouri Supreme Court and Missouri Court of Appeals affirming convictions as against fair-cross-section claims based on exclusion of women from juries are vacated, and the cases are remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357. Because *Duren* does not announce any "new standards" of constitutional law not evident from the decision in *Taylor* v. *Louisiana,* 419 U. S. 522, the considerations calling for departure from full retroactive application of constitutional holdings are inapplicable to juries sworn after the *Taylor* decision.

Certiorari granted in Nos. 77–6066, 77–6068, 77–6701, and 77–7012. 556 S. W. 2d 11; 556 S. W. 2d 25; 556 S. W. 2d 135; 559 S. W. 2d 749; 560 S. W. 2d 283; and 564 S. W. 2d 328, vacated and remanded.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* are granted.

In each of these cases, the trial court denied a timely motion to quash the petit jury panel. On appeal, the convictions were affirmed on the basis of *State* v. *Duren,* 556 S. W. 2d 11 (Mo. 1977). *State* v. *Lee,* 556 S. W. 2d 25 (Mo. 1977); *State* v. *Minor,* 556 S. W. 2d 35 (Mo. 1977); *State* v. *Arrington,* 559 S. W. 2d 749 (Mo. 1978); *State* v. *Burnfin,* 560 S. W. 2d 283 (Mo. App. 1977); *State* v. *Combs,* 564 S. W. 2d 328 (Mo. App. 1978).

We reversed the decision below in *Duren* because of inconsistency with the principles enunciated in *Taylor* v.

*Together with No. 77–6068, *Minor* v. *Missouri,* also on certiorari to, and No. 77–6553, *Arrington* v. *Missouri,* on appeal from, the same court, and No. 77–6701, *Burnfin* v. *Missouri,* and No. 77–7012, *Combs* v. *Missouri,* on certiorari to the Court of Appeals of Missouri, Kansas City District.

Louisiana, 419 U. S. 522 (1975). *Ante,* p. 357. The State of Missouri has urged that our decision in *Duren* not be applied retroactively to petitioners or appellants other than Duren himself. However, because that decision does not announce any "new standards" of constitutional law not evident from the decision in *Taylor* v. *Louisiana,* the considerations that have led us in other cases to depart from full retroactive application of constitutional holdings, see, *e. g., Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), are inapplicable to juries sworn after the decision in *Taylor* v. *Louisiana.* Compare *Daniel* v. *Louisiana,* 420 U. S. 31 (1975), holding *Taylor* v. *Louisiana* inapplicable to cases in which the jury was sworn prior to the date of that decision.

We note that in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U. S. C. § 2254 unless the petitioner can show cause for having failed to raise his claim properly in the state courts. See *Wainwright* v. *Sykes,* 433 U. S. 72 (1977).

The petitions for certiorari in Nos. 77–6066, 77–6068, 77–6701, and 77–7012 are granted. The judgments below in those cases, together with that in No. 77–6553, are vacated, and the cases are remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357.

So ordered.

[For opinion of Mr. Justice Powell concurring in the judgments, see *ante,* p. 460.]

Mr. Justice Rehnquist dissents.

Syllabus

WASHINGTON ET AL. *v.* CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-388. Argued October 2, 1978—Decided January 16, 1979

Section 6 of Pub. L. 280 authorizes the people of States whose constitutions or statutes contain organic law disclaimers of jurisdiction over Indian country to amend "where necessary" their constitutions or statutes to remove any legal impediment to assumption of such jurisdiction under the Act, notwithstanding the provision of any Enabling Act for the admission of the State, but provided that the Act shall not become effective with respect to such assumption of jurisdiction until the people of the State have appropriately amended their state constitution or statutes as the case may be. In § 7 of Pub. L. 280, Congress gave the consent of the United States "to any other State . . . to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." The State of Washington's Constitution contains a disclaimer of authority over Indian country, and hence the State is one of those covered by § 6. In 1963, after the Washington Supreme Court in another case had held that the barrier posed by the disclaimer could be lifted by the state legislature, the legislature enacted a statute (Chapter 36) obligating the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands unless the affected tribe so requested. Appellee Yakima Nation, which did not make such a request, brought this action in Federal District Court challenging the statutory and constitutional validity of the State's partial assertion of jurisdiction on its Reservation. The Tribe contended that the State had not complied with the procedural requirements of Pub. L. 280, especially the requirement that the State first amend its constitution; that, in any event, Pub. L. 280 did not authorize the State to assert only partial jurisdiction within an Indian reservation; and that Chapter 36, even if authorized by Congress, violated the equal protection and due process guarantees of the Fourteenth Amendment. The

District Court rejected both the statutory and constitutional claims and entered judgment for the State. The Court of Appeals, while rejecting the contention that Washington's assumption of only partial jurisdiction was not authorized by Congress, reversed, holding that the "checkerboard" jurisdictional system produced by Chapter 36 had no rational foundation and therefore violated the Equal Protection Clause. *Held:*

1. Section 6 of Pub. L. 280 does not require disclaimer States to amend their constitutions to make an effective acceptance of jurisdiction over an Indian reservation, and any Enabling Act requirement of this nature was effectively repealed by § 6. Here, the Washington Supreme Court, having determined that for purposes of the repeal of the state constitutional disclaimer legislative action is sufficient and the state legislature having enacted legislation obligating the State to assume jurisdiction under Pub. L. 280, it follows that the State has satisfied the procedural requirements of § 6. Pp. 478–493.

2. Once the requirements of § 6 have been satisfied, the terms of § 7 govern the scope of jurisdiction conferred upon disclaimer States. Statutory authorization for the partial subject-matter and geographic jurisdiction asserted by Washington is found in the words of § 7 permitting option States to assume jurisdiction "in such manner" as the people of the State shall "by affirmative legislative action, obligate and bind the State to assumption thereof." The phrase "in such manner" means at least that an option State can condition the assumption of full jurisdiction on an affected tribe's consent. Here, Washington has offered to assume full jurisdiction if a tribe so requests. The partial jurisdiction asserted on the reservations of nonconsenting tribes reflects a responsible attempt to accommodate both state and tribal interests and is consistent with the concerns that underlay the adoption of Pub. L. 280. Accordingly, it does not violate the terms of § 7. Pp. 493–499.

3. The "checkerboard" pattern of jurisdiction ordained by Chapter 36 is not on its face invalid under the Equal Protection Clause. Pp. 499–502.

(a) The classifications based on tribal status and land tenure implicit in Chapter 36 are not "suspect" so as to require that they be justified by a compelling state interest nor does Chapter 36 abridge any fundamental right of self-government. Pp. 500–501.

(b) Chapter 36 is valid as bearing a rational relationship to the State's interest in providing protection to non-Indian citizens living within a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands, the land-tenure classification being neither an irrational nor arbitrary means of identifying those areas

within a reservation in which tribal members have the greatest interest in being free of state police power. Pp. 501–502.

552 F. 2d 1332, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 502.

Slade Gorton, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Malachy R. Murphy,* Deputy Attorney General, and *Jeffrey C. Sullivan.*

James B. Hovis argued the cause and filed a brief for appellee.

Louis F. Claiborne argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Peter R. Steenland, Jr., Carl Strass,* and *Neil T. Proto.**

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to resolve a dispute between the State of Washington and the Yakima Indian Nation over the validity of the State's exercise of jurisdiction on the Yakima Reservation. In 1963 the Washington Legislature obligated the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. Ch. 36, 1963 Wash. Laws.[1] The Yakima Nation

**Michael Taylor, Robert L. Pirtle,* and *Robert D. Dellwo* filed a brief for the Confederated Tribes of the Colville Reservation et al. as *amici curiae.*

[1] The statute, codified as Wash. Rev. Code § 37.12.010 (1976), provides:

"Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil

did not make such a request. State authority over Indians within the Yakima Reservation was thus made by Chapter 36 to depend on the title status of the property on which the offense or transaction occurred and upon the nature of the subject matter.

The Yakima Nation brought this action in a Federal District Court challenging the statutory and constitutional validity of the State's partial assertion of jurisdiction on its Reservation. The Tribe contended that the federal statute upon which the State based its authority to assume jurisdiction over the Reservation, Pub. L. 280,[2] imposed certain procedural requirements, with which the State had not complied—most notably, a requirement that Washington first amend its own constitution—and that in any event Pub. L. 280 did not

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jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R. C. W. 37.12.021 [tribal consent] have been invoked, except for the following:

"(1) Compulsory school attendance;

"(2) Public assistance;

"(3) Domestic relations;

"(4) Mental illness;

"(5) Juvenile delinquency;

"(6) Adoption proceedings;

"(7) Dependent children; and

"(8) Operation of moter vehicles upon the public streets, alleys, roads and highways: *Provided further,* That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."

The statute will be referred to in this opinion as Chapter 36.

[2] Act of Aug. 15, 1953, 67 Stat. 588–590. For the full text of the Act, see n. 9, *infra.*

authorize the State to assert only partial jurisdiction within an Indian reservation. Finally, the Tribe contended that Chapter 36, even if authorized by Congress, violated the equal protection and due process guarantees of the Fourteenth Amendment.

The District Court rejected both the statutory and constitutional claims and entered judgment for the State.[3] On appeal, the contention that Washington's assumption of only partial jurisdiction was not authorized by Congress was rejected by the Court of Appeals for the Ninth Circuit, sitting en banc. The en banc court then referred the case to the original panel for consideration of the remaining issues. *Confederated Bands and Tribes of the Yakima Indian Nation* v. *Washington,* 550 F. 2d 443 (*Yakima I*).[4] The three-judge

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[3] The complaint also contained other claims that were decided adversely to the plaintiff by the District Court. After extensive discovery and the entry of a pretrial order, the District Court granted partial summary judgment in favor of the State on several of these claims. On the question of compliance with Pub. L. 280, the District Court held that it was bound by the decision of the Court of Appeals for the Ninth Circuit in *Quinault Tribe of Indians* v. *Gallagher,* 368 F. 2d 648, 655–658, which had determined that the State of Washington could accept jurisdiction under Pub. L. 280 without first amending its constitution and that Washington's jurisdictional arrangement did not constitute an unauthorized partial assumption of jurisdiction. The District Court also rejected the claim that Chapter 36 was facially invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The question of the constitutional validity of Chapter 36 as applied to the Yakima Reservation was reserved for a hearing and factual determination. After a one-week trial, the District Court found that the appellee had not proved "that the state or county have discriminated . . . to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens or similar geographic location." The complaint was then dismissed.

The opinion of the District Court is unreported.

[4] The en banc hearing was ordered by the Court of Appeals *sua sponte* after the original panel had heard argument. This hearing was limited to the question whether that court's earlier partial-jurisdiction holding in

panel, confining itself to consideration of the constitutional validity of Chapter 36, concluded that the "checkerboard" jurisdictional system it produced was without any rational foundation and therefore violative of the Equal Protection Clause of the Fourteenth Amendment. Finding no basis upon which to sever the offending portion of the legislation, the appellate court declared Chapter 36 unconstitutional in its entirety, and reversed the judgment of the District Court. *Confederated Bands and Tribes of the Yakima Indian Nation* v. *Washington,* 552 F. 2d 1332 (*Yakima II*).

The State then brought an appeal to this Court. In noting probable jurisdiction of the appeal, we requested the parties to address the issue whether the partial geographic and subject-matter jurisdiction ordained by Chapter 36 is authorized by federal law, as well as the Equal Protection Clause issue. 435 U. S. 903.[5]

Quinault Tribe of Indians v. *Gallagher, supra,* should be overruled. A majority of the en banc panel agreed with the result in *Quinault,* finding no statutory impediment to the assumption of partial geographic and subject-matter jurisdiction. 550 F. 2d, at 448. Five judges dissented. *Id.,* at 449.

[5] The three-judge appellate court's equal protection decision was based upon the disparity created by Chapter 36 in making criminal jurisdiction over Indians depend upon whether the alleged offense occurred on fee or nonfee land. 552 F. 2d, at 1334–1335. The court found this criterion for the exercise of state criminal jurisdiction facially unconstitutional. The appellate court found it unnecessary, therefore, to reach the Tribe's contention that the eight statutory categories of subject-matter jurisdiction are vague or its further contention that the *application* of Chapter 36 deprived it of equal protection of the laws. 552 F. 2d, at 1334.

In its motion to affirm, filed here in response to the appellants' jurisdictional statement, the Yakima Nation invoked in support of the judgment "each and every one" of the contentions it had made in the District Court and Court of Appeals, but limited its discussion to the equal protection rationale relied upon by the appellate court. In its brief on the merits the Tribe has addressed—in addition to those subjects implicit in our order noting probable jurisdiction, see n. 20, *infra,* one issue that merits brief discussion. The Tribe contends that Chapter 36 is void for failure

I

The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered "one nation" and that specified lands located in the Territory of Washington would be set aside for their exclusive use. The treaty was ratified by Congress in 1859. 12 Stat. 951. Since that time, the Yakima Nation has without interruption maintained its tribal identity.

The Yakima Reservation is located in the southeastern part of the State of Washington and now consists of approximately 1,387,505 acres of land, of which some 80% is held in trust by the United States for the Yakima Nation or individual members of the Tribe. The remaining parcels of land are held in fee by Indian and non-Indian owners. Much of the trust acreage on the Reservation is forest. The Tribe receives the bulk of its income from timber, and over half of the Reservation is closed to permanent settlement in order to protect the forest area. The remaining lands are primarily agricultural.

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to meet the standards of definiteness required by the Due Process Clause of the Fourteenth Amendment, asserting that the eight subject-matter categories over which the State has extended full jurisdiction are too vague to give tribal members adequate notice of what conduct is punishable under state law. This challenge is without merit. As the District Court observed, Chapter 36 creates no new criminal offenses but merely extends jurisdiction over certain classes of offenses defined elsewhere in state law. If those offenses are not sufficiently defined, individual tribal members may defend against any prosecutions under them at the time such prosecutions are brought. See *Younger* v. *Harris,* 401 U. S. 37. The eight subject-matter areas are themselves defined with reasonable clarity in language no less precise than that commonly accepted in federal jurisdictional statutes in the same field. See *United States* v. *Mazurie,* 419 U. S. 544. The District Court's ruling that Chapter 36 is not void for vagueness under the Due Process Clause of the Fourteenth Amendment was therefore correct.

There are three incorporated towns on the Reservation, the largest being Toppenish, with a population of under 6,000.

The land held in fee is scattered throughout the Reservation, but most of it is concentrated in the northeastern portion close to the Yakima River and within the three towns of Toppenish, Wapato, and Harrah. Of the 25,000 permanent residents of the Reservation, 3,074 are members of the Yakima Nation, and tribal members live in all of the inhabited areas of the Reservation.[6] In the three towns—where over half of the non-Indian population resides—members of the Tribe are substantially outnumbered by non-Indian residents occupying fee land.

Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia,* 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U. S. 217, 219–220.[7] As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly

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[6] These are the membership figures given by the District Court. The United States, in its *amicus curiae* brief, has indicated that more than 5,000 tribal members live permanently on the Reservation and that the number increases during the summer months.

[7] These abstract principles do not and could not adequately describe the complex jurisdictional rules that have developed over the years in cases involving jurisdictional clashes between the States and tribal Indians since *Worcester* v. *Georgia* was decided. For a full treatment of the subject, see generally M. Price, Law and the American Indian (1973); U. S. Dept. of Interior, Federal Indian Law (1958).

provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 170–171.

Public Law 280, upon which the State of Washington relied for its authority to assert jurisdiction over the Yakima Reservation under Chapter 36, was enacted by Congress in 1953 in part to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan* v. *Itasca County,* 426 U. S. 373, 379; H. R. Rep. No. 848, 83d Cong., 1st Sess., 5–6 (1953). The basic terms of Pub. L. 280, which was the first federal jurisdictional statute of general applicability to Indian reservation lands,[8] are well known.[9] To five States it effected

[8] See Price, *supra* n. 7, at 210. Before 1953, there had been other surrenders of authority to some States. See, *e. g.,* 62 Stat. 1224, 25 U. S. C. § 232 (New York), 64 Stat. 845, 25 U. S. C. § 233 (New York); 54 Stat. 249 (Kansas); 60 Stat. 229 (North Dakota); and 62 Stat. 1161 (Iowa). Public Law 280, however, was the first federal statute to attempt an omnibus transfer.

[9] The Act provides in full:

"AN ACT

"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"'1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"'§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"'(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such

an immediate cession of criminal and civil jurisdiction over Indian country, with an express exception for the reservations of three tribes. Pub. L. 280, §§ 2 and 4.[10] To the remaining

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State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

" 'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

" '(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

" '(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.'

"SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

" '1360. State civil jurisdiction in actions to which Indians are parties.'

"SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

" '§ 1360. State civil jurisdiction in actions to which Indians are parties

" '(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are

[*Footnote 10 is on page 474*]

States it gave an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the tribes that

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parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"'(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"'(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.'

"SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment

would be affected. States whose constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country were dealt with in § 6.[11] The people of those States were given permission to amend "where necessary" their state constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction under the Act. All others were covered in § 7.[12]

The Washington Constitution contains a disclaimer of authority over Indian country,[13] and the State is, therefore, one of those covered by § 6 of Pub. L. 280. The State did not take any action under the purported authority of Pub. L. 280 until 1957. In that year its legislature enacted a statute which obligated the State to assume criminal and civil jurisdiction over any Indian reservation within the State at the request of the tribe affected.[14] Under this legislation state jurisdiction was requested by and extended to several Indian tribes within the State.[15]

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to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

[10] See n. 9, *supra*. The five States given immediate jurisdiction were California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added to this group in 1958. Act of Aug. 8, 1958, 72 Stat. 545, codified at 18 U. S. C. § 1162, 28 U. S. C. § 1360.

[11] See n. 9, *supra*.

[12] See n. 9, *supra*.

[13] Wash. Const., Art. XXVI, ¶ 2.

[14] Wash. Rev. Code, ch. 37.12 (1976).

[15] For a detailed discussion of the Washington history under Pub. L. 280, see 1 National American Indian Court Judges Assn., Justice and the

In one of the first prosecutions brought under the 1957 jurisdictional scheme, an Indian defendant whose tribe had consented to the extension of jurisdiction challenged its validity on the ground that the disclaimer clause in the state constitution had not been amended in the manner allegedly required by § 6 of Pub. L. 280. *State* v. *Paul*, 53 Wash. 2d 789, 337 P. 2d 33. The Washington Supreme Court rejected the argument, construing the state constitutional provision to mean that the barrier posed by the disclaimer could be lifted by the state legislature.[16]

In 1963, Washington enacted Chapter 36, the law at issue in this litigation.[17] The most significant feature of the new statute was its provision for the extension of at least some jurisdiction over all Indian lands within the State, whether or not the affected tribe gave its consent. Full criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved. Except for eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. The eight jurisdictional categories of state law that were thus extended to all parts of every Indian reservation were in the areas of compulsory school attendance, public assistance, domestic relations,

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American Indian: The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations (1974).

[16] The Washington Supreme Court relied upon a previous decision in which it had rejected a challenge to Washington legislation permitting taxation of property leased from the Federal Government. *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P. 2d 838. The *Boeing* legislation was challenged on the ground that the State had failed to remove by amendment a constitutional disclaimer of authority to tax federal property, and the Washington court held in *Boeing* that legislative action was sufficient.

[17] See n. 1, *supra*.

mental illness, juvenile delinquency, adoption proceedings, dependent children, and motor vehicles.[18]

The Yakima Indian Nation did not request the full measure of jurisdiction made possible by Chapter 36, and the Yakima Reservation thus became subject to the system of jurisdiction outlined at the outset of this opinion.[19] This litigation followed.

II

The Yakima Nation relies on three separate and independent grounds in asserting that Chapter 36 is invalid. First, it argues that under the terms of Pub. L. 280 Washington was not authorized to enact Chapter 36 until the state constitution had been amended by "the people" so as to eliminate its Art. XXVI which disclaimed state authority over Indian lands.[20]

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[18] See nn. 1 and 5, *supra*.

[19] Those tribes that had consented to state jurisdiction under the 1957 law remained fully subject to such jurisdiction. Wash. Rev. Code §37.12.010 (1976). Since 1963 only one tribe, the Colville, has requested the extension of full state jurisdiction. 1 National American Indian Court Judges, *supra* n. 15, at 77–81. The Yakima Nation, ever since 1952 when its representatives objected before a congressional committee to a predecessor of Pub. L. 280, see n. 33, *infra*, has consistently contested the wisdom and the legality of attempts by the State to exercise jurisdiction over its Reservation lands. See *ibid.*

[20] Washington strenuously argues that this question is not properly before the Court. We think that it is. The Yakima Indian Nation has pressed this issue throughout the litigation. In its motion to dismiss or affirm, the alleged invalidity of Washington's legislative assumption of jurisdiction was presented as a basis upon which the judgment below should be sustained. See n. 5, *supra*. As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals. *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435–436; *Dandridge* v. *Williams*, 397 U. S. 471, 475, and n. 6. Moreover, the disclaimer issue was implicit in the subjects the parties were requested to address in our order noting probable jurisdiction of this appeal. 435 U. S. 903. Cf. *Gent* v.

Second, it contends that Pub. L. 280 does not authorize a State to extend only partial jurisdiction over an Indian reservation. Finally, it asserts that Chapter 36, even if authorized

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Arkansas, 384 U. S. 937; *Zicarelli* v. *New Jersey State Comm'n*, 401 U. S. 933.

Washington also contends that this Court's summary dismissals in *Makah Indian Tribe* v. *State*, 76 Wash. 2d 485, 457 P. 2d 590, appeal dismissed, 397 U. S. 316; *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P. 2d 744, appeal dismissed, 420 U. S. 915; and *Comenout* v. *Burdman*, 84 Wash. 2d 192, 525 P. 2d 217, appeal dismissed, 420 U. S. 915, should preclude reconsideration of the disclaimer issue here. In those cases, it had been argued that Washington's statutory assumption of jurisdiction was ineffective under Pub. L. 280 and invalid under the state constitution because of the absence of a constitutional amendment eliminating Art. XXVI. In each case, the Washington Supreme Court rejected both the state constitutional and the federal arguments. On appeal from each, the appellants questioned the validity of the state court's conclusion that under the federal statute no constitutional amendment was required. Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks* v. *Miranda*, 422 U. S. 332, 343–345, in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel* v. *Bradley*, 432 U. S. 173, 176. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Edelman* v. *Jordan*, 415 U. S. 651, 670–671; *Richardson* v. *Ramirez*, 418 U. S. 24, 53. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, see, *e. g.*, *Mandel* v. *Bradley*, *supra*, necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 309 n. 1; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14. We do so in this case. The question that Washington asks us to avoid or to resolve on the basis of *stare decisis* has never received full plenary attention here. It has been the subject of extensive briefing and argument by the parties. It has provoked several, somewhat uncertain, opinions from the Washington courts, see n. 27, *infra*, whose ultimate judgments were the subjects of summary dismissals here. Finally, it is an

by Pub. L. 280, violates the Fourteenth Amendment of the Constitution. We turn now to consideration of each of these arguments.

III

We first address the contention that Washington was required to amend its constitution before it could validly legislate under the authority of Pub. L. 280. If the Tribe is correct, we need not consider the statutory and constitutional questions raised by the system of partial jurisdiction established in Chapter 36. The Tribe, supported by the United States as *amicus curiae*,[21] argues that a requirement for popular amendatory action is to be found in the express terms of § 6 of Pub. L. 280 or, if not there, in the terms of the Enabling Act that admitted Washington to the Union.[22] The

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issue upon which the Executive Branch of the United States Government has recently changed its position diametrically, as explained in its *amicus* brief and oral argument in this case.

[21] The United States has fully briefed the constitutional amendment question and the question whether partial jurisdiction is authorized by Pub. L. 280. Its position on the equal protection holding of the Court of Appeals is equivocal.

[22] The Tribe also contends that under its 1855 Treaty with the United States, 12 Stat. 951, it was guaranteed a right of self-government that was not expressly abrogated by Pub. L. 280. The argument assumes that under our cases, see, *e. g.*, *Menominee Tribe* v. *United States*, 391 U. S. 404, treaty rights are preserved unless Congress has shown a specific intent to abrogate them. Although we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed, *id.*, at 413; *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160, this rule of construction must be applied sensibly. In this context, the argument made by the Tribe is tendentious. The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject matter of Pub. L. 280. To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.

argument can best be understood in the context of the specific statutory provisions involved.

A

The Enabling Act under which Washington, along with the States of Montana, North Dakota, and South Dakota, gained entry into the Union, was passed in 1889.[23] Section 4 of that

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[23] Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The Act provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

. . . . . .

"SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories . . . after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

. . . . . .

"Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ."

Other admitting Acts requiring a disclaimer of authority over Indian lands are Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910,

Act required the constitutional conventions of the prospective new States to enact provisions by which the people disclaimed title to lands owned by Indians or Indian tribes and acknowledged that those lands were to remain "under the absolute jurisdiction and control of" Congress until the Indian or United States title had been extinguished. The disclaimers were to be made "by ordinances irrevocable without the consent of the United States and the people of said States." Washington's constitutional convention enacted the disclaimer of authority over Indian lands as part of Art. XXVI of the state constitution.[24] That Article, captioned "Compact with

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ch. 310, 36 Stat. 557 (Arizona and New Mexico). The language of these Acts is virtually the same as that of 25 Stat. 676.

[24] Article XXVI reads as follows:

"COMPACT WITH THE UNITED STATES

"The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

. . . . . .

"Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided,* That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe."

the United States," is prefaced with the statement—precisely tracking the language of the admitting statute—that "the following ordinance shall be irrevocable without the consent of the United States and the people of [the State of Washington]." Its substantive terms mirror the language used in the enabling legislation.

We have already noted that two distinct provisions of Pub. L. 280 are potentially applicable to States not granted an immediate cession of jurisdiction. The first, § 6, without question applies to Washington and the seven other States admitted into the Union under enabling legislation requiring organic law disclaimers similar to that just described. This much is clear from the legislative history of Pub. L. 280,[25] as well as from the express language of § 6. That section provides

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

All other States were covered by § 7. In that section Congress gave the consent of the United States

> "to any other State . . . to assume jurisdiction at such

[25] See H. R. Rep. No. 848, 83d Cong., 1st Sess. (1953). According to this report accompanying H. R. 1063 (the House version of Pub. L. 280) "[e]xamination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington." H. R. Rep. No. 848, at 6.

time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

These provisions appear to establish different modes of procedure by which an option State, depending on which section applies to it, is to accept the Pub. L. 280 jurisdictional offer. The procedure specified in § 7 is straightforward: affirmative legislative action by which the State obligates and binds itself to assume jurisdiction. Section 6, in contrast, is delphic. The only procedure mentioned is action by the people "to amend . . . their State constitutions or existing statutes, as the case may be" to remove any legal impediments to the assumption of jurisdiction. The phrase "where necessary" in the main clause suggests that a requirement for popular—as opposed to legislative—action must be found if at all in some source of law independent of Pub. L. 280. The proviso, however, has a different import.

B

The proper construction to be given to the single inartful sentence in § 6 has provoked chapters of argument from the parties. The Tribe and the United States urge that notwithstanding the phrase "where necessary," § 6 should be construed to mandate constitutional amendment by disclaimer States. It is their position that § 6 operates not only to grant the consent of the United States to state action inconsistent with the terms of the enabling legislation but also to establish a distinct procedure to be followed by Enabling Act States. To support their position, they rely on the language of the proviso and upon certain legislative history of § 6.[26]

In the alternative, the Tribe and the United States argue that popular amendatory action, if not compelled by the terms of § 6, is mandated by the terms of the Enabling Act of

[26] See n. 35, *infra,* and accompanying text.

Feb. 22, 1889, ch. 180, § 4. Although they acknowledge that Congress in § 6 did grant the "consent of the United States" required under the Enabling Act before the State could remove the disclaimer, they contend that § 6 did not eliminate the need for the "consent of the people" specified in the Enabling Act. In their view, the 1889 Act—if not Pub. L. 280—dictates that constitutional amendment is the only valid procedure by which that consent can be given.

The State draws an entirely different message from § 6. It contends that the section must be construed in light of the overall congressional purpose to facilitate a transfer of jurisdiction to those option States willing to accept the responsibility. Section 6 was designed, it says, not to establish but to remove legal barriers to state action under the authority of Pub. L. 280. The phrase "where necessary" in its view is consistent with this purpose. It would construe the word "appropriately" in the proviso to be synonymous with "where necessary" and the entire section to mean that constitutional amendment is required only if "necessary" as a matter of state law. The Washington Supreme Court having found that legislative action is sufficient to grant the "consent of the people" to removal of the disclaimer in Art. XXVI of the state constitution,[27] the State argues that the procedural

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[27] The validity of Chapter 36 was first challenged in the federal courts in *Quinault Tribe of Indians* v. *Gallagher,* 368 F. 2d 648 (CA9). In *Quinault,* the Court of Appeals for the Ninth Circuit held that under § 6 and the Enabling Act the consent of the people to removal of the disclaimer need only be made in some manner "valid and binding under state law." *Id.,* at 657. Relying on the Washington Supreme Court's holding in *State* v. *Paul,* 53 Wash. 2d 789, 337 P. 2d 33, that legislative action would suffice, it concluded that Washington's assumption of jurisdiction was valid. When Chapter 36 was first challenged in the state courts, the Washington Supreme Court reaffirmed its holding in *State* v. *Paul.* See *Makah Indian Tribe* v. *State,* 76 Wash. 2d 485, 457 P. 2d 590; *Tonasket* v. *State,* 84 Wash. 2d 164, 525 P. 2d 744. See also n. 16, *supra.* In *Makah,* the Court reasoned, as it had in *Paul,* that the makers of the

requirements of § 6 have been fully satisfied. It finds the Enabling Act irrelevant since in its view § 6 effectively repealed any federal-law impediments in that Act to state assertion of jurisdiction under Pub. L. 280.[28]

C

From our review of the statutory, legislative, and historical materials cited by the parties, we are persuaded that Washington's assumption of jurisdiction by legislative action fully complies with the requirements of § 6. Although we adhere to the principle that the procedural requirements of Pub. L. 280 must be strictly followed, *Kennerly* v. *District Court of Montana,* 400 U. S. 423, 427; *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 180, and to the general rule that ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians, see, *e. g., Bryan* v. *Itasca County,* 426 U. S., at 392, those principles will not stretch so far as to permit us to find a federal requirement affecting the manner in which the States are to modify their organic legislation on the basis of materials that are essentially speculative. Cf. *Board of County Comm'rs* v. *United States,* 308 U. S. 343, 350–351. The language of § 6, its legislative

Washington Constitution intended that for purposes of Art. XXVI "the people would speak through the mouth of the legislature." 76 Wash. 2d, at 490, 457 P. 2d, at 593. In addition, it relied on *Quinault* for the proposition that under § 6 the constitutional disclaimer need be removed only by a method binding under state law. In *Tonasket,* the Washington court reaffirmed this reasoning. It also relied on the alternative ground that the disclaimer in Art. XXVI could be construed not to preclude "criminal and civil regulation" on Indian lands and therefore would not stand as a barrier to state jurisdiction. 84 Wash. 2d, at 177, 525 P. 2d, at 752.

[28] The State asserts as well that the Washington constitutional disclaimer does not pose any substantive barrier to state assumption of jurisdiction over fee and unrestricted lands within the reservation. In light of our holding that Washington has satisfied the procedural requirements for repealing the disclaimer, we need not consider the scope of this state constitutional provision.

history, and its role in Pub. L. 280 all clearly point the other way.

We turn first to the language of § 6. The main clause is framed in permissive, not mandatory, terms. Had the drafters intended by that clause to require popular amendatory action, it is unlikely that they would have included the words "where necessary." As written, the clause suggests that the substantive requirement for constitutional amendment must be found in some source of law independent of § 6. The basic question, then, is whether that requirement can be found in the language of the proviso to § 6 or alternatively in the terms of the Enabling Act.

We are unable to find the procedural mandate missing from the main clause of § 6 in the language of the proviso. That language in the abstract could be read to suggest that constitutional amendment is a condition precedent to a valid assumption of jurisdiction by disclaimer States. When examined in its context, however, it cannot fairly be read to impose such a condition. Two considerations prevent this reading. First, it is doubtful that Congress—in order to compel disclaimer States to amend their constitutions by popular vote—would have done so in a provision the first clause of which consents to that procedure "where necessary" and the proviso to which indicates that the procedure is to be followed if "appropriate." Second, the reference to popular amendatory action in the proviso is not framed as a description of the procedure the States must follow to assume jurisdiction, but instead is written as a condition to the effectiveness of "the provisions of" Pub. L. 280. When it is recalled that the only substantive provisions of the Act—other than those arguably to be found in § 7—accomplish an immediate transfer of jurisdiction to specifically named States, it seems most likely that the proviso was included to ensure that § 6 would not be construed to effect an immediate transfer to the disclaimer group of option States. The main clause removes a federal-law bar-

rier to any new state jurisdiction over Indian country. The proviso suggests that disclaimer States are not automatically to receive jurisdiction by virtue of that removal. Without the proviso, in the event that state constitutional amendment were not found "necessary," [29] § 6 could be construed as effecting an immediate cession. Congress clearly wanted all the option States to "obligate and bind" themselves to assume the jurisdiction offered in Pub. L. 280.[30] To

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[29] Disclaimer States have responded in diverse ways to the Pub. L. 280 offer of jurisdiction. See Goldberg, Pub. L. 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 546–548, 567–575 (1975). Only one—North Dakota—has amended its constitution. Art. 16, N. D. Const., amended by Art. 68, June 24, 1958 (1957 N. D. Laws, ch. 403; 1959 N. D. Laws, ch. 430).

[30] In *Kennerly* v. *District Court of Montana,* 400 U. S. 423, we emphasized the need for the responsible jurisdictions to "manifes[t] by political action their willingness and ability to discharge their new responsibilities." *Id.,* at 427. *Kennerly* involved an attempt by the state courts of Montana to assert civil jurisdiction over a transaction that occurred within reservation boundaries. The tribe had requested state jurisdiction, but the State had not obligated itself to assume it. The case was litigated on the theory that § 7 was applicable. We held that the State must comply with the § 7 requirement of "affirmative legislative action." 400 U. S., at 427. Two of our other cases involving Pub. L. 280 also illustrate the need for responsible action under the federal statute. In *Williams* v. *Lee,* 358 U. S. 217, we held that the State of Arizona—one of the disclaimer States—could not validly exercise jurisdiction over a civil action brought by a non-Indian against an Indian for a transaction that occurred on the Navaho Reservation. We relied on the traditional principle that a State may not infringe the right of reservation Indians "to make their own laws and be ruled by them" without an express authorization by Congress. *Id.,* at 220. In *Williams,* the State had not attempted to comply with § 6: the state court had taken jurisdiction without state statutory or constitutional authorization. A similar situation obtained in *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164. There we held that Arizona could not, by simple legislative enactment, tax income earned by a Navaho from reservation sources. The tax statute at issue was not framed as a measure obligating the State to assume responsibility under Pub. L. 280.

be sure, constitutional amendment was referred to as the process by which this might be accomplished in disclaimer States. But, given the distinction that Congress clearly drew between those States and automatic-transfer States, this reference can hardly be construed to require that process.

Before turning to the legislative history, which, as we shall see, accords with this interpretation of § 6, we address the argument that popular amendatory action, if not a requirement of Pub. L. 280, is mandated by the legislation admitting Washington to the Union. This argument requires that two assumptions be made. The first is that § 6 eliminated some but preserved other Enabling Act barriers to a State's assertion of jurisdiction over Indian country. The second is that the phrase "where necessary" in the main clause of § 6 was intended to refer to those federal-law barriers that had been preserved. Only if each of these premises is accepted does the Enabling Act have any possible application.

Since we find the first premise impossible to accept, we proceed no further. Admitting legislation is, to be sure, the only source of law mentioned in the main clause of § 6 and might therefore be looked to as a referent for the phrase "where necessary" in the clause. This reading, however, is not tenable. It supplies no satisfactory answer to the question why Congress—in order to give the consent of the United States to the removal of state organic law disclaimers—would not also have by necessary implication consented to the removal of any procedural constraints on the States imposed by the Enabling Acts. The phrase "[n]otwithstanding the provisions of any Enabling Act" in § 6 is broad—broad enough to suggest that Congress when it referred to a possible necessity for state constitutional amendment did not intend thereby to perpetuate any such requirement in an Enabling Act. Even assuming that the phrase "consent of the people" in the Enabling Act must be construed to preclude consent by legislative action—and the Tribe and the United States have of-

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fered no concrete authority to support this restrictive reading of the phrase—[31] we think it obvious that in the "notwithstanding" clause of § 6 Congress meant to remove any federal impediments to state jurisdiction that may have been created by an Enabling Act.

The legislative history of Pub. L. 280 supports the conclusion that § 6 did not of its own force establish a state constitutional amendment requirement and did not preserve any such requirement that might be found in an Enabling Act. Public Law 280 was the first jurisdictional bill of general applicability ever to be enacted by Congress. It reflected congressional concern over the law-and-order problems on Indian reservations and the financial burdens of continued federal jurisdictional responsibilities on Indian lands, *Bryan* v. *Itasca County*, 426 U. S. 373. It was also, however, without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's.[32]

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[31] There is, for example, nothing in the legislative history of the Enabling Act to indicate that the "consent of the people" could be given only by a process of constitutional amendment. The scant legislative record of the Enabling Act is devoted to a debate over the wisdom of splitting the Dakota Territory into two States and of admitting both immediately to the Union. In none of these debates was there any extended discussion of the Indian land disclaimer or any indication that the "consent of the people" to removal of the disclaimer could not be given by the people's representatives in the legislature. See Adverse Reports of the House Committee on the Territories, May 1886 and Feb. 1888, annexed to H. R. Rep. No. 1025, 50th Cong., 1st Sess., 19–25 (1888). See also, *e. g.*, 19 Cong. Rec. 2804, 2883, 3001, 3117 (1888); 20 Cong. Rec. 801, 869 (1889). The only explicit references to the disclaimer of authority over Indian lands are found in H. R. Rep. No. 1025, *supra*, at 8–9 (calling attention to fact that by the terms of the bill large Indian reservations in the Dakota Territory "remain within the exclusive control and jurisdiction of the United States") and in 19 Cong. Rec. 2832 (1888) (Oklahoma Delegate objecting to the disclaimer).

[32] That policy was formally announced in H. R. Con. Res. 108, 67 Stat.

See H. R. Rep. No. 848, 83d Cong., 1st Sess. (1953). See also Hearings on H. R. 459, H. R. 3235, and H. R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess. (1952) (hereinafter 1952 Hearings). The failure of Congress to write a tribal-consent provision into the transfer provision applicable to option States as well as its failure to consult with the tribes during the final deliberations on Pub. L. 280 provide ample evidence of this.[33]

B132, approved on July 27, 1953, the same day that Pub. L. 280 was passed by the House. 99 Cong. Rec. 9968 (1953). As stated in H. R. Con. Res. 108, the policy of Congress was "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . ."

This policy reflected a return to the philosophy of the General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388, as amended, 25 U. S. C. § 331, popularly known as the Dawes Act, a philosophy which had been rejected with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984.

In *Bryan* v. *Itasca County,* 426 U. S. 373, the Court emphasized that Pub. L. 280 was not a termination measure and should not be construed as such. Our discussion here is not to the contrary. The parties agree that Pub. L. 280 reflected an assimilationist philosophy. That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in Pub. L. 280 to terminate tribal self-government. Indeed, the Tribe has argued that even after the transfer tribal courts retain concurrent jurisdiction in areas in which they formerly shared jurisdiction with the Federal Government. This issue, however, is not within the scope of our order noting probable jurisdiction, see n. 20, *supra,* and we do not decide it here.

[33] These features of Pub. L. 280 have attracted extensive criticism. See generally Goldberg, *supra* n. 29. Indeed, the experience of the Yakima Nation is in itself sufficient to demonstrate why the Act has provoked so much criticism. In 1952, in connection with the introduction of bills that proposed a general jurisdictional transfer, see 1952 Hearings, a representa-

Indeed, the circumstances surrounding the passage of Pub. L. 280 in themselves fully bear out the State's general thesis that Pub. L. 280 was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States. Public Law 280 originated in a series of individual bills introduced in the 83d Congress to transfer jurisdiction to the five willing States which eventually were covered in §§ 2 and 4.[34] H. R. Rep. No. 848, *supra*. Those bills were consolidated into H. R. 1063, which was referred to the House Committee on Interior and Insular Affairs for consideration. Closed hearings on the bills were held before the Subcommittee on Indian Affairs on June 29 and before the Committee on July 15, 1953.[35] During the opening session on June 29,

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tive of the Yakimas testified that the Tribe was opposed to the extension of state jurisdiction on the Yakima Reservation. He stated:

"The Yakima Indians . . . feel that in the State Courts they will not be treated as well as they are in the Federal courts, because they believe that many of the citizens of the State are still prejudiced against the Indians.

"They are now under the Federal laws and have their own tribal laws, customs, and regulations. This system is working well and the Yakima Tribe believes that it should be continued and not changed at this time." *Id.*, at 84–85.

In 1953, when the Indian Affairs Subcommittee of the House Committee on Indian Affairs considered the final version of Pub. L. 280, the Committee was again aware that the Yakima Nation opposed state jurisdiction. The House Report accompanying H. R. 1063 contains a letter from the Department of the Interior listing the Tribe as among those opposed to "being subjected to State jurisdiction" and having a "tribal law-and-order organization that functions in a reasonably satisfactory manner." H. R. Rep. No. 848, 83d Cong., 1st Sess., 7 (1953). Had Washington been included among the mandatory States, it is thus quite possible that the Yakima Reservation would have been excepted.

[34] Similar bills had been introduced in the 82d Congress, and in public hearings held on those the idea of a general transfer was discussed at length. See 1952 Hearings.

[35] See unpublished transcript of Hearings on H. R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and In-

Committee Members, counsel, and representatives of the Department of the Interior discussed various proposals designed to give H. R. 1063 general applicability. June 29 Hearings 1–22. It rapidly became clear that the Members favored a general bill. *Ibid.* At this point, Committee counsel noted that several States "have constitutional prohibitions against jurisdiction." *Id.,* at 23. There followed some discussion of the manner in which these States should be treated. On July 15, a version of § 6 was proposed. July 15 Hearings 6. After further discussion of the disclaimer problem, the "notwithstanding" clause was added, *id.,* at 9, and the language eventually enacted as § 6 was approved by the Committee that day. The speed and the context alone suggest that § 6 was designed to remove an obstacle to state jurisdiction, not to create one. And the discussion at the hearings, which in essence were markup sessions, makes this clear.[36]

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sular Affairs, 83d Cong., 1st Sess. (June 29, 1953), and unpublished transcript of Hearings on H. R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (July 15, 1953) (hereinafter cited as June 29 Hearings and July 15 Hearings, respectively). The transcripts of these hearings were first made available to this Court by the United States during the briefing of *Tonasket* v. *Washington,* 411 U. S. 451. They were again supplied in *Bryan* v. *Itasca County, supra,* and for this appeal have been reproduced in full in the Appendix to Brief for Appellee. These hearings, along with the House Report on H. R. 1063 as amended, H. R. Rep. No. 848, *supra,* and the Senate Report, which is virtually identical, S. Rep. No. 699, 83d Cong., 1st Sess. (1953), constitute the primary legislative materials on Pub. L. 280.

[36] On July 15, Committee counsel presented an amendment which was eventually to become § 6. He explained the effect of the amendment as follows:

"[T]he legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply first to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus to acquire jurisdiction.

"The other amendment would apply to any other Indian states . . .

While some Committee Members apparently thought that § 6 States, as a matter of state law, would have to amend their constitutions in order to remove the disclaimers found there,[37]

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who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." July 15 Hearings 4.

Immediately after the proposed § 6 was read to the Subcommittee, the Chairman, Congressman D'Ewart, commented:

"I do not think we have to grant permission to a state to amend its own statutes." July 15 Hearings 7.

Committee counsel replied:

"Mr. D'Ewart, I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, but by some state courts it may be interpreted as being necessary." *Ibid.*

The version of § 6 read to the Committee Members by counsel contained no reference to the Enabling Acts but merely granted consent for the States to remove existing impediments to the assertion of jurisdiction over Indians. It was suggested that in order effectively to authorize the States to modify their organic legislation the clause should be more specific. This suggestion resulted in the proposal of the "notwithstanding" clause. The following exchange then took place:

"[Committee counsel]: I believe that clause 'notwithstanding any provisions of the Enabling Act' for such states might well be included. It would make clear that Congress was repealing the Enabling Act.

"[Congressman Dawson]: To give permission to amend their constitution.

"[Committee counsel]: I think that would help clarify the intent of the committee at the present time and of Congress if they favorably acted on the legislation." *Id.*, at 9.

The next day, July 16, the Committee filed its report on the substitute bill. H. R. Rep. No. 848, *supra*. The Report explains that § 6 would

"give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws."

The Committee hearings thus make clear an intention to remove any federal barriers to the assumption of jurisdiction by Enabling Act States. They also make clear that that consent was not to effect an immediate transfer of jurisdiction.

[37] See June 29 Hearings 23; July 15 Hearings 6–11.

there is no indication that the Committee intended to impose any such requirement.[38]

We conclude that § 6 of Pub. L. 280 does not require disclaimer States to amend their constitutions to make an effective acceptance of jurisdiction. We also conclude that any Enabling Act requirement of this nature was effectively repealed by § 6. If as a matter of state law a constitutional amendment is required, that procedure must—as a matter of state law—be followed. And if under state law a constitutional amendment is not required, disclaimer States must still take positive action before Pub. L. 280 jurisdiction can become effective. The Washington Supreme Court having determined that for purposes of the repeal of Art. XXVI of the Washington Constitution legislative action is sufficient,[39] and appropriate state legislation having been enacted, it follows that the State of Washington has satisfied the procedural requirements of § 6.

IV

We turn to the question whether the State was authorized under Pub. L. 280 to assume only partial subject-matter and geographic jurisdiction over Indian reservations within the State.[40]

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[38] The House passed the bill without debate on July 27, 1953. 99 Cong. Rec. 9962–9963. In the Senate, the bill was referred to the Committee on Interior and Insular Affairs. *Id.*, at 10065. That Committee held no hearings of its own, and it reported out the bill two days later without amendment. *Id.*, at 10217. The bill received only brief consideration on the Senate floor before it was passed on August 1, 1953. *Id.*, at 10783–10784.

[39] The Tribe has intimated that the Washington Supreme Court's holding is incorrect. However, the procedure by which the disclaimer might be removed or repealed—Congress having given its consent—is as we have held a question of state law.

[40] Both parties find support for their positions on this issue in the legislative history of the amendments to Pub. L. 280 in Title IV of the Indian

The argument that Pub. L. 280 does not permit this scheme of partial jurisdiction relies primarily upon the text of the federal law. The main contention of the Tribe and the United States is that partial jurisdiction, because not specifically authorized, must therefore be forbidden. In addition, they assert that the interplay between the provisions of Pub. L. 280 demonstrates that § 6 States are required, if they assume any jurisdiction, to assume as much jurisdiction as was transferred to the mandatory States.[41] Pointing out that 18 U. S. C. § 1151 defines Indian country for purposes of federal jurisdiction as including an entire reservation notwithstanding "the issuance of any patent," they reason that when Congress in § 2 transferred to the mandatory States "criminal jurisdiction" over "offenses committed by or against Indians in the Indian country," it meant that all parts of Indian country were to be covered. Similarly, they emphasize that civil jurisdiction of comparable scope was transferred to the mandatory

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Civil Rights Act of 1968, 82 Stat. 73. The 1968 legislation provides that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected. 25 U. S. C. §§ 1321 (a), 1322 (a). The amendments also provide explicitly for partial assumption of jurisdiction. *Ibid.* In addition, they authorize the United States to accept retrocessions of jurisdiction, full or partial, from the mandatory and the § 7 States. 25 U. S. C. § 1323 (a). Section 7 itself was repealed with the proviso that the repeal was not intended to affect any cession made prior to the repeal. 25 U. S. C. § 1323 (b). Section 6 was re-enacted without change. 25 U. S. C. § 1324.

We do not rely on the 1968 legislation or its history, finding the latter equivocal, and mindful that the issues in this case are to be determined in accord with legislation enacted by Congress in 1953.

[41] Since entire reservations were exempted from coverage in three of the mandatory States, the Tribe and the United States concede that the option States could probably assume jurisdiction on a reservation-by-reservation basis. The United States also concedes that the word "or" in § 7 might be construed to mean that option States need not extend both civil and criminal jurisdiction.

States. They stress that in both §§ 2 and 4, the consequence of state assumption of jurisdiction is that the state "criminal laws" and "civil laws of . . . general application" are henceforth to "have the same force and effect within . . . Indian country as they have elsewhere within the State." Finally, the Tribe and the United States contend that the congressional purposes of eliminating the jurisdictional hiatus thought to exist on Indian reservations, of reducing the cost of the federal responsibility for jurisdiction on tribal lands, and of assimilating the Indian tribes into the general state population are disserved by the type of checkerboard arrangement permitted by Chapter 36.

We agree, however, with the State of Washington that statutory authorization for the state jurisdictional arrangement is to be found in the very words of § 7. That provision permits option States to assume jurisdiction "in such manner" as the people of the State shall "by affirmative legislative action, obligate and bind the State to assumption thereof." Once the requirements of § 6 have been satisfied, the terms of § 7 appear to govern the scope of jurisdiction conferred upon disclaimer States. The phrase "in such manner" in § 7 means at least that any option State can condition the assumption of full jurisdiction on the consent of an affected tribe. And here Washington has done no more than refrain from exercising the full measure of allowable jurisdiction without consent of the tribe affected.

Section 6, as we have seen, was placed in the Act to eliminate possible organic law barriers to the assumption of jurisdiction by disclaimer States. The Tribe and the United States acknowledge that it is a procedural, not a substantive, section. The clause contains only one reference of relevance to the partial-jurisdiction question. This is the phrase "assumption of civil and criminal jurisdiction in accordance with the provisions of this Act." As both parties recognize, this phrase necessarily leads to other "provisions" of the Act for

clarification of the substantive scope of the jurisdictional grant. The first question then is which other "provisions" of the Act govern. The second is what constraints those "provisions" place on the jurisdictional arrangements made by option States.

The Tribe argues as an initial matter that § 7 is not one of the "provisions" referred to by § 6. It relies in part upon the contrast between the phrase "assumption of civil and criminal jurisdiction" in § 6 and the disjunctive phrase "criminal offenses or civil causes of action" in § 7. From this distinction between the "civil *and* criminal jurisdiction" language of § 6 and the optional language in § 7, we are asked to conclude that § 6 States must assume full jurisdiction in accord with the terms applicable to the mandatory States even though § 7 States are permitted more discretion. We are unable to accept this argument, not only because the statutory language does not fairly support it, but also because the legislative history is wholly to the contrary. It is clear from the Committee hearings that the States covered by § 6 were, except for the possible impediments contained in their organic laws, to be treated on precisely the same terms as option States.[42]

Section 6, as we have seen, was essentially an afterthought designed to accomplish the limited purpose of removing any barrier to jurisdiction posed by state organic law disclaimers of jurisdiction over Indians. All option States were originally treated under the aegis of § 7.[43] The record of the Committee hearings makes clear that the sole purpose of § 6 was to resolve the disclaimer problem.[44] Indeed, to the extent that the Tribe and the United States suggest that disclaimer States stand on a different footing from all other option States, their argument makes no sense. It would ascribe to Congress an

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[42] See June 29 and July 15 Hearings.

[43] See *ibid.*

[44] See, *e. g.*, July 15 Hearings 4.

intent to require States that by force of organic law barriers may have had only a limited involvement with Indian country to establish the most intrusive presence possible on Indian reservations, if any at all, and at the same time an intent to allow States with different traditions to exercise more restraint in extending the coverage of their law.

The Tribe and the United States urge that even if, as we have concluded, all option States are ultimately governed by § 7, the reference in that section to assumption of jurisdiction "as provided for in [the] Act" should be construed to mean that the automatic-transfer provisions of §§ 2 and 4 must still apply. The argument would require a conclusion that the option States stand on the same footing as the mandatory States. This view is not persuasive. The mandatory States were consulted prior to the introduction of the single-state bills that were eventually to become Pub. L. 280. All had indicated their willingness to accept whatever jurisdiction Congress was prepared to transfer. This, however, was not the case with the option States. Few of those States had been consulted, and from the June 29 and July 15 hearings it is apparent that the drafters were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other States willing to accept jurisdiction. It is clear that the all-or-nothing approach suggested by the Tribe would impede even the most responsible and sensitive jurisdictional arrangements designed by the States. To find that under Pub. L. 280 a State could not exercise partial jurisdiction, even if it were willing to extend full jurisdiction at tribal request, would be quite inconsistent with this basic history.

The language of § 7, which we have found applicable here, provides, we believe, surer guidance to the issue before us.[45]

[45] The 1968 amendments, which re-enacted § 6 without change as 25 U. S. C. § 1324 but repealed § 7, 25 U. S. C. § 1323 (b), and added substantive jurisdictional provisions covering "any State," see 25 U. S. C.

The critical language in § 7 is the phrase permitting the assumption of jurisdiction "at such time and in such manner as the people of the State shall . . . obligate and bind the State to assumption thereof." Whether or not "in such manner" is fully synonymous with "to such extent," the phrase is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected.

The United States argues that a construction of Pub. L. 280 which permits selective extension of state jurisdiction allows a State to "pick and choose" only those subject-matter areas and geographical parts of reservations over which it would like to assume responsibility. Congress, we are told, passed Pub. L. 280 not as a measure to benefit the States, but to reduce the economic burdens associated with federal jurisdiction on reservations, to respond to a perceived hiatus in law enforcement protections available to tribal Indians, and to achieve an orderly assimilation of Indians into the general population. That these were the major concerns underlying the passage of Pub. L. 280 cannot be doubted. See *Bryan* v. *Itasca County*, 426 U. S., at 379.

But Chapter 36 does not reflect an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress. To the contrary, the State must assume total jurisdiction whenever a tribal request is made that it do so. Moreover, the partial geographic and subject-matter jurisdiction that exists in the absence of tribal consent is responsive to the law enforcement concerns that underlay the adoption of Pub. L. 280. State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on nontrust lands. The law enforcement hiatus that preoccupied the 83d Congress has to that extent been eliminated. On trust and restricted lands within the reservations

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§§ 1321, 1322, suggest that in the future the scope of jurisdiction for all States is to be the same.

whose tribes have not requested the coverage of state law, jurisdiction over crimes by Indians is, as it was when Pub. L. 280 was enacted, shared by the tribal and Federal Governments. To the extent that this shared federal and tribal responsibility is inadequate to preserve law and order, the tribes need only request and they will receive the protection of state law.

The State of Washington in 1963 could have unilaterally extended full jurisdiction over crimes and civil causes of action in the entire Yakima Reservation without violating the terms of Pub. L. 280. We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent.

V

Having concluded that Chapter 36 violates neither the procedural nor the substantive terms of Pub. L. 280, we turn, finally, to the question whether the "checkerboard" pattern of jurisdiction applicable on the reservations of nonconsenting tribes is on its face invalid under the Equal Protection Clause of the Fourteenth Amendment.[46] The Court of Ap-

[46] The Court of Appeals did not disturb the finding of the District Court that Chapter 36 had not been applied on the Yakima Reservation to discriminate against the Tribe or any of its members. The District Court found that the governmental legal services available to the Tribe and its

peals for the Ninth Circuit concluded that it is, reasoning that the land-title classification is too bizarre to meet "any formulation of the rational basis test." 552 F. 2d, at 1335. The Tribe advances several different lines of argument in defense of this ruling.

First, it argues that the classifications implicit in Chapter 36 are racial classifications, "suspect" under the test enunciated in *McLaughlin* v. *Florida,* 379 U. S. 184, and that they cannot stand unless justified by a compelling state interest. Second, it argues that its interest in self-government is a fundamental right, and that Chapter 36—as a law abridging this right—is presumptively invalid. Finally, the Tribe argues that Chapter 36 is invalid even if reviewed under the more traditional equal protection criteria articulated in such cases as *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307.[47]

We agree with the Court of Appeals to the extent that its opinion rejects the first two of these arguments and reflects a judgment that Chapter 36 must be sustained against an Equal Protection Clause attack if the classifications it employs "rationally furthe[r] the purpose identified by the State." *Massachusetts Bd. of Retirement* v. *Murgia, supra,* at 314. It is settled that "the unique legal status of Indian tribes under

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members were not significantly different from those offered to other rural and city residents of Yakima County. It also concluded that the distinctions drawn between non-Indians and Indians in the statute were not motivated by a discriminatory purpose. In view of these findings, our inquiry here is limited to the narrow question whether the distinctions drawn in Chapter 36 on their face violate the Equal Protection Clause of the Fourteenth Amendment.

[47] The Court of Appeals limited its holding to the land-tenure classification. The Tribe, in support of the judgment, has argued that the Chapter 36 classifications based on the tribal status of the offender and on whether a juvenile is involved are also facially invalid. In our view these status classifications of Chapter 36 are indistinguishable from the interrelated land-tenure classification so far as the Equal Protection Clause is concerned.

federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton* v. *Mancari,* 417 U. S. 535, 551–552. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, *e. g., United States* v. *McBratney,* 104 U. S. 621. For these reasons, we find the argument that such classifications are "suspect" an untenable one. The contention that Chapter 36 abridges a "fundamental right" is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See, *e. g., United States* v. *Wheeler,* 435 U. S. 313. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.[48]

The question that remains, then, is whether the lines drawn by Chapter 36 fail to meet conventional Equal Protection Clause criteria, as the Court of Appeals held. Under those criteria, legislative classifications are valid unless they bear no rational relationship to the State's objectives. *Massachusetts Bd. of Retirement* v. *Murgia, supra,* at 314. State legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect."

[48] This is not to hold that Pub. L. 280 was a termination measure. Whether there is concurrent tribal and state jurisdiction on some areas of the Reservation is an issue we do not decide. See n. 32, *supra.*

Dandridge v. *Williams*, 397 U. S. 471, 485. Under these standards we have no difficulty in concluding that Chapter 36 does not offend the Equal Protection Clause.

The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. See *Seymour* v. *Superintendent*, 368 U. S. 351; *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463. Chapter 36 is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands. The land-tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the tribes with those of the States are strikingly similar. See, *e. g.*, *United States* v. *McBratney*, *supra*; *Draper* v. *United States*, 164 U. S. 240; *Williams* v. *Lee*, 358 U. S. 217; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164. In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.

For the reasons set out in this opinion, the judgment of the Court of Appeals is reversed.

It is so ordered.

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

For over 140 years, the Court has resolved ambiguities in statutes, documents, and treaties that affect retained tribal sovereignty in favor of the Indians.[1] This interpretive prin-

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[1] *E. g.*, *Worcester* v. *Georgia*, 6 Pet. 515, 580–582 (1832) (McLean, J., concurring); *The Kansas Indians* (*Wan-zop-e-ah* v. *Board of Comm'rs*

ciple is a response to the unique relationship between the Federal Government and the Indian people, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U. S. 363, 367 (1930). More fundamentally, the principle is a doctrinal embodiment of "the right of [Indian nations] to make their own laws and be ruled by them," *Williams* v. *Lee,* 358 U. S. 217, 220 (1959), a right emphatically reaffirmed last Term in *United States* v. *Wheeler,* 435 U. S. 313, 322–330 (1978). Although retained tribal sovereignty "exists only at the sufferance of Congress," *id.,* at 323, the States may not encroach upon an Indian nation's internal self-government until Congress has unequivocally sanctioned their presence within a reservation. See *ibid.; McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 168–169, 172–173); *Worcester* v. *Georgia,* 6 Pet. 515, 554, 557, 561 (1832); see also *Oliphant* v. *Suquamish Indian Tribe,* 435 U. S. 191, 212 (1978) (MARSHALL, J., dissenting).

While the Court in its discussion of the disclaimer issue professes to follow this settled principle of statutory interpretation, *ante,* at 484, it completely ignores the rule when addressing Washington's assertion of partial jurisdiction. In my view, the language and legislative history of Pub. L. 280 do not unequivocally authorize States to assume the type of selective geographic and subject-matter jurisdiction that Washington asserted in 1963.[2] Because our precedents compel

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of the County of Miami), 5 Wall. 737, 760 (1867); *Jones* v. *Meehan,* 175 U. S. 1, 11–12 (1899); *Cherokee Intermarriage Cases,* 203 U. S. 76, 94 (1906); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912); *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918); *Carpenter* v. *Shaw,* 280 U. S. 363, 366–367 (1930); *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 353–354 (1941); *Squire* v. *Capoeman,* 351 U. S. 1, 6–7 (1956); *Menominee Tribe of Indians* v. *United States,* 391 U. S. 404, 406 n. 2 (1968); *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 173–175, and n. 13 (1973); *Bryan* v. *Itasca County,* 426 U. S. 373, 392–393 (1976).

[2] Since I would invalidate Washington's jurisdictional arrangement on this ground, I need not address the disclaimer issue. For present pur-

us to construe the statute in favor of the Indians, I respectfully dissent.

As is evident from the majority opinion, the text of Pub. L. 280 does not on its face empower option States to assert partial geographic or subject-matter jurisdiction over Indian reservations.[3] The statute refers without limitation to "criminal" and "civil" jurisdiction. Nevertheless, because option States could have conditioned their exercise of full jurisdiction on the consent of affected tribes, *ante,* at 495, 498, and because Pub. L. 280 would have permitted Washington to extend full jurisdiction over the Yakima Indian Reservation without consulting the Tribe, *ante,* at 499, the Court concludes that the States can unilaterally assert less than full jurisdiction.

I agree that Pub. L. 280 permits option States to refuse jurisdiction absent the consent of the Indians, and that prior to the 1968 amendments of the Act,[4] Washington could have unilaterally extended full jurisdiction over the Reservation. But the majority does not explain how the statutory language governing exercise of *full* jurisdiction allows the States to exercise piecemeal jurisdiction. That Washington has done no more than "refrain from exercising the full measure of allowable jurisdiction," *ante,* at 495, raises but does not answer

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poses I will assume that Washington was not required to amend its constitutional disclaimer of authority over Indian lands before it could exercise power over the Reservation.

[3] It may be that the disjunctive language of § 7 allows option States to exercise either criminal or civil jurisdiction. See *ante,* at 496–497, and n. 41. And perhaps extension of jurisdiction reservation by reservation is also permissible. See *ante,* at 494 n. 41. But neither of these questions is posed by this case. The issue presented here is whether the language of Pub. L. 280 authorizes any patchwork jurisdictional arrangement that suits the States' peculiar interests.

[4] These amendments prohibit States from exercising further jurisdiction over Indian reservations after 1968 without tribal consent. 25 U. S. C. §§ 1321 (a), 1322 (b), 1326.

the critical question whether Pub. L. 280 sanctions this jurisdictional arrangement.

The sparse legislative history of Pub. L. 280, like the statutory language, says nothing about the propriety of partial jurisdictional schemes. In light of the expressed reluctance of at least one State to assume the financial burden that jurisdiction over Indian territory entails,[5] this silence is particularly instructive. Although selective assertion of jurisdiction within reservations would obviously ameliorate such fiscal concerns, at no point in the congressional deliberations was it advanced as a solution. Rather, Congress permitted the option States to refrain from exercising full jurisdiction until they could meet their financial obligations.[6] The legislative focus was clearly on full-fledged assumption of jurisdiction.[7]

To disregard this legislative focus and allow assumption of partial jurisdiction undermines an important purpose behind Pub. L. 280. In enacting the statute, Congress sought to eliminate the serious "hiatus in law-enforcement authority" on Indian reservations, H. R. Rep. No. 848, *supra* n. 5, at 6, which was attributable in large part to the division of law enforcement functions among federal, state, and Indian authorities.[8] It intended to accomplish this goal by granting

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[5] See Hearings on H. R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 8–10, 14–15 (1953) (hereinafter 1953 Subcommittee Hearings); Hearings on H. R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 3, 7, 13, 17 (1953) (hereinafter 1953 Committee Hearings); H. R. Rep. No. 848, 83d Cong., 1st Sess., 7 (1953).

[6] See 1953 Committee Hearings 13; H. R. Rep. No. 848, *supra*, at 6–7.

[7] See, *e. g.*, 1953 Subcommittee Hearings 3, 4, 5, 7, 17; 1953 Committee Hearings 3, 8; 99 Cong. Rec. 10782–10783 (1953) (statement of Sen. Thye; letter from Gov. Anderson to Sen. Thye).

[8] See H. R. Rep. No. 848, *supra*, at 5–6; 1953 Subcommittee Hearings 2–3, 21–22; Hearings on H. R. 459, H. R. 3235 and H. R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and

to the States the authority previously exercised by the Federal Government, thereby simplifying the administration of law on Indian reservations. See 1953 Subcommittee Hearings 7. Washington's complex jurisdictional system, dependent on the status of the offender, the location of the crime, and the type of offense involved, by no means simplifies law enforcement on the Yakima Reservation. Cf. 1 National American Indian Court Judges Assn., Justice and the American Indian: The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations 6–13 (1974). To the contrary, it exacerbates the confusion that the statute was designed to redress.

Had Congress intended to condone exercise of limited subject-matter jurisdiction on a random geographic basis, it could have easily expressed this purpose. See *Bryan* v. *Itasca County*, 426 U. S. 373, 392–393 (1976); *Mattz* v. *Arnett*, 412 U. S. 481, 504–505 (1973); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 173–175, and n. 13; *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404, 412–413 (1968); *Creek County Comm'rs* v. *Seber*, 318 U. S. 705, 713 (1943). Indeed, it did so in the 1968 amendments to the Act when it authorized partial criminal or civil jurisdiction by subject matter, geography, or both, but only with the Indians' consent. 25 U. S. C. §§ 1321 (a), 1322 (a).[9] I am unwilling to

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Insular Affairs, 82d Cong., 2d Sess., 14 (1952) (statement of Rep. D'Ewart); Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. Rev. 535, 541–543 (1975).

[9] The legislative history of the 1968 amendments provides further evidence that Congress in 1953 did not unambiguously sanction assertion of selective jurisdiction. There were numerous conflicting opinions on whether the new provisions authorizing States to assume partial jurisdiction effected a change in the law. In 1965, the Department of the Interior had intimated that partial assumption of criminal jurisdiction was a novel idea when it recommended partial jurisdiction in civil matters, but concluded that "extension of criminal jurisdiction to the States on a piecemeal basis needs to be considered further." Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional

presume that Congress' failure in 1953 to sanction piecemeal jurisdiction in similar terms was unintentional. In any event, it is indisputable that the statute does not unambiguously authorize assertion of partial jurisdiction. If we adhere more than nominally to the practice of resolving ambiguities in favor of the Indians, then Washington's jurisdictional arrangement cannot stand.

Accordingly, I dissent.

Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 321 (1965) (letter from Frank J. Barry, Acting Secy. of the Interior, to Sen. Eastland). This letter also noted that the Department of Justice was opposed to selective extensions of criminal jurisdiction because of the likelihood of unnecessary confusion in the enforcement of criminal laws. *Ibid.*

However, in 1968, Assistant Secretary of the Interior Harry R. Anderson believed that authority to assume piecemeal jurisdiction was implicit in Pub. L. 280. Hearings on H. R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess., 25 (1968) (letter to Rep. Wayne N. Aspinall). By contrast, Congressman Aspinall, who played a fundamental role in drafting Pub. L. 280, stated that the new partial-jurisdiction provisions substantially altered prior law. 114 Cong. Rec. 9615 (1968). Similarly, Arthur Lazarus, an attorney representing six Tribes, argued that "[o]ne of the major objections to Public Law 280 is its 'all or nothing' approach, requiring States to assume all jurisdiction on Indian reservations if any jurisdiction is desired." 1968 Hearings, *supra,* at 116. Deputy Attorney General Warren Christopher was noncommittal on the reading of prior law. *Id.,* at 28 (letter to Rep. Aspinall).

This subsequent legislative consideration of the precise issue before us sheds light on the intent of Congress in 1953. See *Mattz* v. *Arnett,* 412 U. S. 481, 505 n. 25 (1973); *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 472–475 (1976); *Bryan* v. *Itasca County,* 426 U. S., at 386. Given the congressional and executive equivocation, the Court's apparent certainty is unfounded.

FEDERAL ENERGY REGULATORY COMMISSION *v.* PENNZOIL PRODUCING CO. ET AL.

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

No. 77–648. Argued November 28, 1978—Decided January 16, 1979

Respondent pipeline company purchases for resale in the interstate market natural gas produced from a Louisiana field by respondent oil companies (Producers), whose prices are subject to regulation by petitioner Commission. Under their lease agreements with the field's owner, the Producers pay royalties pegged to the "market value" or "market price" of the gas. Following a dispute over the lessor's contention that those terms related to the unregulated price of natural gas in the intrastate market rather than to the lower interstate Commission-regulated rates, the parties ultimately agreed to increased royalty payments based on intrastate market values of natural gas. Alternatively, the Producers would abandon delivery to the pipeline company of the royalty portion of the gas and deliver it instead as payment in kind to the lessor. The settlement agreement was to be binding only if the rate increase or the alternative abandonment was approved by the Commission, which the Producers then petitioned for special relief. The Commission denied price relief, holding that it would be contrary to its mandate to permit royalty costs to be passed on to the Producers' customers if the royalties were calculated on any basis other than the just and reasonable rate for the gas involved, and, relying in part on *FPC* v. *Texaco Inc.*, 417 U. S. 380, the Commission concluded that it was "not free" to allow royalty costs based on the value of the gas in an unregulated market. The Commission also denied the alternative abandonment request. The Court of Appeals reversed and remanded, concluding that the Commission had "authority to consider the reasonableness of any costs incurred," which "necessarily requires consideration of market price"; had failed to explain why royalty costs in an unregulated market differ from other production costs; and should determine the merits of the Producers' requests. The court, following its opinion in *Southland Royalty Co.* v. *FPC*, 543 F. 2d 1134, disagreed with the Commission on the abandonment issue. *Held:*

1. The Natural Gas Act does not deny the Commission authority to give special rate relief to individual producers where escalating royalty costs are a function of, or are otherwise based upon, an unregulated

market price for the product whose sale in the interstate market is regulated by the Commission, and the Commission misconstrued *Texaco* in holding to the contrary. Pp. 514–517.

2. The Court of Appeals encroached upon the Commission's rate-making authority when it strongly suggested that the Commission is required to grant relief to the Producers as long as the increase in royalty costs is not imprudent and the relief when granted will merely sustain rather than increase the Producers' profits, since the Commission is not obliged automatically to relieve the bind on producers facing increased royalty costs based on unregulated prices. "All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level." *FPC* v. *Texaco Inc.*, *supra*, at 392. Pp. 517–519.

3. In view of the record, a remand to the Commission is proper so that in the first instance it may clearly enunciate whether and to what extent individual relief from area rates will be granted due to the increased royalty costs, and, if relief is to be denied, that it may adequately explain its judgment. Pp. 519–520.

4. On the abandonment issue, the Court of Appeals erred to the extent that it relied upon its judgment that was later reversed in *California* v. *Southland Royalty Co.*, 436 U. S. 519. Moreover, the questions of individual rate relief and abandonment are not unrelated and may be considered by the Commission on remand. Pp. 520–521.

553 F. 2d 485, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined except STEWART and POWELL, JJ., who took no part in the consideration or decision of the case.

Deputy Solicitor General Barnett argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Richard A. Allen,* and *Howard E. Shapiro.*

Jeron Stevens argued the cause for respondent Pennzoil Producing Co. With him on the briefs were *Stephen M. Hackerman* and *John M. Young.* *Thomas G. Johnson* argued the cause and filed a brief for respondent Shell Oil Co. *Edwin W. Edwards,* Governor of Louisiana, *William J. Guste, Jr.,* Attorney General, *James R. Patton, Jr., David B. Robinson,* and *Harry E. Barsh, Jr.,* filed a brief for respondent State

of Louisiana. *Lee M. Huber* and *Donald R. Arnett* filed a brief for respondent United Gas Pipe Line Co. *Tom P. Hamill, Carroll L. Gilliam,* and *Philip R. Ehrenkranz* filed a memorandum for respondent Mobil Oil Corp.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The major issue in this case involves the authority of the Federal Energy Regulatory Commission, petitioner herein, to grant or refuse to grant individual producers special relief from applicable area and nationwide rates set by the Commission for the sale of natural gas. The Court of Appeals for the Fifth Circuit set aside what it considered to have been the decision of the Commission that under the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*, it did not have authority to grant exceptional relief which would allow producers to pass through to interstate customers increased royalty costs based upon the intrastate price of natural gas. A secondary issue involves a question of abandonment under § 7 (b) of the Act, 15 U. S. C. § 717f (b), and an application of our decision last Term in *California* v. *Southland Royalty Co.*, 436 U. S. 519 (1978), rev'g *Southland Royalty Co.* v. *FPC*, 543 F. 2d 1134 (CA5 1976).

I

Respondent United Gas Pipe Line Co. (United) purchases for resale in the interstate market natural gas produced by respondents Pennzoil Oil Producing Co. and Shell Oil Co. (Producers) from the Gibson field in southern Louisiana. Producers' prices are subject to Commission regulation and may not exceed the just and reasonable rates established by the Commission in its relevant area and nationwide rate

**Anthony M. DiLeo* filed a brief for Williams, Inc., et al. as *amici curiae* urging affirmance.

Dale M. Stucky and *Gerrit H. Wormhoudt* filed a brief for Lawrence Lightcap et al. as *amici curiae*.

proceedings.[1] Under their lease agreements with the owner of the Gibson field, Producers pay royalties pegged to the "market value" or "market price" of the gas. After commencement of state-court litigation involving the lessor's contention that these references are to the unregulated price of natural gas in the intrastate market,[2] rather than to the applicable interstate rates set by the Commission,[3] the lessor and Producers reached a settlement agreement whereby royalty payments would be pegged to the higher of 78¢ per 1,000 cubic feet of gas (increasing 1.5¢ per year beginning in 1976) or 150% of the highest applicable interstate rate. In the alternative, Producers would abandon delivery to United of the royalty portion of the gas and deliver it instead as payment in kind to the lessor. However, this settlement would be binding only if the Commission allowed Producers to charge United a rate higher than applicable area and

[1] At the time of the Commission's decision in this case, the applicable rates were those prescribed by Opinion No. 598, *Area Rate Proceeding (Southern Louisiana Area)*, 46 F. P. C. 86, enf'd *sub nom. Placid Oil Co.* v. *FPC*, 483 F. 2d 880 (CA5 1973), aff'd *sub nom. Mobil Oil Corp.* v. *FPC*, 417 U. S. 283 (1974); Opinion No. 699–H, *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F. P. C. 1604 (1974), aff'd *sub nom. Shell Oil Co.* v. *FPC*, 520 F. 2d 1061 (CA5 1975), cert. denied, 426 U. S. 941 (1976).

[2] The Commission takes the position that construction of such clauses is a question of federal law, and that the "market" referred to is that for interstate gas. See Brief for Petitioner 35–37, and n. 22. Compare *Lightcap* v. *Mobil Oil Corp.*, 221 Kan. 448, 562 P. 2d 1, cert. denied, 434 U. S. 876 (1977), petition for rehearing pending, No. 76–1694; and *Kingery* v. *Continental Oil Co.*, 434 F. Supp. 349 (WD Tex. 1977), with *Mobil Oil Corp.* v. *FPC*, 149 U. S. App. D. C. 310, 319–320, 463 F. 2d 256, 265–266 (1971), cert. denied, 406 U. S. 976 (1972).

[3] Under the Natural Gas Policy Act of 1978, Pub. L. 95–621, 92 Stat. 3351, all wellhead natural gas, including that dedicated to the intrastate market, that is sold after December 1, 1978, will be subject to the Act's price ceilings. However, there will remain for some time a differential between the rate prescribed for gas previously unregulated and that prescribed for gas dedicated to the interstate market.

nationwide rates by the amount of the resulting increase in royalty costs, or in the alternative, permitted the desired abandonment.[4]

The Commission referred Producers' subsequent petition for special relief, supported by intervenor United, to an Administrative Law Judge who, after a hearing, denied the petition. Under his view of applicable cases, special relief from the relevant ceiling rates, while not absolutely prohibited, would be available only if Producers demonstrated "that [their] overall costs incurred in the operation of the particular well or group of wells are higher than the applicable Commission-established area or nationwide ceiling rates, or, even more stringently, that [their] out-of-pocket expenses will exceed revenues." App. 171. The Administrative Law Judge concluded that neither Producer had satisfied its burden of proof in this respect. Nor had it made a case for abandonment of the royalty portion of the gas.

The Commission affirmed but took a somewhat different approach.[5] Acknowledging for the purposes of this case that it had no jurisdiction over royalty rates,[6] the Commission nevertheless noted its authority to regulate the prices charged by Producers for gas sold in interstate commerce and asserted that it would be "inconsistent" with and "contrary" to its mandate to permit royalty costs to be passed on to Producers' customers if royalties were calculated on any basis other than

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[4] In separate agreements, United consented to make the additional payments or to release the royalty gas, pursuant to Commission approval.

[5] The Commission framed the issue before it as "whether [the Commission] can legally grant any form of rate relief above either an area or nationwide just and reasonable rate solely because the producer selling the gas in interstate commerce *may* be obligated to make a royalty payment based not upon the regulated price the producer receives for the gas, but rather on the 'market value' of the gas." 55 F. P. C. 400, 404 (1976).

[6] See *Mobil Oil Corp.* v. *FPC*, 149 U. S. App. D. C. 310, 463 F. 2d 256 (1971), cert. denied, 406 U. S. 976 (1972).

the just and reasonable rate for the gas involved. Relying in part on our decision in *FPC* v. *Texaco Inc.*, 417 U. S. 380 (1974), the Commission concluded that it was "not free" to allow royalty costs based on the value of the gas in an unregulated market. 55 F. P. C. 400, 404–405 (1976).[7] In an opinion and order denying rehearing, the Commission said that it "does not have the power to base a part of the regulated price on the unregulated market value of intrastate gas."[8] Price relief was thus denied without accepting or rejecting the findings of the Administrative Law Judge with respect to the relationship between the Producers' costs and

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[7] The Commission said:

"In the instant proceeding, the impetus of the settlement is the market value of the royalties and no consideration has been given to regulated rates. As such, we cannot permit any incremental royalty costs resulting from this settlement, or resulting from any judgment by a state court regarding royalty payments, to be passed on to the pipeline if these incremental royalty costs are based on any other factors than the regulated just and reasonable rate. On this point, we note the Supreme Court's warning in *FPC* v. *Texaco* . . . that the Commission is not free to equate just and reasonable rates with the prices for gas in the marketplace. Accordingly, we believe that we are not free to allow royalty costs, which are based on market values, to be passed on to the pipelines as just and reasonable rates. A contrary result would not '. . . afford customers a complete, permanent, and effective bond of protection from excessive rates and charges.'" 55 F. P. C., at 405.

[8] 55 F. P. C. 901 (1976). The Commission also explained:

"In arriving at the national rates costs of production were used and royalties were computed at 16 percent of total costs. . . . It is for these reasons that the Commission is not free to allow royalty costs, which are based on market values, to be passed on to the pipelines as just and reasonable rates." *Id.*, at 902.

In separately denying the petition for rehearing filed by another litigant, the Commission observed that in setting area rates, an allowance for royalty costs "would depend on the royalties generally being paid in the area," but this did not mean that an "individual producer's rates should be increased because it must pay a higher royalty, particularly one based on market value." 55 F. P. C. 1377, 1379 (1976).

revenues. The Commission also denied the alternative request for abandonment of the royalty portion of the gas.

The Court of Appeals rejected the Commission's determination that it was without authority to allow producers of natural gas to increase their rates above applicable area and nationwide rates in order "to reflect the increased cost of 'market value' or 'market price' royalty obligations." *Pennzoil Producing Co.* v. *FPC*, 553 F. 2d 485, 487 (CA5 1977). Asserting that the Commission "has taken a cost plus profit approach to gas rate regulation," the Court of Appeals believed that in seeking to pass through their increased royalty expense, Producers "do not seek to increase their profits but merely to maintain those margins already determined by the Commission to be just and reasonable." *Id.*, at 488. The Commission had "authority to consider the reasonableness of any costs incurred," but doing so "necessarily requires consideration of market price," and the Commission had failed to explain why royalty costs in an unregulated market are different from any other cost of production. *Ibid.* The court concluded that these considerations and our decision in *Mobil Oil Corp.* v. *FPC*, 417 U. S. 283 (1974), entitled the Producers to a "determination of the merits" of their request for special relief for the applicable area and nationwide rates. 553 F. 2d, at 488.

Based on its opinion and judgment in *Southland Royalty Co.* v. *FPC*, 543 F. 2d 1134 (CA5 1976), the Court of Appeals also disagreed with the Commission on the abandonment issue.

II

If the Commission's opinion is to be read as holding that granting an individual producer a rate increase at variance with the established area or national rate in order to accommodate an increase in royalty costs is forbidden by the Act under any circumstance, the Court of Appeals was surely correct in disagreeing with the Commission. In *Permian*

Basin Area Rate Cases, 390 U. S. 747 (1968), the Commission urged that "nothing in the Constitution or in the Natural Gas Act require[s] the Commission to provide exceptions to the area rates," at least so long as the Commission permitted abandonment when costs exceed revenues, but it nevertheless pointed out that it had established a procedure whereby individual producers may seek relief from the applicable area rate. Brief for the FPC, O. T. 1967, Nos. 90 et al., p. 64. Similarly, in *Mobil Oil Corp.* v. *FPC, supra,* the Commission, responding to the possibility of certain producers facing higher royalty payments than the fixed percentage of total costs used by the Commission in setting the area rates, stated—in agreement with the Court of Appeals—that "the issue is hypothetical at this stage and that if it becomes a reality producers may seek special relief from the Commission" Brief for Respondent FPC, O. T. 1973, Nos. 73–437 et al., p. 62. This Court proceeded on a similar assumption, saying that "in any event an affected producer is entitled to seek individualized relief." 417 U. S., at 328.

None of the foregoing is consistent with the proposition that the Commission is totally without power to give special relief to individual producers whose escalating royalty costs place them in an untenable position. In view of the scope of the discretion vested in the Commission to establish just and reasonable rates consistent with the public interest, we could not hold that the Act forbids special relief from area rates to accommodate increased royalty costs regardless of the circumstances.

Nor do we understand the Commission in this Court to deny its jurisdiction to extend such relief in proper situations. Indeed, in its brief before this Court the Commission states that "with the approval of the courts, [it] has established the policy that it will not authorize departures from area rates unless a producer can show that its costs exceed its revenues at the area rate. See, *e. g.,* Op. No. 699, 51 F. P. C. 2212,

2279, aff'd, *Shell Oil Co.* v. *Federal Power Commission,* 520 F. 2d 1061 (C. A. 5), certiorari denied, 426 U. S. 941." Brief for Petitioner 34. The Commission does not suggest that this policy is generally inapplicable to cases seeking relief because of escalating royalty costs.

Nevertheless, the Commission's initial opinion and its opinion denying rehearing indicated that it is "not free" and that "it does not have the power" to give individualized relief where escalating royalty costs are a function of, or are otherwise based upon,[9] an unregulated market price for the product the sale of which in the interstate market is regulated by the Commission. Erroneously, we think, the Commission sought support for these conclusions in *Texaco,* 417 U. S., at 399, where we reminded the Commission that "[i]n subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price." We did not, however, hold, as suggested by the Commission, that it "has no authority to permit rate increases based on royalty costs tied to the unregulated market for natural gas." Brief for Petitioner 13; see also *id.,* at 16, 19, 21. Our concern in *Texaco* was that rates of small producers might be totally exempted from the Act, and we did not indicate that producer or pipeline rates would be *per se* unjust and unreasonable because related to the unregulated price of natural gas. *Texaco* did not purport to circumscribe so severely the Commission's discretion to decide what formulas and methods it will employ to ensure just and reasonable rates. Indeed, the decision underscored the wide

[9] The increasing rates provided for in the tentative settlement between United and Producers in this case, while formally pegged to the higher of the regulated rate or a specific price, are based upon unregulated market prices in that, as the Commission noted, 55 F. P. C., at 405, "the impetus of the settlement is the [unregulated] market value of the royalties."

discretion vested in the Commission. See 417 U. S., at 387–393.

III

We are also convinced, however, that the Court of Appeals trenched upon the ratemaking authority vested in the Commission when it strongly suggested that the Commission is required to grant the relief Producers request in this case so long as the increase in royalty costs is not imprudent and the relief, when granted, will merely sustain rather than increase Producers' profits.

Sections 4 and 5 of the Natural Gas Act, 15 U. S. C. §§ 717c and 717d, mandate the Commission to set just and reasonable rates for the sale of interstate natural gas. In sustaining the Commission's authority to establish maximum rates on an areawide basis, we noted that "courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness,' " *Permian Basin Area Rate Cases, supra,* at 797. Moreover, in arriving at just and reasonable rates "no single method need be followed." *Wisconsin* v. *FPC,* 373 U. S. 294, 309 (1963). Specifically, the Commission is not required to adhere "rigidly to a cost-based determination of rates, much less to one that base[s] each producer's rates on his own costs." *Mobil Oil,* 417 U. S., at 308. While recognizing that under an areawide approach, " 'high cost operators may be more seriously affected . . . than others,' " *Permian Basin, supra,* at 769, quoting *Bowles* v. *Willingham,* 321 U. S. 503, 518 (1944), we refused to invalidate as inadequate the Commission's proposal to provide special relief when a producer's " 'out of pocket expenses in connection with the operation of a particular well' exceed[s] its revenue from the well under the applicable area price," 390 U. S., at 770–771.

The Court of Appeals proceeded from the proposition that "[a] cost-based methodology was approved" in *Permian Basin,* to the implicit conclusion that the Commission is required to

allow producers to maintain whatever profit margins they enjoyed under area or national rates, and that therefore it must grant special relief from these rates for all reasonable cost increases, emphasizing that a cost is not unreasonable simply because it is based on an unregulated market price. It must be noted, however, that the methodology employed by the Commission in arriving at the area rates approved in *Permian Basin* was not a purely cost-plus approach. To the contrary, the Court recognized "deviation[s] from cost-based pricing" which it "found not to be unreasonable and to be consistent with the Commission's responsibility to consider not merely the interests of the producers . . . but also 'the relevant public interests' . . . ." *Mobil Oil, supra,* at 308–309, quoting *Permian Basin,* 390 U. S., at 792. Furthermore, the notion that the Commission is required to maintain, or even allowed to maintain to the exclusion of other considerations, the profit margin of any particular producer is incompatible not only with the specific area approach to natural gas regulation approved in *Permian Basin* and *Mobil Oil* but also with a basic precept of rate regulation. "The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591, 601 (1944). The Commission is not required by the Act to grant special relief from area or nationwide rates simply because the costs of an individual producer increase and his profits decline.

Given the wide discretion of the Commission to refuse exceptional relief, we are somewhat unsure of the meaning of the Court of Appeals' statement that respondents in this case "were entitled to a determination of the merits of their requests." 553 F. 2d, at 488. We think that the Court of Appeals read too much into our statement in *Mobil Oil* that a producer with rising royalty costs "is entitled to seek individualized relief." 417 U. S., at 328. We did not there suggest

that the Commission must be prepared to grant such relief in order to forestall declining profits. Indeed, we rejected the claim that the Commission must "provide automatic adjustments in area rates to compensate for anticipated higher royalty costs." *Ibid.* Moreover, in *Texaco,* decided the same day as *Mobil,* we faced the issue whether the Commission had acted arbitrarily in failing to provide relief from the bind that pipelines and large producers might be put in if direct regulation of small producers were eliminated, a bind similar to that in which respondent Producers may find themselves if their royalty costs increase. We concluded in *Texaco:*

> "[R]equiring pipelines and the large producers to assume the risk in bargaining for reasonable prices from small producers is within the Commission's discretion in working out the balance of the interests . . . involved." 417 U. S., at 392.

Likewise, the Commission is under no obligation automatically to relieve the bind on producers facing increased royalty costs based on unregulated prices. "All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level." *Id.,* at 391–392. The Commission would not exceed its statutory authority if, in its view of the public interest, it determines to reject requests for special relief presenting no colorable claim that the applicable area or nationwide rate is confiscatory or, what may amount to the same thing,[10] outside the "zone of reasonableness," *Permian Basin, supra,* at 797; *FPC* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 585 (1942).

IV

Although we hold that the Court of Appeals too narrowly confined the Commission's functions and judgment on remand, we agree that the case should be returned to the Commission.

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[10] See *Mobil Oil,* 417 U. S., at 316; *Permian Basin Area Rate Cases,* 390 U. S. 747, 769–770 (1968).

As we have said, despite the indications to the contrary in its opinions below and despite its failure to address the Administrative Law Judge's findings with respect to Producers' proof as to their costs and revenues, the Commission does not seem to take the position here that it is totally without power to grant individual relief from area rates in recognition of increased royalty costs and that the relationship between the individual producer's costs and revenues in such a proceeding is totally irrelevant. Expressing its adherence to the policy approved in *Shell Oil Co.* v. *FPC*, 520 F. 2d 1061 (CA5 1975), cert. denied, 426 U. S. 941 (1976), the Commission points to the findings of the Administrative Law Judge that Producers in this case failed to make any showing that their costs exceed revenues. See Brief for Petitioner 34–35. At the same time, however, the Commission disaffirms any suggestion that its order be sustained on a ground that it did not itself rely upon. *Id.*, at 34. The agency's reluctance is understandable, see *Texaco*, 417 U. S., at 395–397; *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168–169 (1962); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). The upshot is that, given this state of the record, a remand to the Commission is the proper course in order that the Commission in the first instance may clearly enunciate whether and to what extent individual relief from area rates will be granted due to the increased royalty costs that are or may be involved in this case, and, if relief is to be denied, that it may make an adequate explanation of its judgment. Cf. *Burlington Truck Lines*, *supra*, at 167–168. If, as the Commission perhaps now suggests, the policy set forth in *Shell Oil* is the policy to be followed in cases such as this, the Commission should proceed to complete its task of reviewing and sustaining or rejecting the findings of the Administrative Law Judge.

V

With respect to the issue of abandonment, it is apparent that to the extent that the Court of Appeals relied upon its

judgment in the *Southland* case, it was in error since that judgment was reversed here. It also appears to us, however, that the question of individual rate relief and that of abandonment are not unrelated. If the Commission were to take the position that relief from area rates to accommodate royalty costs tied to intrastate rates is unavailable regardless of the relationship between costs and revenues, it may be that the issue of abandonment would appear in a different light. Cf. *Permian Basin,* 390 U. S., at 770–771. In any event, it is the better part of wisdom to vacate the judgment of the Court of Appeals and to remand the case to that court with directions to return the entire case to the Commission for further appropriate proceedings.

So ordered.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

THOR POWER TOOL CO. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 77–920. Argued November 1, 1978—Decided January 16, 1979

Inventory accounting for tax purposes is governed by §§ 446 and 471 of the Internal Revenue Code of 1954. Section 446 provides that taxable income is to be computed under the taxpayer's normal method of accounting unless that method "does not clearly reflect income," in which event taxable income is to be computed "under such method as, in the opinion of the [Commissioner], does clearly reflect income." Section 471 provides that "[w]henever in the opinion of the [Commissioner] the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventory shall be taken by such taxpayer on such basis as the [Commissioner] may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting income." The implementing Regulations require a taxpayer to value inventory for tax purposes at cost unless "market" (defined as replacement cost) is lower. The Regulations specify two situations in which inventory may be valued below "market" as so defined: (1) where the taxpayer in the normal course of business has actually offered merchandise for sale at prices lower than replacement cost; and (2) where the merchandise is defective. In 1964, petitioner, a tool manufacturer, wrote down in accord with "generally accepted accounting principles" what it regarded as "excess" inventory to its own estimate of the "net realizable value" (generally scrap value) of the "excess" goods (mostly spare parts), but continued to hold the goods for sale at their original prices. It offset the write-down against 1964 sales and thereby produced a net operating loss for that year. The Commissioner disallowed the offset, maintaining that the write-down did not reflect income clearly for tax purposes. Deductions for bad debts are covered by § 166. Section 166 (c) provides that an accrual-basis taxpayer "shall be allowed (in the discretion of the [Commissioner]) a deduction for a reasonable addition to a reserve for bad debts." In 1965, petitioner added to its reserve and asserted as a deduction under § 166 (c) a sum that presupposed a substantially higher charge-off rate for bad debts than it had experienced in immediately preceding years. The Commissioner ruled that the addition was exces-

sive, and determined, pursuant to the "six-year moving average" formula derived from *Black Motor Co.* v. *Commissioner,* 41 B. T. A. 300, what he regarded as a lesser but "reasonable" amount to be added to petitioner's reserve. On petitioner's petition for redetermination, the Tax Court upheld the Commissioner's exercise of discretion with respect to both the inventory write-down and the bad-debt deduction, and the Court of Appeals affirmed. *Held:*

1. The Commissioner did not abuse his discretion in determining that the write-down of "excess" inventory failed to reflect petitioner's 1964 income clearly, since the write-down was plainly inconsistent with the governing Regulations. Pp. 531–546.

(a) Although conceding that "an active market prevailed" on the inventory date, petitioner made no effort to determine the replacement cost of its "excess" inventory and thus failed to ascertain "market" in accord with the general rule of the Regulations. Petitioner, however, failed to bring itself within either of the authorized exceptions for valuing inventory below "market." Whereas the Regulations demand concrete evidence of reduced market value, petitioner provided no objective evidence whatever that its "excess" inventory had the value management ascribed to it. Pp. 535–538.

(b) There is no presumption that an inventory practice conformable to "generally accepted accounting principles" is valid for tax purposes. Such a presumption is insupportable in light of the statute, this Court's past decisions, and the differing objectives of tax and financial accounting. Pp. 538–544.

(c) While petitioner argues that it should not be forced to defer a tax benefit for inventory currently deemed unsalable until future years, when the "excess" items are actually disposed of, petitioner's "dilemma" is nothing more than the choice every taxpayer with a paper loss must face. Pp. 545–546.

2. The Commissioner did not abuse his discretion in recomputing a "reasonable" addition to petitioner's bad-debt reserve according to the *Black Motor* formula. Because petitioner did not show why its debt collections in 1965 would be less likely than in prior years, it failed to carry its "heavy burden" of showing that application of the *Black Motor* formula would have been arbitrary. Pp. 546–550.

563 F. 2d 861, affirmed.

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

Mark H. Berens argued the cause for petitioner. With him on the briefs were *Lee N. Abrams* and *Douglas A. Poe.*

Stuart A. Smith argued the cause for respondent. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson,* and *Ann Belanger Durney.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case, as it comes to us, presents two federal income tax issues. One has to do with inventory accounting. The other relates to a bad-debt reserve.

The Inventory Issue. In 1964, petitioner Thor Power Tool Co. (hereinafter sometimes referred to as the taxpayer), in accord with "generally accepted accounting principles," wrote down what it regarded as excess inventory to Thor's own estimate of the net realizable value of the excess goods. Despite this write-down, Thor continued to hold the goods for sale at original prices. It offset the write-down against 1964 sales and thereby produced a net operating loss for that year; it then asserted that loss as a carryback to 1963 under § 172 of the Internal Revenue Code of 1954, 26 U. S. C. § 172. The Commissioner of Internal Revenue, maintaining that the write-down did not serve to reflect income clearly for tax purposes, disallowed the offset and the carryback.

The Bad-Debt Issue. In 1965, the taxpayer added to its reserve for bad debts and asserted as a deduction, under § 166 (c) of the Code, 26 U. S. C. § 166 (c), a sum that presupposed a substantially higher charge-off rate than Thor had experienced in immediately preceding years. The Commissioner ruled that the addition was excessive, and determined, pursuant to a formula based on the taxpayer's past experi-

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*Briefs of *amici curiae* urging reversal were filed by *Donald E. Egan, Francis X. Grossi, Jr., Robert S. Connors, Laurence B. Kraus,* and *Stanley T. Kaleczyc, Jr.,* for the Chamber of Commerce of the United States; and by *Crane C. Hauser, Arthur I. Gould, Richard D. Godown,* and *John Lucas* for the National Association of Manufacturers of the United States.

Eric Neisser filed a brief for the Taxation With Representation Fund et al. as *amici curiae* urging affirmance.

ence, what he regarded as a lesser but "reasonable" amount to be added to Thor's reserve.

On the taxpayer's petition for redetermination, the Tax Court, in an unreviewed decision by Judge Goffe, upheld the Commissioner's exercise of discretion in both respects. 64 T. C. 154 (1975). As a consequence, and also because of other adjustments not at issue here, the court redetermined, App. 264, the following deficiencies in Thor's federal income tax:

calendar year 1963—$494,055.99
calendar year 1965—$59,287.48

The United States Court of Appeals for the Seventh Circuit affirmed. 563 F. 2d 861 (1977). We granted certiorari, 435 U. S. 914 (1978), to consider these important and recurring income tax accounting issues.

I

The Inventory Issue

A

Taxpayer is a Delaware corporation with principal place of business in Illinois. It manufactures hand-held power tools, parts and accessories, and rubber products. At its various plants and service branches, Thor maintains inventories of raw materials, work-in-process, finished parts and accessories, and completed tools. At all times relevant, Thor has used, both for financial accounting and for income tax purposes, the "lower of cost or market" method of valuing inventories. App. 23–24. See Treas. Reg. § 1.471–2 (c), 26 CFR § 1.471–2 (c) (1978).

Thor's tools typically contain from 50 to 200 parts, each of which taxpayer stocks to meet demand for replacements. Because of the difficulty, at the time of manufacture, of predicting the future demand for various parts, taxpayer produced liberal quantities of each part to avoid subsequent pro-

duction runs. Additional runs entail costly retooling and result in delays in filling orders. App. 54–55.

In 1960, Thor instituted a procedure for writing down the inventory value of replacement parts and accessories for tool models it no longer produced. It created an inventory contra-account and credited that account with 10% of each part's cost for each year since production of the parent model had ceased. 64 T. C., at 156–157; App. 24. The effect of the procedure was to amortize the cost of these parts over a 10-year period. For the first nine months of 1964, this produced a write-down of $22,090. 64 T. C., at 157; App. 24.

In late 1964, new management took control and promptly concluded that Thor's inventory in general was overvalued.[1] After "a physical inventory taken at all locations" of the tool and rubber divisions, *id.*, at 52, management wrote off approximately $2.75 million of obsolete parts, damaged or defective tools, demonstration or sales samples, and similar items. *Id.*, at 52–53. The Commissioner allowed this writeoff because Thor scrapped most of the articles shortly after their removal from the 1964 closing inventory.[2] Management also wrote down $245,000 of parts stocked for three unsuccessful prod-

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[1] In August 1964, Stewart-Warner Corp., Thor's principal shareholder (owning approximately 20% of petitioner's outstanding common shares), agreed with Thor to purchase substantially all of Thor's assets. Its ensuing examination and audit led Stewart-Warner to conclude that petitioner's assets were substantially overstated and its liabilities understated. The purchase agreement then was rescinded and Stewart-Warner agreed, instead, to provide management assistance to Thor.

[2] Both in his brief, Brief for Respondent 6, 17, 30–31, and at oral argument, Tr. of Oral Arg. 24–25, the Commissioner has maintained that the reason for the allowance of Thor's $2.75 million writeoff was that the items were scrapped soon after they were written off. The Court of Appeals accepted this explanation. 563 F. 2d 861, 864 (1977). Thor challenges its factual predicate, and asserts that 40% of the obsolete parts in fact remained unscrapped as late as the end of 1967. Reply Brief for Petitioner 8. The record does not enable us to resolve this factual dispute; in any event, we must accept the Commissioner's explanation at face value.

ucts. *Id.*, at 56. The Commissioner allowed this write-down, too, since Thor sold these items at reduced prices shortly after the close of 1964. *Id.*, at 62.

This left some 44,000 assorted items, the status of which is the inventory issue here. Management concluded that many of these articles, mostly spare parts,[3] were "excess" inventory, that is, that they were held in excess of any reasonably foreseeable future demand. It was decided that this inventory should be written down to its "net realizable value," which, in most cases, was scrap value. 64 T. C., at 160–161; Brief for Petitioner 9; Tr. of Oral Arg. 11.

Two methods were used to ascertain the quantity of excess inventory. Where accurate data were available, Thor forecast future demand for each item on the basis of actual 1964 usage, that is, actual sales for tools and service parts, and actual usage for raw materials, work-in-process, and production parts. Management assumed that future demand for each item would be the same as it was in 1964. Thor then applied the following aging schedule: the quantity of each item corresponding to less than one year's estimated demand was kept at cost; the quantity of each item in excess of two years' estimated demand was written off entirely; and the quantity of each item corresponding to from one to two years' estimated demand was written down by 50% or 75%. App. 26.[4] Thor presented no statistical evidence to rationalize

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[3] The inventory items broke down as follows:

Raw materials	4,297
Work-in-process	1,781
Finished parts and accessories	33,670
Finished tools	4,344
Total number of inventory items	44,092

64 T. C., at 158.

[4] The operation of Thor's aging formula is well illustrated by a chart set forth in the opinion of the Tax Court. *Id.*, at 159. The chart assumes that 100 units of each of five hypothetical items were on hand at the end

these percentages or this time frame. In the Tax Court, Thor's president justified the formula by citing general business experience, and opined that it was "somewhat in between" possible alternative solutions.[5] This first method yielded a total write-down of $744,030. 64 T. C., at 160.

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of 1964, but that the number of units sold or used in that year varied from 20–100:

ANTICIPATED DEMAND

Item	Units on hand at 12–31–64	Units sold or used in 1964	0–12 Months	13–18 Months	19–24 Months	+24 Months	Percent of write-down
A	100	20	20	10	10	60	
			0%	50%	75%	100%	
			0	5	7.5	60	= 72.5
B	100	40	40	20	20	20	
			0%	50%	75%	100%	
			0	10	15	20	= 45.0
C	100	60	60	30	10	0	
			0%	50%	75%	100%	
			0	15	7.5	0	= 22.5
D	100	80	80	20	0	0	
			0%	50%	75%	100%	
			0	10	0	0	= 10.0
E	100	100	100	0	0	0	
			0%	50%	75%	100%	
			0	0	0	0	= 0.0

[5] "So here is where I fell back on my experience of 20 years in manufacturing of trying to determine a reasonable basis for evaluating this inventory. In my previous association, we had generally written off inventory that was in excess of one year. In this case, we felt that that would be overly conservative, and it might understate the value of the inventory. On the other hand, we felt that two years . . . would be too optimistic and that we would overvalue the inventory [in view of] the factors which affect inventory, such as technological change, market changes, and the like, that two years, in our opinion, was too long a period of time.

"So what we did is we came up with a formula which was somewhat in between . . . writing off, say, everything over one year as compared to writing everything [off] over two years, and we came up with this formula that has been referred to in this Court today." App. 57.

At two plants where 1964 data were inadequate to permit forecasts of future demand, Thor used its second method for valuing inventories. At these plants, the company employed flat percentage write-downs of 5%, 10%, and 50% for various types of inventory.[6] Thor presented no sales or other data to support these percentages. Its president observed that "this is not a precise way of doing it," but said that the company "felt some adjustment of this nature was in order, and these figures represented our best estimate of what was required to reduce the inventory to net realizable value." App. 67. This second method yielded a total write-down of $160,832. 64 T. C., at 160.

Although Thor wrote down all its "excess" inventory at once, it did not immediately scrap the articles or sell them at reduced prices, as it had done with the $3 million of obsolete and damaged inventory, the write-down of which the Commissioner permitted. Rather, Thor retained the "excess" items physically in inventory and continued to sell them at original prices. *Id.,* at 160–161. The company found that, owing to the peculiar nature of the articles involved,[7] price reductions were of no avail in moving this "excess" inventory.

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[6] This write-down was formulated as follows:

Type of Inventory	*Write-down Percentage*	*Write-down Amount*
(1) tool parts and motor parts at plant A	5	$26,341
(2) raw materials, work-in-process, and finished goods at plants A and B	10	99,954
(3) hardware items at plant A	50	34,537
		$160,832

64 T. C., at 159–160; App. 209.

[7] The Tax Court found that the finished tools were too specialized to attract bargain hunters; that no one would buy spare parts, regardless of price, unless they were needed to fix broken tools; that work-in-process had no value except as scrap; and that other manufacturers would not buy raw materials in the secondary market. 64 T. C., at 160–161.

As time went on, however, Thor gradually disposed of some of these items as scrap; the record is unclear as to when these dispositions took place.[8]

Thor's total write-down of "excess" inventory in 1964 therefore was:

Ten-year amortization of parts for discontinued tools	$22,090
First method (aging formula based on 1964 usage)	744,030
Second method (flat percentage write-downs)	160,832
Total	$926,952

Thor credited this sum to its inventory contra-account, thereby decreasing closing inventory, increasing cost of goods sold, and decreasing taxable income for the year by that amount.[9] The company contended that, by writing down excess inventory to scrap value, and by thus carrying all inventory at "net realizable value," it had reduced its inventory to "market" in accord with its "lower of cost or market" method of accounting. On audit, the Commissioner disallowed the write-down in its entirety, asserting that it did not serve clearly to reflect Thor's 1964 income for tax purposes.

The Tax Court, in upholding the Commissioner's determination, found as a fact that Thor's write-down of excess inventory did conform to "generally accepted accounting principles"; indeed, the court was "thoroughly convinced . . . that such was the case." *Id.*, at 165. The court found that if Thor had failed to write down its inventory on some reason-

[8] It appears that 78% of the "excess" inventory at two of Thor's plants was scrapped between 1965–1971. *Id.*, at 161; App. 218.

[9] For a manufacturing concern like Thor, Gross Profit basically equals Sales minus Cost of Goods Sold. Cost of Goods Sold equals Opening Inventory, plus Cost of Inventory Acquired, minus Closing Inventory. A reduction of Closing Inventory, therefore, increases Cost of Goods Sold and decreases Gross Profit accordingly.

able basis, its accountants would have been unable to give its financial statements the desired certification. *Id.*, at 161–162. The court held, however, that conformance with "generally accepted accounting principles" is not enough; § 446 (b), and § 471 as well, of the 1954 Code, 26 U. S. C. §§ 446 (b) and 471, prescribe, as an independent requirement, that inventory accounting methods must "clearly reflect income." The Tax Court rejected Thor's argument that its write-down of "excess" inventory was authorized by Treasury Regulations, 64 T. C., at 167–171, and held that the Commissioner had not abused his discretion in determining that the write-down failed to reflect 1964 income clearly.

B

Inventory accounting is governed by §§ 446 and 471 of the Code, 26 U. S. C. §§ 446 and 471. Section 446 (a) states the general rule for methods of accounting: "Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books." Section 446 (b) provides, however, that if the method used by the taxpayer "does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the [Commissioner], does clearly reflect income." Regulations promulgated under § 446, and in effect for the taxable year 1964, state that "no method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income." Treas. Reg. § 1.446–1 (a)(2), 26 CFR § 1.446–1 (a)(2) (1964).[10]

Section 471 prescribes the general rule for inventories. It states:

"Whenever in the opinion of the [Commissioner] the use

[10] The Regulations define "method of accounting" to include "not only the over-all method of accounting of the taxpayer but also the accounting treatment of any item." Treas. Reg. § 1.446–1 (a)(1), 26 CFR § 1.446–1 (a)(1) (1964).

> of inventories is necessary in order clearly to determine the income of any taxpayer, inventory shall be taken by such taxpayer on such basis as the [Commissioner] may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

As the Regulations point out, § 471 obviously establishes two distinct tests to which an inventory must conform. First, it must conform "as nearly as may be" to the "best accounting practice," a phrase that is synonymous with "generally accepted accounting principles." Second, it "must clearly reflect the income." Treas. Reg. § 1.471–2 (a)(2), 26 CFR § 1.471–2 (a)(2) (1964).

It is obvious that on their face, §§ 446 and 471, with their accompanying Regulations, vest the Commissioner with wide discretion in determining whether a particular method of inventory accounting should be disallowed as not clearly reflective of income. This Court's cases confirm the breadth of this discretion. In construing § 446 and its predecessors, the Court has held that "[t]he Commissioner has broad powers in determining whether accounting methods used by a taxpayer clearly reflect income." *Commissioner* v. *Hansen,* 360 U. S. 446, 467 (1959). Since the Commissioner has "[m]uch latitude for discretion," his interpretation of the statute's clear-reflection standard "should not be interfered with unless clearly unlawful." *Lucas* v. *American Code Co.,* 280 U. S. 445, 449 (1930). To the same effect are *United States* v. *Catto,* 384 U. S. 102, 114 (1966); *Schlude* v. *Commissioner,* 372 U. S. 128, 133–134 (1963); *American Automobile Assn.* v. *United States,* 367 U. S. 687, 697–698 (1961); *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180, 189–190 (1957); *Brown* v. *Helvering,* 291 U. S. 193, 203 (1934). In construing § 203 of the Revenue Act of 1918, 40 Stat. 1060, a predecessor of § 471, the Court held that the taxpayer bears a "heavy burden of [proof]," and that the Commissioner's dis-

allowance of an inventory accounting method is not to be set aside unless shown to be "plainly arbitrary." *Lucas* v. *Structural Steel Co.*, 281 U. S. 264, 271 (1930).

As has been noted, the Tax Court found as a fact in this case that Thor's write-down of "excess" inventory conformed to "generally accepted accounting principles" and was "within the term, 'best accounting practice,' as that term is used in section 471 of the Code and the regulations promulgated under that section." 64 T. C., at 161, 165. Since the Commissioner has not challenged this finding, there is no dispute that Thor satisfied the first part of § 471's two-pronged test. The only question, then, is whether the Commissioner abused his discretion in determining that the write-down did not satisfy the test's second prong in that it failed to reflect Thor's 1964 income clearly. Although the Commissioner's discretion is not unbridled and may not be arbitrary, we sustain his exercise of discretion here, for in this case the write-down was plainly inconsistent with the governing Regulations which the taxpayer, on its part, has not challenged.[11]

It has been noted above that Thor at all pertinent times used the "lower of cost or market" method of inventory accounting. The rules governing this method are set out in Treas. Reg.

[11] See 64 T. C., at 166; Tr. of Oral Arg. 17–19. Even if Thor had made a timely challenge to the Regulations, it is well established, of course, that they still " 'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes,' and 'should not be overruled except for weighty reasons.' " *Bingler* v. *Johnson*, 394 U. S. 741, 750 (1969), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).

As an alternative to his argument that Thor's write-down was inconsistent with the Regulations, the Commissioner argues that he was justified in disallowing the write-down in any event because it constituted a "change of accounting method" for which Thor failed to obtain the Commissioner's prior consent, as required by § 446 (e), 26 U. S. C. § 446 (e). The Regulations define a change of accounting method to include "a change in the treatment of a material item." Treas. Reg. § 1.446–1 (e)(2)(i), 26 CFR § 1.446–1 (e)(2)(i) (1964). In view of our disposition of the case, we need not reach this alternative contention.

§ 1.471–4, 26 CFR § 1.471–4 (1964). That Regulation defines "market" to mean, ordinarily, "the current bid price prevailing at the date of the inventory for the particular merchandise in the volume in which usually purchased by the taxpayer." § 1.471–4 (a). The courts have uniformly interpreted "bid price" to mean replacement cost, that is, the price the taxpayer would have to pay on the open market to purchase or reproduce the inventory items.[12] Where no open market exists, the Regulations require the taxpayer to ascertain "bid price" by using "such evidence of a fair market price at the date or dates nearest the inventory as may be available, such as specific purchases or sales by the taxpayer or others in reasonable volume and made in good faith, or compensation paid for cancellation of contracts for purchase commitments." § 1.471–4 (b).

The Regulations specify two situations in which a taxpayer is permitted to value inventory below "market" as so defined. The first is where the taxpayer in the normal course of business has actually offered merchandise for sale at prices lower than replacement cost. Inventories of such merchandise may be valued at those prices less direct cost of disposition, "and the correctness of such prices will be determined by reference to the actual sales of the taxpayer for a reasonable period before and after the date of the inventory." *Ibid.* The Regulations warn that prices "which vary materially from the

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[12] *E. g., D. Loveman & Son Export Corp.* v. *Commissioner*, 34 T. C. 776, 796 (1960), aff'd, 296 F. 2d 732 (CA6 1961), cert. denied, 369 U. S. 860 (1962). See Schnelwar & Jurgensen, The New Inventory Regulations in Operation and Other Inventory Valuation Considerations, 33 N. Y. U. Inst. on Fed. Tax. 1077, 1093–1094 (1975); AICPA Accounting Principles Board, Accounting Research Bulletin No. 43, ch. 4, Statement 6 (1953), reprinted in 2 APB Accounting Principles 6016 (1973). Judge Raum emphasized in *D. Loveman & Son* that "market" ordinarily means the price the taxpayer must *pay* to replace the inventory; "it does not mean the price at which such merchandise is resold or offered for resale." 34 T. C., at 796.

actual prices so ascertained will not be accepted as reflecting the market." *Ibid.*

The second situation in which a taxpayer may value inventory below replacement cost is where the merchandise itself is defective. If goods are "unsalable at normal prices or unusable in the normal way because of damage, imperfections, shop wear, changes of style, odd or broken lots, or other similar causes," the taxpayer is permitted to value the goods "at bona fide selling prices less direct cost of disposition." § 1.471–2 (c). The Regulations define "bona fide selling price" to mean an "actual offering of goods during a period ending not later than 30 days after inventory date." *Ibid.* The taxpayer bears the burden of proving that "such exceptional goods as are valued upon such selling basis come within the classifications indicated," and is required to "maintain such records of the disposition of the goods as will enable a verification of the inventory to be made." *Ibid.*

From this language, the regulatory scheme is clear. The taxpayer must value inventory for tax purposes at cost unless the "market" is lower. "Market" is defined as "replacement cost," and the taxpayer is permitted to depart from replacement cost only in specified situations. When it makes any such departure, the taxpayer must substantiate its lower inventory valuation by providing evidence of actual offerings, actual sales, or actual contract cancellations. In the absence of objective evidence of this kind, a taxpayer's assertions as to the "market value" of its inventory are not cognizable in computing its income tax.

It is clear to us that Thor's procedures for writing down the value of its "excess" inventory were inconsistent with this regulatory scheme. Although Thor conceded that "an active market prevailed" on the inventory date, see 64 T. C., at 169, it "made no effort to determine the purchase or reproduction cost" of its "excess" inventory. *Id.*, at 162. Thor thus failed to ascertain "market" in accord with the general rule of the

Regulations. In seeking to depart from replacement cost, Thor failed to bring itself within either of the authorized exceptions. Thor is not able to take advantage of § 1.471–4 (b) since, as the Tax Court found, the company failed to sell its excess inventory or offer it for sale at prices below replacement cost. 64 T. C., at 160–161. Indeed, Thor concedes that it continued to sell its "excess" inventory at original prices. Thor also is not able to take advantage of § 1.471–2 (c) since, as the Tax Court and the Court of Appeals both held, it failed to bear the burden of proving that its excess inventory came within the specified classifications. 64 T. C., at 171; 563 F. 2d, at 867. Actually, Thor's "excess" inventory was normal and unexceptional, and was indistinguishable from and intermingled with the inventory that was not written down.

More importantly, Thor failed to provide any objective evidence whatever that the "excess" inventory had the "market value" management ascribed to it. The Regulations demand hard evidence of actual sales and further demand that records of actual dispositions be kept. The Tax Court found, however, that Thor made no sales and kept no records. 64 T. C., at 171. Thor's management simply wrote down its closing inventory on the basis of a well-educated guess that some of it would never be sold. The formulae governing this write-down were derived from management's collective "business experience"; the percentages contained in those formulae seemingly were chosen for no reason other than that they were multiples of five and embodied some kind of anagogical symmetry. The Regulations do not permit this kind of evidence. If a taxpayer could write down its inventories on the basis of management's subjective estimates of the goods' ultimate salability, the taxpayer would be able, as the Tax Court observed, *id.*, at 170, "to determine how much tax it wanted to pay for a given year." [13]

[13] Thor seeks to justify its write-down by citing *Space Controls, Inc.* v. *Commissioner,* 322 F. 2d 144 (CA5 1963), and similar cases. In *Space*

For these reasons, we agree with the Tax Court and with the Seventh Circuit that the Commissioner acted within his discretion in deciding that Thor's write-down of "excess"

Controls, the taxpayer manufactured trailers under a fixed-price contract with the Government; it was stipulated that the trailers were suitable only for military use and had no value apart from the contract. The taxpayer experienced cost overruns and sought to write down its inventory by the amount by which its cost exceeded the contract sales price. The Court of Appeals, by a divided vote, held that the write-down was authorized by Treas. Reg. § 1.471–4 (b), reasoning that the taxpayer in effect had offered the trailers for sale by way of the fixed-price contract. 322 F. 2d, at 151. While not necessarily approving the Fifth Circuit's decision to dispense with the "actual sale" rule of § 1.471–4 (b), we note that that case is distinguishable from this one. In *Space Controls*, the fixed-price contract offered objective evidence of reduced inventory value; the taxpayer in the present case provided no objective evidence of reduced inventory value at all.

Petitioner's reliance at oral argument on *United States Cartridge Co.* v. *United States*, 284 U. S. 511 (1932), is, we think, similarly misplaced. The taxpayer in that case manufactured ammunition for the Government during World War I. In 1918 the taxpayer was instructed to stop production immediately, with a provision that settlement of its claims for unfinished and undelivered ammunition would be negotiated later. At the end of its taxable calendar year 1918, the ammunition was unsalable at normal prices and settlement negotiations had not yet begun; the taxpayer, accordingly, wrote down its 1918 closing inventory to "market," which was agreed to be $232,000. *Id.*, at 519. The question was whether the taxpayer, in computing its 1918 taxable income, should value its inventory at that figure, or at $732,000, the sum it ultimately realized upon settlement of its claims with the Army in 1920–1922. This Court held that, in accordance with the annual accounting principle, market value controlled, noting that the taxpayer at the end of 1918 "had no assurance as to what settlements finally would be made or that it ever would receive more than the then market value of the inventories." *Id.*, at 520. This case, we think, may be said to support, rather than to conflict with, the result we reach here. Just as Thor cannot write *down* its inventory, in the absence of objective evidence of lower value, because of an anticipated future loss, so the taxpayer in *United States Cartridge* could not be required to write *up* its inventory, in the absence of objective evidence of higher value, because of an anticipated future gain. In this respect, at least, tax accounting travels a two-way street.

inventory failed to reflect income clearly. In the light of the well-known potential for tax avoidance that is inherent in inventory accounting,[14] the Commissioner in his discretion may insist on a high evidentiary standard before allowing write-downs of inventory to "market." Because Thor provided no objective evidence of the reduced market value of its "excess" inventory, its write-down was plainly inconsistent with the Regulations, and the Commissioner properly disallowed it.[15]

C

The taxpayer's major argument against this conclusion is based on the Tax Court's clear finding that the write-down conformed to "generally accepted accounting principles." Thor points to language in Treas. Reg. § 1.446–1 (a)(2), 26 CFR § 1.446–1 (a)(2) (1964), to the effect that "[a] method of accounting which reflects the consistent application of gen-

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[14] See, *e. g.*, H. R. Doc. No. 140, 87th Cong., 1st Sess., 14 (1961) (the President's tax message); B. Bittker & L. Stone, Federal Income, Estate, and Gift Taxation 843 (4th ed. 1972); Skinner, Inventory Valuation Problems, 50 Taxes 748–749 (1972); Schwaigart, Increasing IRS Emphasis on Inventories Stresses Need for Proper Practices, 19 J. Tax. 66, 69 (1963).

[15] The Commissioner also contends that Thor's write-down of "excess" inventory was prohibited by Treas. Reg. § 1.471–2 (f), 26 CFR § 1.471–2 (f) (1964). That section states:

"The following methods . . . are not in accord with the regulations in this part:

"(1) Deducting from the inventory . . . an estimated depreciation in the value thereof.

"(2) Taking work in process, or other parts of the inventory, at a nominal price or at less than its proper value.

"(3) Omitting portions of the stock on hand."

See Rev. Rul. 77–364, 1977–2 Cum. Bull. 183 (percentage write-down of "slow" and "doubtful" inventory violates § 1.471–2 (f)(1)); Rev. Rul. 77–228, 1977–2 Cum. Bull. 182 (deduction from closing inventory of "excess" items still retained for sale violates § 1.471–2 (f)(3)). The Court of Appeals and the Tax Court did not consider these contentions. In view of our disposition, we need not consider them either.

erally accepted accounting principles . . . *will ordinarily be regarded* as clearly reflecting income" (emphasis added). Section 1.471–2 (b), 26 CFR § 1.471–2 (b) (1964), of the Regulations likewise stated that an inventory taken in conformity with best accounting practice "can, *as a general rule,* be regarded as clearly reflecting . . . income" (emphasis added).[16] These provisions, Thor contends, created a *presumption* that an inventory practice conformable to "generally accepted accounting principles" is valid for income tax purposes. Once a taxpayer has established this conformity, the argument runs, the burden shifts to the Commissioner affirmatively to demonstrate that the taxpayer's method does *not* reflect income clearly. Unless the Commissioner can show that a generally accepted method "demonstrably distorts income," Brief for Chamber of Commerce of the United States

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[16] Until 1973, § 1.471–2 (b) of the applicable Regulations provided in pertinent part:

"In order clearly to reflect income, the inventory practice of a taxpayer should be consistent from year to year, and greater weight is to be given to consistency than to any particular method of inventorying or basis of valuation so long as the method or basis used is substantially in accord with §§ 1.471–1 to 1.471–9. An inventory that can be used under the best accounting practice in a balance sheet showing the financial position of the taxpayer can, as a general rule, be regarded as clearly reflecting his income."

The inventory Regulations were amended in 1973 to require most taxpayers engaged in manufacturing to use the "full absorption method of inventory costing," currently set forth in § 1.471–11. T. D. 7285, 1973–2 Cum. Bull. 163, 164; 26 CFR § 1.471–11 (1978). As part of these amendments, the final sentence of § 1.471–2 (b)—containing the "as a general rule" language—was deleted; further, the requirement that inventory practices be *"substantially in accord* with §§ 1.471–1 to *1.479–9"* was revised to require that such methods be *"in accord* with §§ 1.471–1 through *1.471–11."* 26 CFR § 1.471–2 (b) (1978) (emphasis added). The Tax Court and the Court of Appeals both determined that the 1973 amendments to § 1.471–2 (b) were inapplicable to this case. 64 T. C., at 167; 563 F. 2d, at 866 n. 11. We agree.

as *Amicus Curiae* 3, or that the taxpayer's adoption of such method was "motivated by tax avoidance," Brief for Petitioner 25, the presumption in the taxpayer's favor will carry the day. The Commissioner, Thor concludes, failed to rebut that presumption here.

If the Code and Regulations did embody the presumption petitioner postulates, it would be of little use to the taxpayer in this case. As we have noted, Thor's write-down of "excess" inventory was inconsistent with the Regulations; any general presumption obviously must yield in the face of such particular inconsistency. We believe, however, that no such presumption is present. Its existence is insupportable in light of the statute, the Court's past decisions, and the differing objectives of tax and financial accounting.

First, as has been stated above, the Code and Regulations establish two distinct tests to which an inventory must conform. The Code and Regulations, moreover, leave little doubt as to which test is paramount. While § 471 of the Code requires only that an accounting practice conform "as nearly as may be" to best accounting practice, § 1.446–1 (a)(2) of the Regulations states categorically that "*no* method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income" (emphasis added). Most importantly, the Code and Regulations give the Commissioner broad discretion to set aside the taxpayer's method if, "in [his] opinion," it does not reflect income clearly. This language is completely at odds with the notion of a "presumption" in the taxpayer's favor. The Regulations embody no presumption; they say merely that, in most cases, generally accepted accounting practices will pass muster for tax purposes. And in most cases they will. But if the Commissioner, in the exercise of his discretion, determines that they do not, he may prescribe a different practice without having to rebut any presumption running against the Treasury.

Second, the presumption petitioner postulates finds no support in this Court's prior decisions. It was early noted that the general rule specifying use of the taxpayer's method of accounting "is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income." *Lucas* v. *American Code Co.,* 280 U. S., at 449. More recently, it was held in *American Automobile Assn.* v. *United States* that a taxpayer must recognize prepaid income when received, even though this would mismatch expenses and revenues in contravention of "generally accepted commercial accounting principles." 367 U. S., at 690. "[T]o say that in performing the function of business accounting the method employed by the Association 'is in accord with generally accepted commercial accounting principles and practices,' " the Court concluded, "is not to hold that for income tax purposes it so clearly reflects income as to be binding on the Treasury." *Id.,* at 693. "[W]e are mindful that the characterization of a transaction for financial accounting purposes, on the one hand, and for tax purposes, on the other, need not necessarily be the same." *Frank Lyon Co.* v. *United States,* 435 U. S. 561, 577 (1978). See *Commissioner* v. *Idaho Power Co.,* 418 U. S. 1, 15 (1974). Indeed, the Court's cases demonstrate that divergence between tax and financial accounting is especially common when a taxpayer seeks a current deduction for estimated future expenses or losses. *E. g., Commissioner* v. *Hansen,* 360 U. S. 446 (1959) (reserve to cover contingent liability in event of nonperformance of guarantee); *Brown* v. *Helvering,* 291 U. S. 193 (1934) (reserve to cover expected liability for unearned commissions on anticipated insurance policy cancellations); *Lucas* v. *American Code Co., supra* (reserve to cover expected liability on contested lawsuit). The rationale of these cases amply encompasses Thor's aim. By its president's concession, the company's write-down of "excess" inventory was founded on the belief that many of the articles inevitably would become use-

less due to breakage, technological change, fluctuations in market demand, and the like.[17] Thor, in other words, sought a current "deduction" for an estimated future loss. Under the decided cases, a taxpayer so circumstanced finds no shelter beneath an accountancy presumption.

Third, the presumption petitioner postulates is insupportable in light of the vastly different objectives that financial and tax accounting have. The primary goal of financial accounting is to provide useful information to management, shareholders, creditors, and others properly interested; the major responsibility of the accountant is to protect these parties from being misled. The primary goal of the income tax system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc. Consistently with its goals and responsibilities, financial accounting has as its foundation the principle of conservatism, with its corollary that "possible errors in measurement [should] be in the direction of understatement rather than overstatement of net income and net assets." [18] In view of the Treasury's markedly different goals and responsibilities, understatement of income is not destined to be its guiding light. Given this diversity, even contrariety,

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[17] "I think it is pretty obvious that [inventory representing a 10-year supply] has inherently less value [than inventory representing a 1-year supply] because of the things that can happen to the inventory. Some of it will be lost. Some of it may become damaged. Some of it will become obsolete because of the technological change. Some won't be sold because of the fact that you have market changes. So we were confronted with the problem, as anybody in the manufacturing field [would be], of trying to develop a relationship between inventory quantity and anticipated usage." App. 56–57 (testimony of Thor's president).

[18] AICPA Accounting Principles Board, Statement No. 4, Basic Concepts and Accounting Principles Underlying Financial Statements of Business Enterprises ¶ 171 (1970), reprinted in 2 APB Accounting Principles 9089 (1973). See Sterling, Conservatism: The Fundamental Principle of Valuation in Traditional Accounting, 3 Abacus 109–113 (1967).

of objectives, any presumptive equivalency between tax and financial accounting would be unacceptable.[19]

This difference in objectives is mirrored in numerous differences of treatment. Where the tax law requires that a deduction be deferred until "all the events" have occurred that will make it fixed and certain, *United States* v. *Anderson*, 269 U. S. 422, 441 (1926), accounting principles typically require that a liability be accrued as soon as it can reasonably be estimated.[20] Conversely, where the tax law requires that income be recognized currently under "claim of right," "ability to pay," and "control" rationales, accounting principles may defer accrual until a later year so that revenues and expenses may be better matched.[21] Financial accounting, in short, is hospitable to estimates, probabilities, and reasonable certainties; the tax law, with its mandate to preserve the revenue, can give no quarter to uncertainty. This is as it should be. Reasonable estimates may be useful, even essential, in giving shareholders and creditors an accurate picture of a firm's overall financial health; but the accountant's conservatism cannot bind the Commissioner in his efforts to collect taxes. "Only a few reserves voluntarily established as a mat-

[19] Accord, Raby & Richter, Conformity of Tax and Financial Accounting, 139 J. Accountancy 42, 44, 48 (Mar. 1975); Arnett, Taxable Income vs. Financial Income: How Much Uniformity Can We Stand?, 44 Accounting Rev. 482, 485–487, 492–493 (July 1969); Cannon, Tax Pressures on Accounting Principles and Accountants' Independence, 27 Accounting Rev. 419, 419–422 (1952).

[20] See, *e. g.*, McClure, Diverse Tax Interpretations of Accounting Concepts, 142 J. Accountancy 67, 68–69 (Oct. 1976); Kupfer, The Financial Accounting Disclosure of Tax Matters; Conflicts With Tax Accounting Technical Requirements, 33 N. Y. U. Inst. on Fed. Tax. 1121, 1122 (1975); Healy, Narrowing the Gap Between Tax and Financial Accounting, 22 Tulane Tax Inst. 407, 417 (1973); A Challenge: Can the Accounting Profession Lead the Tax System?, 126 J. Accountancy 66, 68–69 (Sept. 1968).

[21] *E. g.*, Raby & Richter, *supra*, at 44; Arnett, *supra*, at 486; 126 J. Accountancy, *supra*, at 68.

ter of conservative accounting," Mr. Justice Brandeis wrote for the Court, "are authorized by the Revenue Acts." *Brown* v. *Helvering,* 291 U. S., at 201–202.

Finally, a presumptive equivalency between tax and financial accounting would create insurmountable difficulties of tax administration. Accountants long have recognized that "generally accepted accounting principles" are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions.[22] "Generally accepted accounting principles," rather, tolerate a range of "reasonable" treatments, leaving the choice among alternatives to management. Such, indeed, is precisely the case here.[23] Variances of this sort may be tolerable in financial reporting, but they are questionable in a tax system designed to ensure as far as possible that similarly situated taxpayers pay the same tax. If management's election among "acceptable" options were dispositive for tax purposes, a firm, indeed, could decide unilaterally—within limits dictated only by its accountants—the tax it wished to pay. Such unilateral decisions would not just make the Code inequitable; they would make it unenforceable.

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[22] Arnett, *supra,* at 492 (noting that there are "many and diverse 'acceptable' practices in valuing inventories, depreciating assets, amortizing or not amortizing goodwill," and the like); 126 J. Accountancy, *supra,* at 69 (noting that "methods of determining inventory costs vary widely and various methods, if consistently applied, will be acceptable for accounting purposes"); Eaton, Financial Reporting in a Changing Society, 104 J. Accountancy 25, 26 (Aug. 1957); Cox, Conflicting Concepts of Income for Managerial and Federal Income Tax Purposes, 33 Accounting Rev. 242 (1958); Cannon, *supra,* at 421 (suggesting that accountants "are quite prone to define 'generally accepted' as 'somebody tried it' ").

[23] Thor's experts did not testify that the company's write-down procedures were the *only* "generally accepted accounting practice." They testified merely that Thor's inventory needed to be written down, and that the formulae Thor used constituted a "reasonable" way of doing this. App. 166, 184, 196.

D

Thor complains that a decision adverse to it poses a dilemma. According to the taxpayer, it would be virtually impossible for it to offer objective evidence of its "excess" inventory's lower value, since the goods cannot be sold at reduced prices; even if they could be sold, says Thor, their reduced-price sale would just "pull the rug out" from under the identical "non-excess" inventory Thor is trying to sell simultaneously. The only way Thor could establish the inventory's value by a "closed transaction" would be to scrap the articles at once. Yet immediate scrapping would be undesirable, for demand for the parts ultimately might prove greater than anticipated. The taxpayer thus sees itself presented with "an unattractive Hobson's choice: either the unsalable inventory must be carried for years at its cost instead of net realizable value, thereby overstating taxable income by such overvaluation until it is scrapped, or the excess inventory must be scrapped prematurely to the detriment of the manufacturer and its customers." Brief for Petitioner 25.

If this is indeed the dilemma that confronts Thor, it is in reality the same choice that every taxpayer who has a paper loss must face. It can realize its loss now and garner its tax benefit, or it can defer realization, and its deduction, hoping for better luck later. Thor, quite simply, has suffered no present loss. It deliberately manufactured its "excess" spare parts because it judged that the marginal cost of unsalable inventory would be lower than the cost of retooling machinery should demand surpass expectations. This was a rational business judgment and, not unpredictably, Thor now has inventory it believes it cannot sell. Thor, of course, is not so confident of its prediction as to be willing to scrap the "excess" parts now; it wants to keep them on hand, just in case. This, too, is a rational judgment, but there is no reason why the Treasury should subsidize Thor's hedging of its bets. There

is also no reason why Thor should be entitled, for tax purposes, to have its cake and to eat it too.

II

The Bad-Debt Issue

A

Deductions for bad debts are covered by § 166 of the 1954 Code, 26 U. S. C. § 166. Section 166 (a)(1) sets forth the general rule that a deduction is allowed for "any debt which becomes worthless within the taxable year." Alternatively, the Code permits an accrual-basis taxpayer to account for bad debts by the reserve method. This is implemented by § 166 (c), which states that "[i]n lieu of any deduction under subsection (a), there shall be allowed (in the discretion of the [Commissioner]) a deduction for a reasonable addition to a reserve for bad debts." A "reasonable" addition is the amount necessary to bring the reserve balance up to the level that can be expected to cover losses properly anticipated on debts outstanding at the end of the tax year.

At all times pertinent, Thor has used the reserve method. Its reserve at the beginning of 1965 was approximately $93,000. See 64 T. C., at 162. During 1965, Thor's new management undertook a stringent review of accounts receivable. In the company's rubber division, credit personnel studied all accounts; a 100% reserve was set up for two accounts deemed wholly uncollectible, and a 1% reserve was established for all other receivables. *Ibid.* In the tool division, credit clerks analyzed all accounts more than 90 days past due with balances over $100; a 100% reserve was established for accounts judged wholly uncollectible, and an identical collectibility ratio was applied to accounts under $100 of the same age. A flat 2% reserve was set up for accounts more than 30 days past due, and a 1% reserve for all other accounts. *Id.*, at 162–163. These judgments, approved by three levels of management, indicated that $136,150 should be added to

the bad-debt reserve, bringing its balance at year-end to a figure slightly below $229,000. *Id.*, at 162. Thor claimed this $136,150 as a deduction under § 166 (c).

The Commissioner ruled that the deduction was excessive. He computed what he believed to be a "reasonable" addition to Thor's reserve by using the "six-year moving average" formula derived from the decision in *Black Motor Co.* v. *Commissioner*, 41 B. T. A. 300 (1940), aff'd on other grounds, 125 F. 2d 977 (CA6 1942). This formula seeks to ascertain a "reasonable" addition to a bad-debt reserve in light of the taxpayer's recent chargeoff history.[24] In this case, the formula indicated that, for the years 1960–1965, Thor's annual charge-offs of bad debts amounted, on the average, to 3.128% of its year-end receivables. 64 T. C., at 163. Applying that percentage to Thor's 1965 year-end receivables, the Commissioner determined that $154,156.80 of accounts receivable could reasonably be expected to default. The amount required to bring Thor's reserve up to this level was $61,359.20, and the Commissioner decided that this was a "reasonable" addition. Accordingly, he disallowed the remaining $74,790.80 of Thor's claimed § 166 (c) deduction. Both the Tax Court, 64 T. C., at 174–175, and the Seventh Circuit, 563 F. 2d, at 870, held that the Commissioner had not abused his discretion in so ruling.

B

Section 166 (c) states that a deduction for an addition to a bad-debt reserve is to be allowed "in the discretion" of the Commissioner. Consistently with this statutory language, the courts uniformly have held that the Commissioner's determination of a "reasonable" (and hence deductible) addition

[24] The details of the calculation are set out in *Black Motor Co.* v. *Commissioner*, 41 B. T. A., at 302. See 2 CCH 1978 Stand. Fed. Tax Rep. ¶ 1624.0992; Whitman, Gilbert, & Picotte, The *Black Motor* Bad Debt Formula: Why It Doesn't Work and How to Adjust It, 35 J. Tax. 366 (1971).

must be sustained unless the taxpayer proves that the Commissioner abused his discretion.[25] The taxpayer is said to bear a "heavy burden" in this respect.[26] He must show not only that his own computation is reasonable but also that the Commissioner's computation is unreasonable and arbitrary.[27]

Since it first received the approval of the Tax Court in 1940, the *Black Motor* bad-debt formula has enjoyed the favor of all three branches of the Federal Government. The formula has been employed consistently by the Commissioner,[28] approved by the courts,[29] and collaterally recognized by the Congress.[30] Thor faults the *Black Motor* formula because of its retrospectivity: By ascertaining current additions to a reserve by reference to past chargeoff experience, the formula

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[25] *Malone & Hyde, Inc.* v. *United States,* 568 F. 2d 474, 477 (CA6 1978); *Business Dev. Corp. of N. C.* v. *United States,* 428 F. 2d 451, 453 (CA4), cert. denied, 400 U. S. 957 (1970); *United States* v. *Haskel Engineering & Supply Co.,* 380 F. 2d 786, 789 (CA9 1967); *Patterson* v. *Pizitz, Inc.,* 353 F. 2d 267, 270 (CA5 1965), cert. denied, 383 U. S. 910 (1966); *Ehlen* v. *United States,* 163 Ct. Cl. 35, 42, 323 F. 2d 535, 539 (1963); *James A. Messer Co.* v. *Commissioner,* 57 T. C. 848, 864–865 (1972).

[26] *Atlantic Discount Co.* v. *United States,* 473 F. 2d 412, 414–415 (CA5 1973) (citing cases); *Consolidated-Hammer Dry Plate & Film Co.* v. *Commissioner,* 317 F. 2d 829, 834 (CA7 1963).

[27] *E. g., Malone & Hyde, Inc.* v. *United States,* 568 F. 2d, at 477; *First Nat. Bank of Chicago* v. *Commissioner,* 546 F. 2d 759, 761 (CA7 1976), cert. denied, 431 U. S. 915 (1977).

[28] See, *e. g.,* Rev. Rul. 76–362, 1976–2 Cum. Bull. 45, 46 ("[A]s a general rule, the *Black Motor* formula may be used to determine a reasonable addition to a reserve for bad debts" under § 166 (c)).

[29] *E. g., Atlantic Discount Co.* v. *United States,* 473 F. 2d, at 413, 415; *Ehlen* v. *United States,* 163 Ct. Cl., at 45, 323 F. 2d, at 540–541; *James A. Messer Co.* v. *Commissioner,* 57 T. C., at 857, 865–866.

[30] See § 585 (b)(3) of the 1954 Code, 26 U. S. C. § 585 (b)(3) (using "six-year moving average" formula as alternative method of computing reasonable addition to bad-debt reserve for banks); § 586 (b)(1) (using "six-year moving average" formula to compute reasonable addition to bad-debt reserve for small business investment companies).

assertedly penalizes taxpayers who have delayed in making writeoffs in the past, or whose receivables have just recently begun to deteriorate. Petitioner's objection is not altogether irrational, but it falls short of rendering the formula arbitrary. Common sense suggests that a firm's recent credit experience offers a reasonable index of the credit problems it may suffer currently. And the formula possesses the not inconsiderable advantage of enhancing certainty and predictability in an area peculiarly susceptible of taxpayer abuse. In any event, after its 40 years of near-universal acceptance, we are not inclined to disturb the *Black Motor* formula now.

Granting that *Black Motor* in principle is valid, then, the only question is whether the Commissioner abused his discretion in invoking the formula in this case. Of course, there will be cases—indeed, the Commissioner has acknowledged that there are cases, see Rev. Rul. 76–362, 1976–2 Cum. Bull. 45, 46—in which the formula will generate an arbitrary result. If a taxpayer's most recent bad-debt experience is unrepresentative for some reason, a formula using that experience as data cannot be expected to produce a "reasonable" addition for the current year.[31] If the taxpayer suffers an extraordinary credit reversal (the bankruptcy of a major customer, for example), the "six-year moving average" formula will fail.[32] In such a case, where the taxpayer can point to conditions that will cause future debt collections to be less likely than in the past, the taxpayer is entitled to—and the Commissioner is prepared to allow—an addition larger than *Black Motor* would call for. See Rev. Rul. 76–362, *supra*.

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[31] *E. g., Westchester Dev. Co.* v. *Commissioner,* 63 T. C. 198, 212 (1974), acq., 1975–2 Cum. Bull. 2 (Commissioner abused discretion in invoking *Black Motor* where taxpayer's recent bad-debt experience was "wholly unrepresentative" given its "comparatively brief operational history").

[32] *E. g., Calavo, Inc.* v. *Commissioner,* 304 F. 2d 650, 651–652, 654 n. 4, 655 (CA9 1962) (extraordinary addition to reserve to cover losses on accounts due from debtor who recently became insolvent).

In this case, however, as the Tax Court found, Thor "did not show that conditions at the end of 1965 would cause collection of accounts receivable to be less likely than in prior years." 64 T. C., at 175. Indeed, the Tax Court "infer[red] from the entire record that collectibility was probably *more* likely at the end of 1965 than it was [previously] because new management had been infused into petitioner" (emphasis added). Thor cited no changes in the conditions of business generally or of its customers specifically that would render the *Black Motor* formula unreliable; new management just came in and second-guessed its predecessor, taking a "tougher" approach. Management's pessimism may not have been unreasonable, but the Commissioner had the discretion to take a more sanguine view.[33]

For these reasons, we agree with the Tax Court and with the Court of Appeals that the Commissioner did not abuse his discretion in recomputing a "reasonable" addition to Thor's bad-debt reserve according to the *Black Motor* formula. Thor failed to carry its "heavy burden" of showing why the application of that formula would have been arbitrary in this case.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[33] Indeed, as has been noted, a significant portion of Thor's addition to its reserve reflected blanket aging of accounts. Both the Treasury, Rev. Rul. 76–362, 1976–2 Cum. Bull. 45, 46, and the courts, *United States* v. *Haskel Engineering & Supply Co.*, 380 F. 2d, at 787, 789; *James A. Messer Co.* v. *Commissioner*, 57 T. C., at 857, 866, have held that such mechanical formulae are inadequate to overcome the Commissioner's discretionary invocation of *Black Motor* under § 166 (c).

Syllabus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* DANIEL

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

No. 77–753. Argued October 31, 1978—Decided January 16, 1979*

A pension plan entered into under a collective-bargaining agreement between petitioner local labor union and employer trucking firms required all employees to participate in the plan but not to pay anything into it. All contributions to the plan were to be made by the employers at a specified amount per week for each man-week of covered employment. To be eligible for a pension, an employee was required to have 20 years of continuous service. Respondent employee, who had over 20 years' service, was denied a pension upon retirement because of a break in service. He then brought suit in Federal District Court, alleging, *inter alia,* that the union and petitioner trustee of the pension fund had misrepresented and omitted to state material facts with respect to the value of a covered employee's interest in the pension plan, and that such misstatements and omissions constituted a fraud in connection with the sale of a security in violation of § 10 (b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5, and also violated § 17 (a) of the Securities Act of 1933. Denying petitioners' motion to dismiss, the District Court held that respondent's interest in the pension fund constituted a "security" within the meaning of § 2 (1) of the Securities Act and § 3 (a) (10) of the Securities Exchange Act because the plan created an "investment contract," and also that there had been a "sale" of this interest to respondent within the meaning of § 2 (3) of the Securities Act and § 3 (a) (14) of the Securities Exchange Act. The Court of Appeals affirmed. *Held:* The Securities Act and the Securities Exchange Act do not apply to a noncontributory, compulsory pension plan. Pp. 558–570.

(a) To determine whether a particular financial relationship constitutes an investment contract, "[t]he test is whether the scheme involves

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*Together with No. 77–754, *Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al.* v. *Daniel,* also on certiorari to the same court.

an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 301. Looking separately at each element of this test, it is apparent that an employee's participation in a noncontributory, compulsory pension plan such as the one in question here does not comport with the commonly held understanding of an investment contract. With respect to the investment-of-money element, in such a pension plan the purported investment is a relatively insignificant part of the total and indivisible compensation package of an employee, who, from the standpoint of the economic realities, is selling his labor to obtain a livelihood, not making an investment for the future. And with respect to the expectation-of-profits element, while the pension fund depends to some extent on earnings from its assets, the possibility of participating in asset earnings is too insubstantial to bring the entire transaction within the Securities Acts. Pp. 558–562.

(b) There is no evidence that Congress at any time thought noncontributory plans were subject to federal regulation as securities. Nor until the instant litigation arose is there any evidence that the SEC had ever considered the Securities Act and Securities Exchange Act to be applicable to such plans. Accordingly, there is no justification for deference to the SEC's present interpretation. Pp. 563–569.

(c) The Employee Retirement Income Security Act of 1974, which comprehensively governs the use and terms of employee pension plans, severely undercuts all argument for extending the Securities Act and Securities Exchange Act to noncontributory, compulsory pension plans, and whatever benefits employees might derive from the effect of these latter Acts are now provided in more definite form through ERISA. Pp. 569–570.

561 F. 2d 1223, reversed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined, and in all but the last paragraph of Part III–A of which, BURGER, C. J., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 570. STEVENS, J., took no part in the consideration or decision of the cases.

Sidney Dickstein argued the cause for petitioner in No. 77–753. With him on the briefs were *George Kaufmann* and *Bernard Weisberg*. *Sherman Carmell* argued the cause and filed briefs for petitioners in No. 77–754.

Lawrence Walner and *Peter J. Barack* argued the cause and filed a brief for respondent in both cases.

Jacob H. Stillman argued the cause for the Securities and Exchange Commission as *amicus curiae*. With him on the brief were *Harvey L. Pitt* and *Paul Gonson*.†

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a noncontributory, compulsory pension plan constitutes a "security" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934 (Securities Acts).

I

In 1954 multiemployer collective bargaining between Local 705 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and Chicago trucking firms produced a pension plan for employees represented by the Local. The plan was compulsory and noncontributory. Employees had no choice as to participation in the plan, and did not have the option of demanding that the employer's contribution be paid directly to them as a substitute for pension eligibility. The employees paid nothing to the plan themselves.[1]

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†Briefs of *amici curiae* urging reversal were filed by *William H. Smith, D. Bret Carlson,* and *Stephen R. Kroll* for the American Bankers Assn.; by *Stanley T. Kaleczyc* and *Robert W. Blanchette* for the Chamber of Commerce of the United States; by *Peter G. Nash* and *George J. Pantos* for the ERISA Industry Committee; and by *Paul S. Berger, Melvin Spaeth,* and *Gerald M. Feder* for the National Coordinating Committee for Multiemployer Plans.

Briefs of *amici curiae* urging affirmance were filed by *Bruce K. Miller* for the Gray Panthers; and by *Arthur L. Fox II* for PROD et al.

Lawrence J. Latto filed a brief for the American Academy of Actuaries as *amicus curiae*.

[1] For examples of other noncontributory, compulsory pension plans, see *Allied Structural Steel Co.* v. *Spannaus,* 438 U. S. 234, 236–237 (1978);

The collective-bargaining agreement initially set employer contributions to the Pension Trust Fund at $2 a week for each man-week of covered employment.[2] The Board of Trustees of the Fund, a body composed of an equal number of employer and union representatives, was given sole authority to set the level of benefits but had no control over the amount of required employer contributions. Initially, eligible employees received $75 a month in benefits upon retirement. Subsequent collective-bargaining agreements called for greater employer contributions, which in turn led to higher benefit payments for retirees. At the time respondent brought suit, employers contributed $21.50 per employee man-week and pension payments ranged from $425 to $525 a month depending on age at retirement.[3] In order to receive a pension an employee was required to have 20 years of continuous service, including time worked before the start of the plan.

The meaning of "continuous service" is at the center of this dispute. Respondent began working as a truckdriver in the Chicago area in 1950, and joined Local 705 the following year. When the plan first went into effect, respondent automatically received 5 years' credit toward the 20-year service requirement because of his earlier work experience.

Malone v. *White Motor Corp.*, 435 U. S. 497, 500–501 (1978); *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 590 (1977).

[2] Contributions were tied to the number of employees rather than the amount of work performed. For example, payments had to be made even for weeks where an employee was on leave of absence, disabled, or working for only a fraction of the week. Conversely, employers did not have to increase their contribution for weeks in which an employee worked overtime or on a holiday. Trust Agreement, Art. 3, § 1, App. 62a.

[3] Because the Fund made the same payments to each employee who qualified for a pension and retired at the same age, rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service, the plan provided a "defined benefit." See 29 U. S. C. § 1002 (35); *Alabama Power Co.* v. *Davis*, *supra*, at 593 n. 18.

He retired in 1973 and applied to the plan's administrator for a pension. The administrator determined that respondent was ineligible because of a break in service between December 1960 and July 1961.[4] Respondent appealed the decision to the trustees, who affirmed. Respondent then asked the trustees to waive the continuous-service rule as it applied to him. After the trustees refused to waive the rule, respondent brought suit in federal court against the International Union (Teamsters), Local 705 (Local), and Louis Peick, a trustee of the Fund.

Respondent's complaint alleged that the Teamsters, the Local, and Peick misrepresented and omitted to state material facts with respect to the value of a covered employee's interest in the pension plan. Count I of the complaint charged that these misstatements and omissions constituted a fraud in connection with the sale of a security in violation of § 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j (b), and the Securities and Exchange Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1978). Count II charged that the same conduct amounted to a violation of § 17 (a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77q. Other counts alleged violations of various labor-law and common-law duties.[5] Respondent sought to proceed on

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[4] Respondent was laid off from December 1960 until April 1961. In addition, no contributions were paid on his behalf between April and July 1961, because of embezzlement by his employer's bookkeeper. During this 7-month period respondent could have preserved his eligibility by making the contributions himself, but he failed to do so.

[5] Count III charged the Teamsters and the Local with violating their duty of fair representation under § 9 (a) of the National Labor Relations Act, 29 U. S. C. § 159 (a), and Count V (later amended as Count VI) charged the Teamsters, the Local, Peick, and all other Teamsters Pension Fund trustees with violating their obligations under § 302 (c)(5) of the Labor Management Relations Act, 29 U. S. C. § 186 (c)(5). Count IV accused all defendants of common-law fraud and deceit.

behalf of all prospective beneficiaries of Teamsters pension plans and against all Teamsters pension funds.[6]

The petitioners moved to dismiss the first two counts of the complaint on the ground that respondent had no cause of action under the Securities Acts. The District Court denied the motion. 410 F. Supp. 541 (ND Ill. 1976). It held that respondent's interest in the Pension Fund constituted a security within the meaning of § 2 (1) of the Securities Act, 15 U. S. C. § 77b (1), and § 3 (a)(10) of the Securities Exchange Act, 15 U. S. C. § 78c (a)(10),[7] because the plan created an "investment contract" as that term had been interpreted in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946). It also determined that there had been a "sale" of this interest to respondent within the meaning of § 2 (3) of the Securities Act, as amended, 15 U. S. C. § 77b (3), and § 3 (a)(14) of the Securities Exchange Act, 15 U. S. C. § 78c (a)(14).[8] It

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[6] As of the time of appeal to the Seventh Circuit the District Court had not yet ruled on any class-certification issues.

[7] Section 2 (1) of the Securities Act, as amended, 15 U. S. C. § 77b (1), defines a "security" as

"any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

The definition of a "security" in § 3 (a)(10) of the Securities Exchange Act is virtually identical and, for the purposes of this case, the coverage of the two Acts may be regarded as the same. *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847 n. 12 (1975); *Tcherepnin* v. *Knight*, 389 U. S. 332, 342 (1967).

[8] Section 2 (3) of the Securities Act provides, in pertinent part, that "[t]he term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value." Section 3 (a)(14) of

believed respondent voluntarily gave value for his interest in the plan, because he had voted on collective-bargaining agreements that chose employer contributions to the Fund instead of other wages or benefits.

The order denying the motion to dismiss was certified for appeal pursuant to 28 U. S. C. § 1292 (b), and the Court of Appeals for the Seventh Circuit affirmed. 561 F. 2d 1223 (1977). Relying on its perception of the economic realities of pension plans and various actions of Congress and the SEC with respect to such plans, the court ruled that respondent's interest in the Pension Fund was a "security." According to the court, a "sale" took place either when respondent ratified a collective-bargaining agreement embodying the Fund or when he accepted or retained covered employment instead of seeking other work.[9] The court did not believe the subsequent enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.*, affected the application of the Securities Acts to pension plans, as the requirements and purposes of ERISA were perceived to be different from those of the Securities Acts.[10] We granted certiorari, 434 U. S. 1061 (1978), and now reverse.

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the Securities Exchange Act states that "[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." Although the latter definition does not refer expressly to a disposition *for value,* the court below did not decide whether the Securities Exchange Act nevertheless impliedly incorporated the Securities Act definition, cf. n. 7, *supra,* as in its view respondent did give value for his interest in the pension plan. In light of our disposition of the question whether respondent's interest was a "security," we need not decide whether the meaning of "sale" under the Securities Exchange Act is any different from its meaning under the Securities Act.

[9] The Court of Appeals and the District Court also held that § 17 (a) of the Securities Act provides private parties with an implied cause of action for damages. In light of our disposition of this case, we express no views on this issue.

[10] Respondent did not have any cause of action under ERISA itself, as that Act took effect after he had retired.

II

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring); see *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197, 199, and n. 19 (1976). In spite of the substantial use of employee pension plans at the time they were enacted, neither § 2 (1) of the Securities Act nor § 3 (a)(10) of the Securities Exchange Act, which define the term "security" in considerable detail and with numerous examples, refers to pension plans of any type. Acknowledging this omission in the statutes, respondent contends that an employee's interest in a pension plan is an "investment contract," an instrument which is included in the statutory definitions of a security.[11]

To determine whether a particular financial relationship constitutes an investment contract, "[t]he test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U. S., at 301. This test is to be applied in light of "the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties." *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 851–852 (1975). Accord, *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967); *Howey, supra*, at 298. Cf. *SEC* v.

[11] Respondent also argues that his interest constitutes a "certificate of interest or participation in any profit-sharing agreement." The court below did not consider this claim, as respondent had not seriously pressed the argument and the disposition of the "investment contract" issue made it unnecessary to decide the question. 561 F. 2d 1223, 1230 n. 15 (CA7 1977). Similarly, respondent here does not seriously contend that a "certificate of interest . . . in any profit-sharing agreement" has any broader meaning under the Securities Acts than an "investment contract." In *Forman, supra*, we observed that the *Howey* test, which has been used to determine the presence of an investment contract, "embodies the essential attributes that run through all of the Court's decisions defining a security." 421 U. S., at 852.

Variable Annuity Life Ins. Co., 359 U. S. 65, 80 (1959) (BRENNAN, J., concurring) ("[O]ne must apply a test in terms of the purposes of the Federal Acts . . ."). Looking separately at each element of the *Howey* test, it is apparent that an employee's participation in a noncontributory, compulsory pension plan such as the Teamsters' does not comport with the commonly held understanding of an investment contract.

A. Investment of Money

An employee who participates in a noncontributory, compulsory pension plan by definition makes no payment into the pension fund. He only accepts employment, one of the conditions of which is eligibility for a possible benefit on retirement. Respondent contends, however, that he has "invested" in the Pension Fund by permitting part of his compensation from his employer to take the form of a deferred pension benefit. By allowing his employer to pay money into the Fund, and by contributing his labor to his employer in return for these payments, respondent asserts he has made the kind of investment which the Securities Acts were intended to regulate.

In order to determine whether respondent invested in the Fund by accepting and remaining in covered employment, it is necessary to look at the entire transaction through which he obtained a chance to receive pension benefits. In every decision of this Court recognizing the presence of a "security" under the Securities Acts, the person found to have been an investor chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security. See *Tcherepnin, supra* (money paid for bank capital stock); *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967) (portion of premium paid for variable component of mixed variable- and fixed-annuity contract); *Variable Annuity Life Ins. Co., supra* (premium paid for variable-annuity contract); *Howey, supra* (money paid for purchase, maintenance,

and harvesting of orange grove); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943) (money paid for land and oil exploration). Even in those cases where the interest acquired had intermingled security and nonsecurity aspects, the interest obtained had "to a very substantial degree elements of investment contracts . . . ." *Variable Annuity Life Ins. Co., supra,* at 91 (BRENNAN, J., concurring). In every case the purchaser gave up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security.

In a pension plan such as this one, by contrast, the purported investment is a relatively insignificant part of an employee's total and indivisible compensation package. No portion of an employee's compensation other than the potential pension benefits has any of the characteristics of a security, yet these noninvestment interests cannot be segregated from the possible pension benefits. Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits.[12] He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.

Respondent also argues that employer contributions on his behalf constituted his investment into the Fund. But it is inaccurate to describe these payments as having been "on behalf" of any employee. The trust agreement used employee man-weeks as a convenient way to measure an employ-

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[12] This is not to say that a person's "investment," in order to meet the definition of an investment contract, must take the form of cash only, rather than of goods and services. See *Forman, supra,* at 852 n. 16.

er's overall obligation to the Fund, not as a means of measuring the employer's obligation to any particular employee. Indeed, there was no fixed relationship between contributions to the Fund and an employee's potential benefits. A pension plan with "defined benefits," such as the Local's, does not tie a qualifying employee's benefits to the time he has worked. See n. 3, *supra*. One who has engaged in covered employment for 20 years will receive the same benefits as a person who has worked for 40, even though the latter has worked twice as long and induced a substantially larger employer contribution.[13] Again, it ignores the economic realities to equate employer contributions with an investment by the employee.

B. Expectation of Profits From a Common Enterprise

As we observed in *Forman*, the "touchstone" of the *Howey* test "is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." 421 U. S., at 852. The Court of Appeals believed that Daniel's expectation of profit derived from the Fund's successful management and investment of its assets. To the extent pension benefits exceeded employer contributions and depended on earnings from the assets, it was thought they contained a profit element. The Fund's trustees provided the managerial efforts which produced this profit element.

As in other parts of its analysis, the court below found an expectation of profit in the pension plan only by focusing on one of its less important aspects to the exclusion of its more significant elements. It is true that the Fund, like other holders of large assets, depends to some extent on earnings

[13] Under the terms of the Local's pension plan, for example, respondent received credit for the five years he worked before the Fund was created, even though no employer contributions had been made during that period.

from its assets. In the case of a pension fund, however, a far larger portion of its income comes from employer contributions, a source in no way dependent on the efforts of the Fund's managers. The Local 705 Fund, for example, earned a total of $31 million through investment of its assets between February 1955 and January 1977. During this same period employer contributions totaled $153 million.[14] Not only does the greater share of a pension plan's income ordinarily come from new contributions, but unlike most entrepreneurs who manage other people's money, a plan usually can count on increased employer contributions, over which the plan itself has no control, to cover shortfalls in earnings.[15]

The importance of asset earnings in relation to the other benefits received from employment is diminished further by the fact that where a plan has substantial preconditions to vesting, the principal barrier to an individual employee's realization of pension benefits is not the financial health of the fund. Rather, it is his own ability to meet the fund's eligibility requirements. Thus, even if it were proper to describe the benefits as a "profit" returned on some hypothetical investment by the employee, this profit would depend primarily on the employee's efforts to meet the vesting requirements, rather than the fund's investment success.[16] When viewed in light of the total compensation package an employee must receive in order to be eligible for pension benefits, it becomes clear that the possibility of participating in a plan's asset earnings "is far too speculative and insubstantial to bring the entire transaction within the Securities Acts," *Forman*, 421 U. S., at 856.

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[14] In addition, the Fund received $7,500,000 from smaller pension funds with which it merged over the years.

[15] See Note, The Application of the Antifraud Provisions of the Securities Laws to Compulsory, Noncontributory Pension Plans After *Daniel* v. *International Brotherhood of Teamsters*, 64 Va. L. Rev. 305, 315 (1978).

[16] See Note, Interest in Pension Plans as Securities: *Daniel* v. *International Brotherhood of Teamsters*, 78 Colum. L. Rev. 184, 201 (1978).

III

The court below believed that its construction of the term "security" was compelled not only by the perceived resemblance of a pension plan to an investment contract but also by various actions of Congress and the SEC with regard to the Securities Acts. In reaching this conclusion, the court gave great weight to the SEC's explanation of these events, an explanation which for the most part the SEC repeats here. Our own review of the record leads us to believe that this reliance on the SEC's interpretation of these legislative and administrative actions was not justified.

A. Actions of Congress

The SEC in its *amicus curiae* brief refers to several actions of Congress said to evidence an understanding that pension plans are securities. A close look at each instance, however, reveals only that Congress might have believed certain kinds of pension plans, radically different from the one at issue here, came within the coverage of the Securities Acts. There is no evidence that Congress at any time thought noncontributory plans similar to the one before us were subject to federal regulation as securities.

The first action cited was the rejection by Congress in 1934 of an amendment to the Securities Act that would have exempted employee stock investment and stock option plans from the Act's registration requirements.[17] The amendment passed the Senate but was eliminated in conference. The legislative history of the defeated proposal indicates it was

[17] The amendment would have added the following language to § 4 (1) of the Securities Act:

"As used in this paragraph, the term 'public offering' shall not be deemed to include an offering made solely to employees by an issuer or by its affiliates in connection with a bona fide plan for the payment of extra compensation or stock investment plan for the exclusive benefit of such employees." 78 Cong. Rec. 8708 (1934).

intended to cover plans under which employees contributed their own funds to a segregated investment account on which a return was realized. See H. R. Conf. Rep. No. 1838, 73d Cong., 2d Sess., 41 (1934); Hearings before the House Committee on Interstate and Foreign Commerce on Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934, 77th Cong., 1st Sess., pt. 1, pp. 895–896 (1941). In rejecting the amendment, Congress revealed a concern that certain interests having the characteristics of a security not be excluded from Securities Act protection simply because investors realized their return in the form of retirement benefits. At no time, however, did Congress indicate that pension benefits in and of themselves gave a transaction the characteristics of a security.

The SEC also relies on a 1970 amendment of the Securities Act which extended § 3's exemption from registration to include "any interest or participation in a single or collective trust fund maintained by a bank . . . which interest or participation is issued in connection with . . . a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of title 26, . . ." § 3 (a) (2) of the Securities Act, as amended, 84 Stat. 1434, 1498, 15 U. S. C. § 77c (a)(2). It argues that in creating a registration exemption, the amendment manifested Congress' understanding that the interests covered by the amendment otherwise were subject to the Securities Acts.[18] It interprets "interest or participation in a single . . . trust fund . . . issued in connection with . . . a stock bonus, pension, or profit-sharing plan" as referring to a prospective beneficiary's interest in a pension fund. But this construction of the 1970

[18] Section 17 (c) of the Securities Act, 15 U. S. C. § 77q (c), and § 10 (b) of the Securities Exchange Act, 15 U. S. C. § 78j (b) (when read with §§ 3 (a)(10) and (12) of that Act), indicate that the antifraud provisions of the respective Acts continue to apply to interests that come within the exemptions created by § 3 (a)(2) of the Securities Act and § 3 (a)(12) of the Securities Exchange Act.

amendment ignores that measure's central purpose, which was to relieve banks and insurance companies of certain registration obligations. The amendment recognized only that a pension plan had "an interest or participation" in the fund in which its assets were held, not that prospective beneficiaries of a plan had any interest in either the plan's bank-maintained assets or the plan itself.[19]

B. SEC Interpretation

The court below believed, and it now is argued to us, that almost from its inception the SEC has regarded pension plans as falling within the scope of the Securities Acts. We are asked to defer to what is seen as a longstanding interpretation of these statutes by the agency responsible for their

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[19] See S. Rep. No. 91–184, p. 27 (1969); Hearings before the Senate Committee on Banking and Currency on Mutual Fund Legislation of 1967, 90th Cong., 1st Sess., pt. 3, pp. 1341–1342 (1967); Mundheim & Henderson, Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans, 29 L. & Contemp. Probs. 795, 819–837 (1964); Saxon & Miller, Common Trust Funds, 53 Geo. L. J. 994 (1965). The SEC argues that the addition by the House of the language "single or" before "common trust fund" indicated an intent to cover the underlying plans that invested in bank-maintained funds. The legislative history, however, indicates that the change was meant only to eliminate the negative inference suggested by the unrevised language that banks would have to register the segregated investment funds they administered for particular plans. Because the provision as a whole dealt only with the relationship between a plan and its bank, the revision did not affect the registration status of the underlying pension plan. See 116 Cong. Rec. 33287 (1970). This was consistent with the SEC's interpretation of the provision. Hearings, *supra,* at 1326. The subsequent addition of another provision excepting from the exemption funds "under which an amount in excess of the employer's contribution is allocated to the purchase of securities . . . issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer" appears to have been simply an additional safeguard to confirm the SEC's authority to require such plans, and only such plans, to register. See H. R. Conf. Rep. No. 91–1631, p. 31 (1970).

administration. But there are limits, grounded in the language, purpose, and history of the particular statute, on how far an agency properly may go in its interpretative role. Although these limits are not always easy to discern, it is clear here that the SEC's position is neither longstanding nor even arguably within the outer limits of its authority to interpret these Acts.[20]

As we have demonstrated above, the type of pension plan at issue in this case bears no resemblance to the kind of financial interests the Securities Acts were designed to regulate. Further, the SEC's present position is flatly contradicted by its past actions. Until the instant litigation arose, the public record reveals no evidence that the SEC had ever considered the Securities Acts to be applicable to noncontributory pension plans. In 1941, the SEC first articulated the position that voluntary, contributory plans had investment characteristics that rendered them "securities" under the Acts. At the same time, however, the SEC recognized that noncontributory

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[20] It is a commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight. *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974); *Investment Company Institute* v. *Camp*, 401 U. S. 617, 626–627 (1971); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. But this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts. See *SEC* v. *Sloan*, 436 U. S. 103, 117–119 (1978); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41 n. 27 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 212–214 (1976); *Forman*, 421 U. S., at 858 n. 25; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 759 n. 4 (1975) (POWELL, J., concurring); *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 425–427 (1972).

plans were not covered by the Securities Acts because such plans did not involve a "sale" within the meaning of the statutes. Opinions of Assistant General Counsel, [1941–1944 Transfer Binder] CCH Fed. Sec. L. Serv. ¶ 75,195 (1941); Hearings before the House Committee on Interstate and Foreign Commerce on Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934, 77th Cong., 1st Sess., 895, 896–897 (1941) (testimony of Commissioner Purcell).[21]

In an attempt to reconcile these interpretations of the Securities Acts with its present stand, the SEC now augments its past position with two additional propositions. First, it is argued, noncontributory plans are "securities" even where a "sale" is not involved. Second, the previous concession that noncontributory plans do not involve a "sale" was meant to apply only to the registration and reporting requirements of the Securities Acts; for purposes of the antifraud provisions, a "sale" is involved. As for the first proposition, we observe that none of the SEC opinions, reports, or testimony cited to us address the question. As for the second, the record is unambiguously to the contrary.[22] Both in its 1941 statements

[21] Subsequent to 1941, the SEC made no further efforts to regulate even contributory, voluntary pension plans except where the employees' contributions were invested in the employer's securities. Cf. n. 19, *supra*. It also continued to disavow any authority to regulate noncontributory, compulsory plans. See letter from Assistant Director, Division of Corporate Finance, May 12, 1953, [1978] CCH Fed. Sec. L. Rep. ¶ 2105.51; letter from Chief Counsel, Division of Corporate Finance, Aug. 1, 1962, [1978] CCH Fed. Sec. L. Rep. ¶ 2105.52; Hearings before the Senate Committee on Banking and Currency, *supra* n. 19, at 1326; 1 L. Loss, Securities Regulation 510–511 (2d ed. 1961); 4 *id.*, at 2553–2554 (2d ed. 1969); Hyde, Employee Stock Plans and the Securities Act of 1933, 16 W. Res. L. Rev. 75, 86 (1964); Mundheim & Henderson, *supra* n. 19, at 809–811; Note, Pension Plans as Securities, 96 U. Pa. L. Rev. 549, 549–551 (1948).

[22] On occasion the SEC has contended that because § 2 of the Securities Act and § 3 of the Securities Exchange Act apply the qualifying phrase "unless the context otherwise requires" to the Acts' general definitions, it

and repeatedly since then, the SEC has declared that its "no sale" position applied to the Securities Acts as a whole. See opinions of Assistant General Counsel, [1941–1944 Transfer Binder] CCH Fed. Sec. L. Serv. ¶ 75,195, p. 75,387 (1941); Hearings before the House Committee on Interstate and Foreign Commerce, *supra,* at 888, 896–897; Institutional Investor Study Report of the Securities and Exchange Commission, H. R. Doc. No. 92–64, pt. 3, p. 996 (1971) ("[T]he Securities Act does not apply . . ."); Hearings before the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare on Welfare and Pension Plans Investigation, 84th Cong., 1st Sess., pt. 3, pp. 943–946 (1955). Congress acted on this understanding when it proceeded to develop the legislation that became ERISA. See, *e. g.,* Interim Report of Activities of the Private Welfare and Pension Plan Study, 1971, S. Rep. No. 92–634, p. 96 (1972) ("Pension and profit-sharing plans are *exempt from coverage* under the Securities Act of 1933 . . . unless the plan is a voluntary con-

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is permissible to regard a particular transaction as involving a sale or not depending on the form of regulation involved. See 1 L. Loss, Securities Regulation 524–528 (2d ed. 1961); 4 *id.,* at 2562–2565 (2d ed. 1969). The Court noted the contention in *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 465–466 (1969). On previous occasions the SEC appears to have taken a different position: In 1943 it submitted an *amicus* brief in the Ninth Circuit arguing that a transaction must be a sale for all purposes of the Securities Act or for none, and it did not begin to rely on its "regulatory context" theory until 1951. See Brief for the SEC in *National Supply Co.* v. *Leland Stanford Junior University,* No. 10270 (CA9 Apr. 1, 1943); 1 L. Loss, *supra,* at 524 n. 211; Cohen, Rule 133 of the Securities and Exchange Commission, 14 Record of N. Y. C. B. A. 162, 164–165 (1959). We also note that, with respect to statutory mergers, the area in which the SEC originally developed its theory as to the bifurcated definition of a sale, the SEC since has abandoned its position and finds the presence of a "sale" for all purposes in the case of such mergers. See 17 CFR § 230.145 (1978). In view of our disposition of this case, we express no opinion as to the correct resolution of the divergent views on this issue.

tributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer") (emphasis added). As far as we are aware, at no time before this case arose did the SEC intimate that the antifraud provisions of the Securities Acts nevertheless applied to noncontributory pension plans.

IV

If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1974, 88 Stat., 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U. S. C. §§ 1021–1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts, see *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462, 474–477 (1977); *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U. S. 438 (1976). Further, ERISA regulates the substantive terms of pension plans, setting standards for plan funding and limits on the eligibility requirements an employee must meet. For example, with respect to the underlying issue in this case—whether respondent served long enough to receive a pension—§ 203 (a) of ERISA, 29 U. S. C. § 1053 (a), now sets the minimum level of benefits an employee must receive after accruing specified years of service, and § 203 (b), 29 U. S. C. § 1053 (b), governs continuous-service requirements. Thus, if respondent had retired after § 1053 took effect, the Fund would have been required to pay him at least a partial pension. The Securities Acts, on the other hand, do not purport to set the substantive terms of financial transactions.

The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to non-

contributory, compulsory pension plans. Congress believed that it was filling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged. Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose. See *Califano* v. *Sanders,* 430 U. S. 99, 104–107 (1977). Cf. *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S. 235, 250 (1970). Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

V

We hold that the Securities Acts do not apply to a noncontributory, compulsory pension plan. Because the first two counts of respondent's complaint do not provide grounds for relief in federal court, the District Court should have granted the motion to dismiss them. The judgment below is therefore

Reversed.

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

MR. CHIEF JUSTICE BURGER, concurring.

I join in the opinion of the Court except as to the discussion of the 1970 amendment to § 3 (a)(2) of the Securities Act. There is no need to deal, in this case, with the scope of the exemption, since it is not an issue presented for decision.

The Commission argues that the new exemption from the registration requirement of the Act applies to participation in a pension plan, and infers that Congress must have understood that such participation is a security which otherwise would be subject to the Act. It is not necessary to evaluate the Commission's interpretation of the exemption, however, because even if it is correct, it does not support the conclusion the Commission draws.

First, the inference concerning Congress' understanding of the Act in 1970 is tenuous. The language of the amendment covers a variety of financial interests, some of which clearly are "securities" as defined in the Act. Congress most likely acted with a view to those interests, without considering other financial interests like those involved here, for which registration never had been required.

Second, even if a draftsman concerned with exempting a variety of interests from the registration requirement may have believed, in 1970, that certain pension interests were within the statutory definition of "security," that would have little, if any, bearing on this case. At issue here is the construction of definitions enacted in 1933 and 1934.

The briefs suggest that the construction of the 1970 amendment may be problematic. The scope of the exemption may be of real importance to someone in some future case—but it is not so in connection with this action. Accordingly, I reserve any expression of views on the issue at this time.

HISQUIERDO *v.* HISQUIERDO

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 77–533. Argued November 1, 1978—Decided January 22, 1979

The Railroad Retirement Act of 1974 (Act) provides retirement benefits for railroad employees. The benefits are not contractual and can be altered by Congress at any time. Benefits for an employee's spouse terminate upon an absolute divorce. 45 U. S. C. § 231d (c)(3). Except for satisfying child-support or alimony obligations, "no annuity [under the Act] shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." 45 U. S. C. § 231m. Petitioner, a California resident whose years of service as a railroad employee entitled him to benefits under the Act if and when he attained age 60, petitioned for dissolution of his marriage to respondent, also a resident of California, which has a community property law. The trial court divided the parties' community property but held that respondent had no interest in petitioner's expectation of receiving railroad retirement benefits. The Supreme Court of California ultimately reversed, holding that because the benefits would flow in part from petitioner's employment during marriage, they were community property. The court rejected petitioner's contention that § 231m barred respondent's claim, reasoning that the provision was intended to apply to creditors only. *Held:* Benefits payable under the Act may not be divided under the community property law. Pp. 581–590.

(a) Ordering petitioner to pay respondent an appropriate portion of his benefits under the Act, or its monetary equivalent, as petitioner receives it, would contravene § 231m and would deprive petitioner of a portion of the benefit Congress, in § 231d (c)(3), indicated was designed for the railroad employee alone. Under the Supremacy Clause, California must defer to the Act's statutory scheme for allocating benefits insofar as the terms of federal law require. Pp. 583–587.

(b) An offsetting award for the expected value of respondent's interest in petitioner's statutory benefits would likewise defeat the purpose of barring the anticipation of payments under § 231m of the Act. Pp. 588–590.

19 Cal. 3d 613, 566 P. 2d 224, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and STEVENS, JJ.,

joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 591.

James D. Endman argued the cause and filed a brief for petitioner.

Howard M. Fields argued the cause *pro hac vice* for respondent. On the brief was *Ray C. Bennett*.

Elinor H. Stillman argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General McCree, H. Bartow Farr III*, and *Edward S. Hintzke*.

Herma Hill Kay argued the cause for the NOW Legal Defense and Education Fund as *amicus curiae* urging affirmance. With her on the brief was *Bruce K. Miller*.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner Jess H. Hisquierdo in 1975 sued to dissolve his marriage with respondent Angela Hisquierdo. The Supreme Court of California, in applying the State's community property rules, awarded respondent an interest in petitioner's expectation of ultimately receiving benefits under the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U. S. C. § 231 *et seq.* The issue here is whether the Act prohibits this allocation and division of benefits.

I

The Railroad Retirement Act, first passed in 1934, 48 Stat. 1283, provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry. Its sponsors felt that the Act would encourage older workers to retire by providing them with the means "to enjoy the closing days of their lives with peace of mind and physical comfort," and so would "assure more rapid advancement in the service"

**Judith Lichtman* filed a brief for Patricia Schroeder et al. as *amici curiae* urging affirmance.

and also more jobs for younger workers.[1] Both employees and carriers pay a federal tax[2] which funds a Railroad Retirement Account. The Railroad Retirement Board, provided for by the Act, 45 U. S. C. § 231f, disburses benefits from the account to each eligible "individual," 45 U. S. C. § 231a.

In its modern form,[3] the Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits. The upper tier, like a private pension, is tied to earnings and career service. An employee, to be eligible for benefits, must work in the industry 10 years. Absent disability, no benefit is paid, however, until the employee either reaches age 62 or is at least 60 years old and has completed 30 years of service. 45 U. S. C. § 231a (a)(1). Like a social welfare or insurance scheme, the taxes paid by

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[1] H. R. Rep. No. 1711, 74th Cong., 1st Sess., 10 (1935).

[2] Railroad Retirement Tax Act, 26 U. S. C. §§ 3201–3233.

[3] This Court ruled that the Railroad Retirement Act of 1934 was unconstitutional and did so on the ground that it took property in violation of the Fifth Amendment and exceeded Congress' power under the Interstate Commerce Clause. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). Congress then promptly enacted substantially similar legislation in 1935 based on its power to tax and spend to promote the general welfare. 49 Stat. 967 and 974. The operation of that legislation was enjoined. *Alton R. Co.* v. *Railroad Retirement Board,* 16 F. Supp. 955 (DC 1936). After Presidential intervention and extensive negotiation, a bill was produced that became the Railroad Retirement Act of 1937. 50 Stat. 307. That Act was amended several times to make it conform more closely to the existing Social Security Act. In 1970 Congress established a Commission on Railroad Retirement to study the actuarial soundness of the system. The Commission submitted a report, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92–350 (1972). Further industry negotiation produced the bill that became the 1974 Act. See *id.*, at 55–75; Hearing on Women and Railroad Retirement before the Subcommittee on Retirement Income and Employment of the Select House Committee on Aging, 94th Cong., 1st Sess. (1976) (Hearing on Women and Railroad Retirement).

and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled. Since 1950, the Railroad Retirement Account has received substantial transfers from the social security system, and legislative changes made in 1974 were expected to require a one-time infusion of $7 billion in general tax revenues.[4]

The lower, and larger, tier of benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act. 45 U. S. C. § 231b (a)(1). The Act provides special benefits for the children or parent of a worker who dies. §§ 231a (d)(1)(iii) and (iv). It also makes detailed provision for a worker's spouse; the spouse qualifies for an individual benefit if the spouse lives with the employee, and receives regular contributions from the employee for support, or is entitled to support from the employee pursuant to a court order. § 231a (c)(3)(i). The benefits terminate, however, when the spouse and the employee are absolutely divorced. § 231d (c)(3).[5]

Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time.[6] This vulnerability to congressional edict contrasts strongly with the protection Congress has afforded recipients from creditors,

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[4] See H. R. Doc. No. 92–350 (1972); Skolnik, Restructuring the Railroad Retirement System, 38 Soc. Sec. Bull., No. 4, p. 23 (1975).

[5] "The entitlement of a spouse of an individual to an annuity under section 231a (c) of this title shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced . . . ."

[6] The Social Security Act specifically provides: "The right to alter, amend, or repeal any provision of this [Act] is reserved to the Congress." 49 Stat. 648, 42 U. S. C. § 1304. While the Railroad Retirement Act does not expressly incorporate that very language, it definitely does so indirectly, because the minimum Railroad Retirement Act benefit is the benefit that would have been received under the Social Security Act. See 45 U. S. C. § 231b (a)(1).

taxgatherers, and all those who would "anticipate" the receipt of benefits:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." 45 U. S. C. § 231m.[7]

In 1975, Congress made an exception to § 231m and similar provisions in all other federal benefit plans. Concerned about recipients who were evading support obligations and thereby throwing children and divorced spouses on the public dole, Congress amended the Social Security Act by adding a new provision, § 459, to the effect that, notwithstanding any contrary law, federal benefits may be reached to satisfy a legal obligation for child support or alimony. 88 Stat. 2357, 42 U. S. C. § 659.[8] In 1977, shortly before the issuance of the Supreme Court of California's opinion in this case, Congress added to the Social Security Act a definitional statute, § 462 (c), which relates to § 459 and limits "alimony" to its tra-

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[7] The goal of this provision, in the words of a union negotiator who testified, was "to make it sure that the annuitant gets the pension." Hearings on S. 2395 before the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., 29 (1937) (statement of George M. Harrison, president of the Brotherhood of Railway Clerks).

[8] The consent provision reads in its entirety:

"Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

ditional common-law meaning of spousal support. That statute states specifically that "alimony"

> "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95–30, Tit. V, § 501 (d), 91 Stat. 160.[9]

II

Petitioner and respondent, who are California residents, were married in Nevada in 1958. They separated in 1972. In 1975 petitioner instituted this proceeding in the Superior Court of California, County of Los Angeles, for dissolution of the marriage. California, like seven other States, by statute has a form of community property law brought to our shores by the Spanish. In California the

> "statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after

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[9] The entire definition reads:

"The term 'alimony,' when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

dissolution, in case of surviving the other." *Meyer* v. *Kinzer*, 12 Cal. 247, 251 (1859).[10]

Community property includes the property earned by either spouse during the union, as well as that given to both during the marriage. See Cal. Civ. Code Ann. § 687 (West 1954). It contrasts with separate property, which includes assets owned by a spouse before marriage or acquired separately by a spouse during marriage through gift. In community property States, ownership turns on the method and timing of acquisition, while the traditional view in common-law States is that ownership depends on title.[11] On the theory that petitioner acquired an expectation of receiving Railroad Retirement Act benefits due in part to his labors while married, respondent (but not petitioner) in the California divorce proceeding listed that expectation as an item of community property subject to division upon dissolution of the marriage. App. 2, 3.

At the time, petitioner, a railroad machinist, was aged 55. He had worked from 1942 to 1975 for the Atchison, Topeka & Santa Fe Railway, and subsequently entered the employ of the Los Angeles Union Passenger Terminal. Both jobs fell within the Act. Because petitioner had 30 years' service, the statute would permit him to receive benefits if and when he attained age 60. Respondent calculated that she was entitled to half the benefits attributable to his labor during the 14 years of their marriage, or, by her estimates, 19.6% of the total benefits to be received.[12] The couple has no children.

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[10] See also Cal. Civ. Code Ann. § 4800 (West Supp. 1978); W. deFuniak & M. Vaughn, Principles of Community Property § 1 (2d ed. 1971).

[11] *Ibid.* Only a small minority of common-law States still adhere strictly to the view that title alone controls the distribution of property on divorce. Foster & Freed, From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution, 3 Comm. Prop. J. 231, 232 (1976).

[12] Reporter's transcript on appeal in No. D 860954 (Super. Ct. Los Angeles) 23; Tr. of Oral Arg. 32.

Respondent in 1975 was 53. She had worked for the preceding eight years in a factory. She had been gainfully employed for 35 years and had an expectation that upon her retirement she would be entitled to benefits under the Social Security Act. Neither petitioner nor respondent claimed that her expectation of receiving those benefits was community property. App. 2, 3.

Respondent, and petitioner, too, waived their claims to spousal support. Tr. of Oral Arg. 5, 33. After its hearing, the Superior Court awarded petitioner the couple's home, in which they had a $12,828 equity, and its furnishings. Respondent was awarded an automobile and a small interest in a mutual fund. The court, however, ordered petitioner to reimburse respondent, by installment payments, for her half of the equity in the home and protected this obligation with an imposed lien in her favor on the real estate. The court ruled that no community interest existed either in petitioner's prospect of receiving Railroad Retirement Act benefits or in respondent's anticipation of benefits under the Social Security Act. App. 4.

The California Court of Appeal affirmed. *In re Hisquierdo,* 133 Cal. Rptr. 684 (2d Dist. 1976). The court, noting that under this Court's Supremacy Clause cases Congress has the power to determine the character of a federally created benefit, rejected respondent's claim that petitioner's expectation of receiving Railroad Retirement Act benefits was community property. The court reasoned that, because federal pension programs may be terminated by Congress at any time, petitioner had no enforceable contract right. Respondent contended that the state court, under the decision in *In re Milhan,* 13 Cal. 3d 129, 528 P. 2d 1145 (1974), cert. denied, 421 U. S. 976 (1975), could determine the expected value of her interest and award her a compensating amount of other property available for distribution. The court held, however, that such a remedy would be contrary to § 231m, which provides that

benefits are not to be "anticipated," and would frustrate the explicit and detailed terms of the Act that grant the employee a benefit separate and distinct from the nonemployee spouse's benefit that terminates upon absolute divorce. See also *In re Nizenkoff*, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1st Dist. 1976) (expectation of receiving benefits under the Social Security Act); *In re Kelley*, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976) (the same).

Review was granted by the Supreme Court of California. Respondent there argued that "there is absolutely no evidence that Congress ever intended to prevent a community property state from recognizing a spouse's community interest in a Railroad Retirement Act retirement plan." [13] In a unanimous opinion that court reversed the Court of Appeal. *In re Hisquierdo*, 19 Cal. 3d 613, 566 P. 2d 224 (1977). Relying on its recent case law,[14] the Supreme Court of California held that because the benefits would flow in part from petitioner's employment during marriage, they were community property even though under federal law petitioner had no enforceable contract right. Congress' decision to terminate benefits for divorced spouses, the court believed, was evidence that Congress intended to rely on traditional state-law doctrines to protect them. The court rejected petitioner's contention that § 231m barred respondent's claim. The court reasoned that it was intended to bar creditors, and respondent was not a creditor but a present owner. The then very recent 1977 amendment to the Social Security Act (mentioned above as the new

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[13] Petition for Hearing in No. LA 30712 (Cal. Sup. Ct.), p. 14.

[14] *In re Fithian*, 10 Cal. 3d 592, 517 P. 2d 449, cert. denied, 419 U. S. 825 (1974) (federal military retirement pay); cf. *In re Brown*, 15 Cal. 3d 838, 544 P. 2d 561 (1976) (nonvested interest in a private employer's retirement plan); see generally Martin, Social Security Benefits for Spouses, 63 Cornell L. Rev. 789, 830–836 (1978); Reppy, Community and Separate Interests in Pensions and Social Security Benefits after *Marriage of Brown* and ERISA, 25 UCLA L. Rev. 417–421, 429–443, 483–511 (1978) (discussing cases) (hereinafter Interests in Pensions).

§ 462 (c) of that Act) was not discussed. The question of remedy was left open for decision on remand. The court indicated that by awarding respondent compensating property under the doctrine of *In re Milhan, supra,* a court could avoid any infringement on the Act's designation of petitioner as the "individual" recipient.

We granted certiorari to consider whether, under the standard of this Court's decided Supremacy Clause cases, the award to respondent impermissibly conflicts with the Railroad Retirement Act.[15] 435 U. S. 994 (1978).

III

Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U. S. 586, 593–594 (1890). Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question. See, *e. g., Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379 (1930). On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. *Wetmore* v. *Markoe,* 196 U. S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *United States* v. *Yazell,* 382 U. S. 341, 352 (1966).

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[15] Texas courts have divided on the question whether an expectation of receiving Railroad Retirement Act benefits is community property. Compare *Allen* v. *Allen,* 363 S. W. 2d 312 (Tex. Civ. App., Houston, 1962) with *Eichelberger* v. *Eichelberger,* 557 S. W. 2d 587 (Tex. Civ. App., Waco, 1977) (writ dismissed).

Nevertheless, on at least four prior occasions this Court has found it necessary to forestall such an injury to federal rights by state law based on community property concepts. In *McCune* v. *Essig,* 199 U. S. 382 (1905), federal homestead law, which permitted a widow to patent federal land that had been entered by her husband, prevailed over a daughter's asserted inheritance of her father's expectancy that the patent would issue to him. And in a trilogy of cases, the Court held that the survivorship rules in federal savings bond and military life insurance programs override community property law, absent fraud or breach of trust by the decedent. *Yiatchos* v. *Yiatchos,* 376 U. S. 306, 309 (1964); *Free* v. *Bland,* 369 U. S. 663 (1962); *Wissner* v. *Wissner,* 338 U. S. 655 (1950).

This case, like those four, has to do with a conflict between federal and state rules for the allocation of a federal entitlement. The manipulation problem that concerned the Court in *Yiatchos* v. *Yiatchos* and *Free* v. *Bland,* however, cases in which savings bonds were purchased with community property, is not present here. Railroad Retirement Act benefits from their very inception have federal overtones. Compulsory federal taxes finance them and not just the taxes that fall on the employee. The benefits more closely parallel the land homesteaded in *McCune* v. *Essig.* Because the United States owned the land, title to it could not pass in a manner contrary to federal law, 199 U. S., at 390, even though a matter of that kind normally is left to the States. Here, California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require. The critical terms here include a specified beneficiary protected by a flat prohibition against attachment and anticipation. In *Wissner* v. *Wissner, supra,* the Court interpreted a somewhat similar provision [16] to pre-

[16] The statute provided that payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever,

clude a division for community property purposes, 338 U. S., at 659–660, even though Congress had not spoken with the specificity that characterizes the Social Security Act amendments that inform our decision here.

The approach must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control. Petitioner contends, as the California Court of Appeal held, that the States may not create rights to these benefits that do not exist under federal law. Petitioner accordingly says that, because not even petitioner "owns" benefits until Congress has determined that they be paid, the Supreme Court of California erred in describing respondent as a present owner of an expectancy in those benefits. Such rights in the abstract, however, do not necessarily cause the injury to federal law that the Supremacy Clause forbids. The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

A

The first way in which respondent seeks to vindicate her community property interest, one particularly pressed at oral argument, Tr. of Oral Arg. 32, 44, is that the Superior Court would retain jurisdiction and order petitioner to pay her an appropriate portion of his benefit, or its monetary equivalent, as petitioner receives it. See *In re Brown*, 15 Cal. 3d 838, 848–850, 544 P. 2d 561, 567–568 (1976). That course, however, runs contrary to the language and purpose of § 231m and would mechanically deprive petitioner of a portion of the benefit Congress, in § 231d (c)(3), indicated was designed for him alone.

Section 231m plays a most important role in the statu-

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either before or after receipt by the beneficiary." 49 Stat. 609, 38 U. S. C. § 454a (1946 ed.).

tory scheme. Like anti-attachment provisions generally, see *Philpott* v. *Essex County Welfare Board,* 409 U. S. 413 (1973); *Wissner* v. *Wissner, supra,* it ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process "[n]otwithstanding any other law . . . of any State." Even state tax-collection laws must bow to its command, for Congress added that phrase in an amendment designed in part to ensure that neither federal nor state tax collectors would encroach on the distribution of benefits.[17] It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.

Congress carefully targeted the benefits created by the Railroad Retirement Act. It even embodied a community concept to an extent. The Act provides a benefit for a spouse, but the spouse need not have worked for a carrier. The spouse's sole contribution is to the marital community that supports the employee who has made railroad employment a career. Congress purposefully abandoned that theory, however, in allocating benefits upon absolute divorce. In direct language the spouse is cut off:

> "The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month pre-

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[17] Senator John F. Kennedy described the amendment on the floor of the Senate:

"[The amendment] makes it clear that railroad retirement and unemployment benefits are still exempt from Federal or State taxation, garnishment and attachment, a clarification made necessary by an inadvertent oversight in last year's new tax law and doubts raised in several States." 101 Cong. Rec. 11772 (1955).

See S. Rep. No. 1040, 84th Cong., 1st Sess., 9–10 (1955); Hearing on S. 1589 before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess., 29–30 (1955) (remarks of Lester P. Schoene, representing all standard railway labor organizations). See also Rev. Rul. 70–343, 1970–2 Cum. Bull. 4.

> ceding the month in which . . . the spouse and the individual are absolutely divorced." 45 U. S. C. § 231d (c)(3).

The choice was deliberate. When the Act was revised in 1974, a proposal was made to award a divorced spouse a benefit like that available to a divorced spouse under the Social Security Act. The labor-management negotiation committee, however, rejected that proposal, and Congress ratified its decision. It based its conclusion on the perilous financial state of the Railroad Retirement Account, and the need to devote funds to other purposes.[18]

Congress has made a choice, and § 231m protects it. It is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate. Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic diminution of that amount frustrates the congressional objective. By reducing benefits received, it discourages the divorced employee from retiring. And it provides the employee with an incentive to keep working, because the former spouse has no community property claim to salary earned after the marital community is dissolved. Section 231m shields the distribution of benefits from state decisions that would actually reverse the flow of incentives Congress originally intended.

Respondent contends that this interpretation of the Act is manifestly unjust, and could not have been intended by

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[18] Hearing on Women and Railroad Retirement 5. The 1972 Report of the Commission on Railroad Retirement said that industry employment, 1.68 million during World War II, had fallen to 582,000 by the first quarter of 1972. The system's beneficiaries already outnumbered the employees who were contributing. The Commission said that, without the changes that it suggested and that Congress embodied in the 1974 Act, the system's funds would be consumed by 1988. H. R. Doc. No. 92–350, pp. 10, 12, 18 (1972).

Congress. She suggests that her contribution to the marital community merits recompense, and she argues that, as a logical matter, Congress would not have terminated the spouse's benefit upon absolute divorce if it had thought that a divorced spouse would be totally unable to assert a state-law claim against the benefits received by the employee spouse. She urges that, at least with respect to spousal claims, the Court should hold that § 231m does no more than restate the Government's sovereign immunity from burdensome garnishment suits, and so has no effect on her right to require petitioner to reimburse her as he receives benefits. She notes that several courts have adopted this construction in holding that an errant spouse could be forced to pay child and spousal support upon receipt of Railroad Retirement Act payments.[19]

We, however, cannot so lightly discard the settled view that anti-assignment statutes have substantive meaning. Section 231m goes far beyond garnishment. It states that the annuity shall not be subject to any "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." Its terms make no exception for a spouse. The judicial construction on which respondent relies is a child of equity, not of law. In *Wissner,* the Court held that a similar line of authority did not apply to community property claims:

> "Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular

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[19] See *LaFarr* v. *LaFarr,* 132 Vt. 191, 315 A. 2d 235 (1974); *Heuchan* v. *Heuchan,* 38 Wash. 2d 207, 228 P. 2d 470 (1951); *Commonwealth* v. *Berfield,* 160 Pa. Super. 438, 51 A. 2d 523 (1947). (Before the 1974 revision of the Act, the § 231m exemption was codified as § 228*l*. See 45 U. S. C. § 228*l* (1970 ed.).)

The dissenting opinion, *post,* at 598–600, argues that § 231m is irrelevant because respondent is a co-owner. Surely, however, inability to use any "legal process under any circumstances whatsoever" to enforce her asserted rights is a severe limitation on the nature of any ownership interest she might otherwise enjoy under state law.

needs, in the alimony and support cases." 338 U. S., at 660.

Now Congress has written into law the same distinction *Wissner* drew as a matter of policy. The 1977 amendments to the Social Security Act, by way of amending the existing § 459 and adding a new § 462, expressly override § 231m, and even facilitate garnishment for claims based on spousal support. They decline to do so, however, for community property claims. The legislative history is sparse and does not mention *Wissner*.[20] We know, however, that the purpose of § 459 was to help children and divorced spouses get off welfare. It is therefore logical to conclude that Congress, in adopting § 462 (c), thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so.

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[20] Section 459, added to the Social Security Act in 1975, overrides § 231m for "alimony" claims. It was part of a package of measures primarily designed to combat increases in welfare payments resulting from an inability to compel payment of support obligations from solvent but unwilling parents. S. Rep. No. 93–1356, pp. 42–43 (1974). After the section's adoption, courts disagreed on whether the alimony that could be made the subject of garnishment included community property. Compare *United States* v. *Stelter*, 553 S. W. 2d 227, 229 (Tex. Civ. App. 1977), rev'd, 567 S. W. 2d 797 (Tex. 1978); *Williams* v. *Williams*, 338 So. 2d 869 (Fla. App. 1976), with *Marin* v. *Hatfield*, 546 F. 2d 1230 (CA5 1977); *Kelley* v. *Kelley*, 425 F. Supp. 181, 183 (WD La. 1977). In 1977, Congress added § 462 (c) and resolved that question. The amendment was the subject of a prior Committee Report, S. Rep. No. 94–1350 (1976). Senator Nunn said that its purpose was to clarify prior law. Neither he nor the Committee explained why property divisions were excluded. See 123 Cong. Rec. 12909–12914, 12958–12959 (1977). Companion measures both established procedures to make garnishment more efficient, and amended § 303 of the Consumer Credit Protection Act, 15 U. S. C. § 1673 (b), to pre-empt state law by limiting garnishments to less than 65% of the remuneration received for employment, including retirement benefits. Pub. L. 95–30, Tit. V., § 501 (e) (2), 91 Stat. 161.

B

Respondent contends that she can vindicate her interest and leave the benefit scheme intact by pursuing her remedy under *In re Milhan,* 13 Cal. App. 3d 129, 528 P. 2d 1145 (1974). She seeks an offsetting award of presently available community property to compensate her for her interest in petitioner's expected benefits. As petitioner's counsel bluntly put it, respondent wants the house. Tr. of Oral Arg. 5. The expected value of the benefits is such that she could get it if this remedy were adopted.

An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. Section 231m provides that payments are not to be "anticipated." Legislative history throws little light on the meaning of this word.[21] In the law of trusts, however, a prohibition against anticipation is commonly understood to mean that "the interest of a sole beneficiary shall not be paid to him before a certain date." E. Griswold, Spendthrift Trusts § 512, p. 583 (2d ed. 1947).[22] The

[21] The original statute, enacted in 1934, contained a prohibition against attachment but not the phrase "nor shall the payment thereof be anticipated." Act of June 27, 1934, ch. 868, § 11, 48 Stat. 1288. The quoted phrase was added without explanation in 1935 and carried over in each later re-enactment of the statute. Act of Aug. 29, 1935, ch. 812, § 10, 49 Stat. 973; Act of June 24, 1937, ch. 382, § 12, 50 Stat. 316; Act of Oct. 16, 1974, Pub. L. 93–445, § 14, 88 Stat. 1345. The Committee Reports attach no special meaning to it. See, *e. g.,* H. R. Rep. No. 1711, 74th Cong., 1st Sess., 12 (1935). It was mentioned during the hearings, but not discussed. See Hearing on H. R. 6956 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 69 (1937); Hearings on S. 3151 before a Subcommittee of the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., 16 (1935). Congress has employed an identical phrase in the Railroad Unemployment Insurance Act, 52 Stat. 1096, as amended, 45 U. S. C. § 352 (e).

[22] In *Hetrick* v. *Reading Co.,* 39 F. Supp. 22 (NJ 1941), the prohibition against anticipation was applied in this sense. The court held that a

Railroad Retirement Act resembles a trust in certain respects. If that definition is applied here, then the offsetting award respondent seeks would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue.

Any such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above the mere loss of wealth caused by the offset. If, for example, a nonemployee spouse receives offsetting property, and then the employee spouse dies before collecting any benefits, the employee's heirs or beneficiaries suffer to the extent that the offset exceeds the lump-sum death benefits the Act provides. See 45 U. S. C. § 231e. Similarly, if the employee leaves the industry before retirement, and so fails to meet the "current connection with the railroad industry" requirement for certain supplemental benefits, see 45 U. S. C. § 231a (b)(1)(iv), the employee never will fully regain the amount of the offset. A third possibility, of course, is that Congress might alter the terms of the Act. In 1974, Congress eliminated certain double benefits accruing after 1982.[23] If past California property settlements had been based on those benefits, then the change in the Act would have worked a multiple penalty on future recipients. By barring lump-sum community property settlements based on mere expectations, the prohibition against anticipation prevents such an obvious frustration of congressional purpose. It also preserves congressional freedom to amend the Act, and so serves much the same function as the frequently stated understanding that programs of this nature convey no future rights and so may be changed without

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defendant employer could not offset a tort claim by the amount the plaintiff expected to receive in Railroad Retirement Act disability benefits.

[23] See 45 U. S. C. § 231b (f)(2); S. Rep. No. 93–1163 (1974); H. R. Rep. No. 93–1345 (1974). For a similar catalog of uncertainties surrounding the payment of future social security benefits, see Interests in Pensions 529–533.

taking property in violation of the Fifth Amendment. See *Richardson* v. *Belcher,* 404 U. S. 78, 80–81 (1971); *Flemming* v. *Nestor,* 363 U. S. 603, 608–611 (1960); *Ruhl* v. *Railroad Retirement Board,* 342 F. 2d 662, 666 (CA7), cert. denied, 382 U. S. 836 (1965).

IV

We are mindful that retirement benefits are increasingly important in American life and that divorce is becoming more frequent. The burden of marital dissolution may be particularly onerous for a spouse who, unlike respondent, has no expectation of receiving his or her own social security benefits. The 1975 and 1977 amendments, however, both permit and encourage garnishment of Railroad Retirement Act benefits for the purposes of spousal support, and those benefits will be claimed by those who are in need. Congress may find that the distinction it has drawn is undesirable. Indeed, Congress recently has passed special legislation to allow garnishment of Civil Service Retirement benefits for community property purposes. See Pub. L. 95–366, 92 Stat. 600.

For the present, however, the community property interest that respondent seeks conflicts with § 231m, promises to diminish that portion of the benefit Congress has said should go to the retired worker alone,[24] and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

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[24] In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. See Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U. S. C. § 1001 *et seq.* Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics.

The judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

We are asked in this case to decide whether federal law prohibits the State of California from treating as community property a divorcing husband's expectancy interest in pension benefits afforded under the Railroad Retirement Act of 1974. There can be no doubt that the State is free to treat this interest as property. *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126. The only question, therefore, is whether something in the federal Act prevents the State from applying its normal substantive property law, under which assets acquired during marriage are commonly owned by the husband and wife. From the Court's own review of the Railroad Retirement Act, it is apparent to me that the asserted federal conflict with California community property law—far from being grounded upon the concrete expressions that ordinarily are required to support a finding of federal pre-emption, see, *e. g., Wissner* v. *Wissner,* 338 U. S. 655—is patched together from statutory provisions that have no relationship at all to substantive marital property rights. Indeed, the federal "policies" the Court perceives amount to little more than the commonplace that retirement benefits are designed to provide an income on retirement to the employee. There is simply nothing in the Act to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in California are a normal incident of marriage.

I

Congress, when it acts, ordinarily does so "against the background of the total *corpus juris* of the states." *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63, 68 (citation

omitted). In any case where it is claimed that a federal statute pre-empts state substantive law, therefore, it is essential to understand what the state law is. *Perez* v. *Campbell*, 402 U. S. 637, 644; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117. Although the question here arises in the context of a proceeding to dissolve a marriage, the state law at issue has to do with the ownership of property *during* marriage. Despite the Court's repeated suggestions to the contrary, community property law is simply not a body of law that is designed to provide a "benefit" for a divorced spouse.

"Community of property between husband and wife is that system whereby the property which the husband and wife have is common property, that is, it belongs to both by halves." W. deFuniak & M. Vaughn, Principles of Community Property § 1, p. 1 (2d ed. 1971) (hereinafter Principles). This definition of the property rights of a married couple was first recognized in written form in 693 A. D. in Visigothic Spain, *id.*, § 2, p. 3, and now prevails in eight States of the Union. As we have recognized many times in the past, the community property system reflects a concept of property and of the marital relationship entirely different from that at common law. See *Poe* v. *Seaborn*, 282 U. S. 101; *Bender* v. *Pfaff*, 282 U. S. 127; *Hopkins* v. *Bacon*, 282 U. S. 122; *United States* v. *Yazell*, 382 U. S. 341. See generally Principles. Fundamental to the system is the premise that husband and wife are equal partners in marriage. *Id.*, § 2, p. 5; W. Reppy & W. deFuniak, Community Property in the United States 13 (1975). Each is deemed to make equal contributions to the marital enterprise, and each accordingly shares equally in its assets. Principles § 11.1, p. 28.

Under the Spanish ganancial system followed in our community property States, property acquired before the marriage or after its termination is the separate property of the spouse who acquired it. *Id.*, § 1, p. 1; Prager, The Persistence of Separate Property Concepts in California's Community Prop-

erty System, 1849–1975, 24 UCLA L. Rev. 1, 6 (1976). All property acquired during the marriage, however, is presumed to be community property. See, *e. g., Meyer* v. *Kinzer,* 12 Cal. 247, 251–252. The presumption is regarded as a rule of substantive property law, not one of procedure or evidence. *Nilson* v. *Sarment,* 153 Cal. 524, 96 P. 315. Cf. *Poe* v. *Seaborn, supra.* In general, all property which stems from the labors of either spouse during the marriage, "irrespective of direct contributions to its acquisition or the condition of title" is, in the absence of an agreement between the spouses to the contrary, community property. Prager, *supra,* at 6. The spouses are deemed to have contributed equally to the acquisition of the property, regardless of the actual division of labor in the marriage and regardless of whether only one spouse formally "earned" it. *Ibid.*[1]

The interests of the spouses in the assets of the marital community are "during continuance of the marriage relation . . . present, existing and equal interests." Cal. Civ. Code Ann. § 5105 (West Supp. 1978). Upon dissolution of the marriage, each possesses an equal and absolute right to his or her one-half interest. *Meyer* v. *Kinzer, supra,* at 251–252; *In re Marriage of Brown,* 15 Cal. 3d 838, 848, 544 P. 2d 561, 567. The right of each spouse to his or her share of the community assets, then, is a substantive property right entirely distinct from the right that a spouse might have to the award of alimony upon dissolution of the marriage. A community property settlement merely distributes to the spouses property which, by virtue of the marital relationship, he or she already owns. An alimony award, by contrast, reflects a

[1] This rule obtains regardless of the relative wealth of the parties. As stated in an early compilation of the Spanish civil law:

"Although the husband may have more than the wife, or the wife more than the husband, in realty or in personalty, let the fruits be common to both." Novisima Recopilacion, Book 10, Tit. 4, Law 3, quoted in Principles § 66, p. 143 n. 72.

judgment that one spouse—even after the termination of the marriage—is entitled to continuing support by the other.

In California, retirement benefits attributable to employment during marriage are community property. *In re Marriage of Brown, supra.* As long as the employee spouse has some reasonable expectancy of receiving the benefits in the future, the nonemployee spouse's interest may attach even if the pension rights are not formally "vested." *Ibid.* Pension rights created by act of the state legislature have been treated as community property by the California courts, *Cheney* v. *City and County of San Francisco,* 7 Cal. 2d 565, 61 P. 2d 754, as have federal military pension benefits, *In re Marriage of Fithian,* 10 Cal. 3d 592, 517 P. 2d 449, and benefits afforded by the federal civil service retirement plan, *In re Marriage of Peterson,* 41 Cal. App. 3d 642, 115 Cal. Rptr. 184. The California Supreme Court in this case, having found no conflict with the express provisions or policies of the Railroad Retirement Act, applied these settled rules of state marital property law to the petitioner's expectation of receiving the retirement benefits afforded by the Act. The State's decision to treat as property benefits that arguably are not "vested" is one that it is free to make. The only question for this Court, then, is whether the State can, consistently with the federal Act, follow its normal substantive community property law in dealing with these prospective benefits.

II

It is clear that Congress, when it established the railroad retirement system, did not purport to regulate the marital property rights of workers covered by the Act. Federal preemption, then, must be based on a perceived conflict between the provisions of the Act and the substantive law of California. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* at 127; *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 423 n. 29. When the state substantive law in

question regulates family and family-property arrangements—matters that traditionally have been left to local law, see *In re Burrus,* 136 U. S. 586, 588–594; *De Sylva* v. *Ballentine,* 351 U. S. 570, 580—state interests "should be overridden by the federal courts only where clear and substantial interests of the National Government, which *cannot* be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States* v. *Yazell,* 382 U. S., at 352 (emphasis added). The full force of this rule applies no less when the property in question consists of federally created benefits. *De Sylva* v. *Ballentine, supra,* at 580–582. Cf. *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S., at 68.

Consistently with this principle, the cases that have held that a State's community property law was pre-empted have depended upon specific provisions in the federal statute governing the ownership of the property involved and, as well, upon a finding that application of the state law would substantially disserve demonstrable federal policies. *Wissner* v. *Wissner,* 338 U. S. 655; *Free* v. *Bland,* 369 U. S. 663. In *Wissner,* for example, the Court held that California could not treat the proceeds of a National Service Life Insurance policy as community property even though it assumed that the policy had been purchased with community assets. The decedent soldier in that case had, without obtaining his wife's consent, designated his mother and father as the beneficiaries under his policy. The Court's conclusion was based primarily upon a section of the National Service Life Insurance Act that specifically gave the insured the "right to designate the beneficiary or beneficiaries of the insurance" and "at all times" the "right to change" that designation. See 38 U. S. C. § 802 (g) (1946 ed.). From this explicit provision, the Court found that Congress had "spoken with force and clarity" in directing that the proceeds were to belong to the "named beneficiary and no other." 338 U. S., at 658. California's judgment awarding one-

half of the proceeds to the wife, the Court said, would nullify the choice Congress had expressly given to the soldier, *id.*, at 659, and frustrate the federal purpose of "enhanc[ing] the morale of the serviceman," *id.*, at 660. The Court also noted that the state-court judgment, insofar as it ordered the "diversion of future payments" as soon as they were paid to the beneficiary, was contrary to a provision in the Act protecting such payments from "seizure . . . either before or after receipt by the beneficiary." *Id.*, at 659.

In *Free* v. *Bland*, a treasury bond purchased by a husband with community assets designated the owner as husband "or" wife. Federal regulations explicitly provided that the survivor of an "or" form bond was to be the absolute owner. This directive, coupled with the substantial federal interest in establishing uniform rules governing the transfer of bonds, the Court found sufficient to override state community property law.

Essential to the finding of pre-emption in the *Wissner* and *Bland* cases was a determination that the ownership of the asset involved had, by express federal directive, been defined in a manner inconsistent with state community property law. In each case, explicit provisions of federal law not only conflicted with principles of state law but also created property rights at variance with the rights that normally would have been created by local property law.[2]

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[2] The Court suggests that the benefits here "more closely parallel" the federal homestead land at issue in *McCune* v. *Essig*, 199 U. S. 382, than those involved in *Wissner* and *Bland*. *Ante*, at 582. The pre-emption principles applied in *McCune*, however, were no less rigorous than those articulated in the more recent cases. In *McCune*, a husband and wife had settled land subject to the homestead laws, and the husband had filed an appropriate claim. He died intestate before a patent was issued. Under the intestate laws of Washington, a community property State, the husband's interest would have passed to his daughter. Two provisions in the Homestead Act, however, established specific rules governing the method of completing a claim. One gave to the widow the right to fulfill the settlement terms and the entitlement to the patent. 199 U. S., at 388,

III

In the Railroad Retirement Act of 1974 Congress did not with "force and clarity" direct that the employee's pension benefits should not be subject to the substantive community property law of California.

A

The Railroad Retirement Act contains no express provisions governing the ownership rights that may or may not attach to the pension interest of a married employee. The provisions governing the basic annuity are in themselves neutral. Both 45 U. S. C. § 231a (a)(1), which defines the eligibility requirements for the employee's annuity, and § 231b, which contains the provisions governing the computation of annuities, state simply that the annuity is that "of the individual" employee. This indication that the benefit belongs to the employee is in this context wholly unremarkable. The congressional decision to "title" this federal benefit in the worker cannot, without more, be taken as evidence that Congress intended to disturb a body of state law that obtains whether or not the asset was earned by or is titled in one or the other spouse.

The benefit structure of the Act is also neutral. To be sure, Congress has chosen to provide a separate and additional benefit for spouses of retired workers, 45 U. S. C. § 231a (c)(3)(i), and to terminate that benefit upon divorce. 45 U. S. C. § 231d (c)(3). These provisions, however, do not preclude a rule of state property law that treats an annuity payable to either spouse as an asset of the marital community.

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389. Another expressly provided that the fee was to "inure to the benefit of" children only if the mother and father were dead. *Id.*, at 389. Noting that "[i]t requires an exercise of ingenuity to establish uncertainty in these provisions," the Court held that Washington law could not apply to reverse the order of ownership established in the statute. *Ibid.* In *McCune*, then, no less than in *Wissner* and *Bland*, the Court based its finding of pre-emption upon federal provisions that were "express" and "clear."

The congressional decision to terminate the separate spousal benefit upon divorce in no way conflicts with that rule, for the community property interest—apart from the fact that it is an ownership interest and not a "benefit" for a divorced spouse—attaches only to that portion of an annuity attributable to labor performed *during* the marriage. And the provision of the separate and additional spousal benefit surely does not itself indicate an intent to displace community property law. The legislative history demonstrates quite clearly that Congress created this benefit in 1951 in order to respond to the greater financial needs of retired workers who are married. H. R. Rep. No. 976, 82d Cong., 1st Sess. (1951). The original Act afforded an annuity only for the individual employee. The amount of the benefit was tied to length of service and to salary, with no account taken of marital status upon retirement. See Report of the Commission on Railroad Retirement, H. R. Doc. No. 92–350, p. 7 (1972). When Congress increased the amounts available to employees with families by providing benefits for spouses, its purpose was simply to increase the level of benefits for employees with families, not to ordain the ownership of property within the family.

B

The only provision in the Act that even arguably might conflict with California community property law is § 231m, the anti-attachment provision. It states:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

Yet this language certainly does not speak to substantive ownership interests that may or may not exist in annuities or

pension payments. Like similar language often included in spendthrift trusts, it seems to have been designed to protect the benefits from the reach of creditors. See generally E. Griswold, Spendthrift Trusts (2d ed. 1947). The provision thus has no real relevance to the question whether the annuity is the property of the marital community.[3] For under community property law, the husband and wife are not one another's creditors; they are co-owners. Upon dissolution of the marital community, the community property is divided, not adjudicated as indebtedness.

Neither the prohibition against "garnishment" nor that against "attachment" bears on an action to enforce a community property decree. Both terms govern remedies, not ownership rights, and the remedies themselves traditionally have been unavailable in an action grounded upon the theory that the property at issue "belongs" to the claimant. See generally J. Rood, Law of Garnishment (1896); S. Kneeland, Law of Attachments (1885).[4] The prohibition against "as-

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[3] *Wissner* v. *Wissner,* 338 U. S. 655, is not to the contrary. The Court did not there hold that the anti-attachment clause in the National Service Life Insurance Act had an effect on the substantive ownership interest in the proceeds. The Court simply reasoned that Congress might have included the clause in order to protect the serviceman's unrestricted choice of beneficiary. That choice was clearly established in a different and "controlling" provision of the Act. *Id.,* at 658.

[4] The 1975 amendment to the Social Security Act permitting those to whom alimony or child-support obligations are owed to garnish federal benefits to satisfy their claims, 42 U. S. C. § 659, hardly transforms these terms of § 231m into provisions that bear on the ownership of railroad retirement benefits. Section 659 was enacted as part of a general bill designed to keep dependents of solvent but unwilling parents receiving federal benefits off the welfare rolls. S. Rep. No. 93–1356, pp. 42–43 (1974). With respect to actions for the enforcement of family-support obligations, the new provision waives the sovereign immunity of the United States and overrides contrary provisions in federal social insurance and retirement statutes. There is, however, nothing in either its language or legislative history to suggest that Congress, when it enacted § 659, intended

signment" of pension payments is equally irrelevant to the question in this case. A determination that a particular asset is community property is clearly not an "assignment" of that property from one spouse to another. It is no more than a conclusion that the property interest—from the moment it arose—belonged equally to the two parties to the marriage. Principles § 97.

It is no doubt for these reasons that the Court places no great reliance on the "garnishment," "attachment," or "assignment" provisions of § 231m. The Court does, however, discern a major conflict between the clause prohibiting "anticipation" of payments and the California community property law. Yet it seems to me demonstrably clear that this provision of § 231m is no more relevant to the issue in this case than the "garnishment," "attachment," and "assignment" provisions.

There is, as the Court acknowledges, no legislative history to explain the meaning of the "anticipation" restraint in the

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to make a statement about substantive property rights that might generally affect the various federal benefit systems.

Such an intent is not to be found either in the 1977 definitional amendment to § 659, in which Congress expressly stated that "alimony" was not meant to include payments or transfers "in compliance with any community property settlement." On its face, the amendment, § 462 (c), simply states a legal truism. An alimony award is entirely distinct from a community property settlement. The only legislative history to explain the definitional amendment is the sponsor's statement that its intent was merely to clarify. 123 Cong. Rec. 12913 (1977). The Court acknowledges that before the amendment some decisions had construed the "alimony" exception to encompass community property awards. *Ante*, at 587 n. 20. One might infer, therefore, that the amendment had the limited purpose of restating the obvious in order to quell unnecessary litigation. Whatever its purpose, it is clear that § 462 (c) could not have been intended to insulate railroad retirement benefits from the reach of state community property law. Addressed as it is to a provision waiving the immunity of the Federal Government to suit, it can mean no more than that a claimant under a community property award cannot proceed directly against the United States.

Railroad Retirement Act. It can only be assumed, therefore, that Congress intended that it was to operate, as at common law,[5] to ensure that the trustees of the fund would not make or be compelled to make lump-sum payments inconsistent with the periodic benefits provided by statute. See Griswold, *supra,* § 512. Like the other terms of § 231m, its import is thus procedural, not substantive. Griswold, *supra,* § 512.

The Court suggests that the "anticipation" restraint conflicts with California community property law because state law permits a court, upon dissolution of a marriage, to consider the value of benefits that are not yet due and then to make the actual award of community property out of other assets that are currently available. The reasoning seems to be that if an employee cannot "anticipate" benefits by securing a lump-sum award, the employee's spouse is similarly prevented from "anticipating" a community property interest by receiving assets of equal value from the marital estate. This reasoning ignores the express wording of § 231m. The clause prohibits anticipation of "the payment" of a pension or annuity. A state judgment that considers the value of the pension interest acquired during marriage and satisfies that interest by ordering the transfer of other community assets does not anticipate a pension "payment." There is, accordingly, no conflict between such a judgment and § 231m, for it has no impact at all upon the timing of payments to the em-

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[5] This type of restraint is thought to have been developed in the late 18th century as a means of protecting the separate equitable estate of a married woman. Hart, The Origin of the Restraint Upon Anticipation, 40 L. Q. Rev. 221 (1924). It prevented the trustee of her estate from making income payments before they were due or from honoring transfers by the beneficiary that would have had the effect of forcing such payments and thereby dissolving the trust established for her protection. *Ibid.* In the modern spendthrift trust, it has the similar function of preventing the trustee from making lump-sum payments in derogation of the periodic payments or time restrictions provided for in the trust instrument. See E. Griswold, Spendthrift Trusts § 512 (2d ed. 1947).

ployee and is therefore not at all incompatible with the distribution system established by Congress.

The Court also suggests that the "no anticipation" provision of § 231m was designed to preserve congressional "freedom to amend the Act." Yet it has never been established that Congress is free to terminate or reduce the benefits afforded by the railroad retirement system. Unlike the Social Security Act, see *Flemming* v. *Nestor,* 363 U. S. 603, 608–611, the Railroad Retirement Act contains no express provision permitting Congress to terminate it. Indeed, the legislative history of the Act suggests that it was established to provide security to railroad workers whose benefits under private pension programs had frequently been treated as discretionary payments. See H. R. Rep. No. 1711, 74th Cong., 1st Sess., 10–11 (1935). The drafters of the original legislation expressly stated that one of the important features of any retirement plan was a guarantee to the worker of an "absolute" right to receive the pension. *Id.,* at 11. It thus seems obvious that the "no anticipation" provision—included as it was in the 1935 version of the Act—had no relationship whatever to any possibility that Congress might try to terminate or reduce the benefits payable under the Act. Whether Congress could ever do so is an open question, a question neither presented nor properly to be decided in the present case.

Finally, the Court suggests that "anticipation" would harm an employee who leaves the industry before retirement and thus is unable to "regain" the amount of the offset. But this difficulty becomes wholly imaginary when the nature of the community property award is understood. A spouse receives only one-half the value of the pension interest attributable to work performed by the other spouse *during* the marriage. The "current connection with industry" requirement for supplemental benefits referred to by the Court obtains at the time the employee becomes eligible for current pension payments. If the employee is still working at the time the marriage is

dissolved, a California court would be obligated to give heed to the benefit provisions of the Act in appraising the value of the interest acquired by the employee's spouse during the marriage. And surely occasional problems in assessing the precise value of the community property—problems with which the courts of California routinely deal—cannot provide a basis for the Court's finding of pre-emption.[6]

IV

The Railroad Retirement Act, unlike the statutes involved in *Wissner* v. *Wissner* and *Free* v. *Bland*, thus contains no evidence that Congress intended to withdraw the benefits at issue from the reach of California community property law. Believing, as I do, that the pre-emption perceived by the Court is entirely of its own making, I respectfully dissent.

[6] The Court also observes that "anticipation" of a community property interest would harm the employee to the extent that the award to the employee's spouse might exceed the lump-sum benefits payable to the employee's heirs should the employee die before collecting benefits. But survivor benefits payable under the Act are wholly distinct from the community property interest involved here.

Reporter's Note

The next page is purposely numbered 801. The numbers between 603 and 801 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 END OF OCTOBER TERM, 1977 THROUGH FEBRUARY 1, 1979

Cases Dismissed in Vacation

No. 77–1674. Field *v.* United States. C. A. 2d Cir. Certiorari dismissed July 18, 1978, under this Court's Rule 60. Reported below: 578 F. 2d 1371.

No. 77–6714. Nicholas *v.* United States. C. A. 2d Cir. Certiorari dismissed July 18, 1978, under this Court's Rule 60. Reported below: 578 F. 2d 1370.

No. 77–1676. McLouth Steel Corp. *v.* Jewell Coal & Coke Co. C. A. 6th Cir. Certiorari dismissed July 21, 1978, under this Court's Rule 60. Reported below: 570 F. 2d 594.

No. 77–1862. Israel, Warden *v.* Hughes. C. A. 7th Cir. Certiorari dismissed August 3, 1978, under this Court's Rule 60. Reported below: 576 F. 2d 1250.

No. 78–94. Tenneco Oil Co. et al. *v.* Federal Energy Regulatory Commission. C. A. 5th Cir. Certiorari dismissed August 7, 1978, under this Court's Rule 60. Reported below: 571 F. 2d 834.

No. 78–81. Van Wyk *v.* Marcoux et al. C. A. 8th Cir. Certiorari dismissed August 24, 1978, under this Court's Rule 60. Reported below: 572 F. 2d 651.

No. 78–145. Banner, Commissioner of Patents and Trademarks *v.* Chakrabarty. C. C. P. A. Certiorari dismissed August 25, 1978, under this Court's Rule 60. Reported below: 571 F. 2d 40.

No. 77–1587. Construction Aggregates Corp. *v.* Morvant, Administratrix. C. A. 6th Cir. Certiorari dismissed August 30, 1978, under this Court's Rule 60. Reported below: 570 F. 2d 626.

No. 77–6766. McKie *v.* Alaska. Sup. Ct. Alaska. Certiorari dismissed September 6, 1978, under this Court's Rule 60.

No. 78–5286. Gonzalez *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari dismissed September 20, 1978, under this Court's Rule 60. Reported below: 63 App. Div. 2d 686, 404 N. Y. S. 2d 933.

No. 78–5190. Dean *v.* Superior Court of California, County of Riverside (California, Real Party in Interest). Ct. App. Cal., 4th App. Dist. Certiorari dismissed September 26, 1978, under this Court's Rule 60.

October 2, 1978

Affirmed on Appeal

No. 77–1570. Millis et al. *v.* High Drive Water District et al. Affirmed on appeal from D. C. Colo.

No. 78–199. Mortgage Growth Investors *v.* Clow Corp. et al. Affirmed on appeal from D. C. E. D. Mich.

Appeals Dismissed

No. 77–1340. Smith *v.* Gummo et al. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument.

No. 77–1373. Maine Central Railroad Co. *v.* Halperin et al. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Powell would note probable jurisdiction and set case for oral argument. Reported below: 381 A. 2d 8.

No. 77–1036. LARSEN, ACTING COMMISSIONER OF LABOR OF THE VIRGIN ISLANDS *v.* LOCKHART. Appeal from C. A. 3d Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 563 F. 2d 617.

No. 77–1568. MISSOURI CHURCH OF SCIENTOLOGY *v.* STATE TAX COMMISSION OF MISSOURI ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 560 S. W. 2d 837.

No. 77–1584. ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., ET AL. *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 43 N. Y. 2d 873, 374 N. E. 2d 363.

No. 77–1723. ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC. *v.* ALCOHOLIC BEVERAGES CONTROL COMMISSION; and ARISTOCRATIC RESTAURANT OF MASSACHUSETTS, INC. *v.* ALCOHOLIC BEVERAGES CONTROL COMMISSION. Appeals from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 374 Mass. 547, 374 N. E. 2d 1181 (first case); 374 Mass. 564, 374 N. E. 2d 1192 (second case).

No. 77–1737. ROLOFF EVANGELISTIC ENTERPRISES, INC., ET AL. *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 556 S. W. 2d 856.

No. 77–1743. DOWNTOWN L. A. IMPORTS ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 77–1775. RENTAR INDUSTRIAL DEVELOPMENT CORP. ET AL. *v.* CARL A. MORSE, INC. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 43 N. Y. 2d 952, 375 N. E. 2d 409.

No. 77–1834. LANG *v.* CITY OF PHILADELPHIA ET AL. Appeal from Commw. Ct. Pa. dismissed for want of substantial federal question. Reported below: 31 Pa. Commw. 537, 377 A. 2d 849.

No. 77–6713. KEYES *v.* OKLAHOMA DEPARTMENT OF INSTITUTIONS, SOCIAL AND REHABILITATIVE SERVICES ET AL. Appeal from Sup. Ct. Okla. dismissed for want of substantial federal question. Reported below: 574 P. 2d 1026.

No. 78–28. SANKO ET AL. *v.* CARLSON, CLERK, KANE COUNTY CIRCUIT COURT. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: See 69 Ill. 2d 246, 371 N. E. 2d 613.

No. 78–39. ZRENCHIK ET AL. *v.* PEOPLES' COMMUNITY HOSPITAL AUTHORITY. Appeal from Ct. App. Mich. dismissed for want of substantial federal question.

No. 78–57. FIVE-R EXCAVATING, INC. *v.* DEPARTMENT OF REVENUE OF PENNSYLVANIA; and J & R EQUIPMENT RENTAL CO., INC. *v.* DEPARTMENT OF REVENUE OF PENNSYLVANIA. Appeals from Sup. Ct. Pa. dismissed for want of substantial federal question.

No. 78–73. WRIGHT, DBA TOUCH OF CLASS MASSAGE PARLOR, ET AL. *v.* CITY OF INDIANAPOLIS ET AL. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 267 Ind. 471, 371 N. E. 2d 1298.

No. 78–101. ROBERTS *v.* ROBERTS. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 200 Neb. 256, 263 N. W. 2d 449.

No. 78–104. JOHNSON ET AL. *v.* ATTORNEY GENERAL OF MARYLAND ET AL. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 282 Md. 274, 385 A. 2d 57.

No. 78–138. WESTINGHOUSE ELECTRIC CORP. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 478 Pa. 164, 386 A. 2d 491.

No. 78–5001. FRANCIS *v.* MASSACHUSETTS; and O'CLAIR *v.* MASSACHUSETTS. Appeals from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 374 Mass. 750, 374 N. E. 2d 1207 (first case); 374 Mass. 759, 374 N. E. 2d 1212 (second case).

No. 78–5081. STEIN *v.* TEXAS POWER & LIGHT CO. ET AL. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 77–1592. CAMBRON ET AL. *v.* CANAL INSURANCE CO. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 240 Ga. 708, 242 S. E. 2d 32.

No. 77–1631. RIDGILL ET UX. *v.* RESTON HOMEOWNERS ASSN. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–1642. CHERAMIE ET AL. *v.* GUIDRY ET UX. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 354 So. 2d 1280.

No. 77–1726. APPLEMAN *v.* FUREDY, TRUSTEE IN BANKRUPTCY. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 567 F. 2d 967.

No. 77–1825. ARTHUR ET AL. *v.* CLAY COMMUNITY SCHOOLS ET AL.; and TOLIN ET AL. *v.* SOUTHWEST PARKE COMMUNITY SCHOOL CORP. ET AL. Appeals from Ct. App. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied.

No. 77–1854. SIGETY ET UX. *v.* HYNES, DEPUTY ATTORNEY GENERAL OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 App. Div. 2d 1143, 403 N. Y. S. 2d 609.

No. 77–6671. SAFFIOTI *v.* NEW YORK. Appeal from C. A. 2d 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: 573 F. 2d 1295.

No. 77–6745. CONRAD *v.* FIRST STATE BANK & TRUST CO. ET AL. Appeal from D. C. E. D. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 446 F. Supp. 1088.

No. 77–6837. CONRAD *v.* WANGELIN, U. S. DISTRICT JUDGE, ET AL. Appeal from D. C. E. D. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 441 F. Supp. 345.

No. 77–6900. MACKEY *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: 357 So. 2d 186.

No. 77–6914. DAVIS *v.* LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OF MINNESOTA ET AL. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 264 N. W. 2d 371.

No. 77–6988. BLOCH ET UX. *v.* GENERAL MOTORS ACCEPTANCE CORP. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 App. Div. 2d 1140, 403 N. Y. S. 2d 164.

No. 77–6999. WAYLAND *v.* ESSEX COUNTY BANK & TRUST CO. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–7003. WAYLAND *v.* ESSEX COUNTY NEWSPAPERS, INC. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 577 F. 2d 721.

No. 78–74. THEIS *v.* CITY OF SAN ANTONIO, BY AND THROUGH WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO. Appeal from Ct. Civ. App. Tex., 12th 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: 554 S. W. 2d 278.

No. 78–5091. KELLEY *v.* JOHNSON ET UX. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 136 Vt. 628 and 629, 388 A. 2d 31 and 32.

No. 78–5092. ALEXANDER *v.* DELAWARE STATE BAR ASSN. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 386 A. 2d 652.

No. 78–5117. HEMMERLE ET AL. *v.* MCDOWELL. Appeal from Dist. Ct. App. Fla., 2d 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: 346 So. 2d 1255.

No. 78–5131. IN RE MORRIS. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 270 S. C. 308, 241 S. E. 2d 911.

No. 77–1621. LIGGETT *v.* KANSAS EX REL. SCHNEIDER, ATTORNEY GENERAL OF KANSAS, ET AL. Appeal from Sup. Ct. Kan. Motion of American Physicians & Surgeons, Inc., for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 223 Kan. 610, 576 P. 2d 221.

No. 77–1670. SUFFOLK OUTDOOR ADVERTISING CO., INC. *v.* HULSE ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 43 N. Y. 2d 483, 373 N. E. 2d 263.

No. 78–5185. JENKINS *v.* DISTRICT OF COLUMBIA. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 77–1671. MODJESKA SIGN STUDIOS, INC. *v.* BERLE, COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 43 N. Y. 2d 468, 373 N. E. 2d 255.

No. 77–1784. VETERANS OF FOREIGN WARS, POST 4264, ET AL. *v.* CITY OF STEAMBOAT SPRINGS. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 195 Colo. 44, 575 P. 2d 835.

No. 77–6604. LITTLE *v.* NEBRASKA. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 199 Neb. 772, 261 N. W. 2d 847.

No. 77–6635. WEEKS *v.* ILLINOIS. Appeal from App. Ct. Ill., 4th Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 52 Ill. App. 3d 1101, 372 N. E. 2d 163.

No. 77–6749. CARTER *v.* DAWSON, SECRETARY, DEPARTMENT FOR HUMAN RESOURCES OF KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. *Quern* v. *Mandley*, 436 U. S. 725 (1978). Reported below: 561 S. W. 2d 686.

Certiorari Granted—Vacated and Remanded

No. 77–792. RUBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his supplemental brief filed August 21, 1978. MR. JUSTICE REHNQUIST dissents. Reported below: 559 F. 2d 975.

No. 77–1599. COOK *v.* MUSKINGUM WATERSHED CONSERVANCY DISTRICT. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monell* v. *Department of Social Services of New York City,* 436 U. S. 658 (1978). Reported below: 573 F. 2d 1310.

No. 77–1663. SOCIETY FOR THE WELFARE OF ANIMALS, INC. *v.* WALRATH. Dist. Ct. App. Fla., 3d Dist. Motion of Humane Society of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977). Reported below: 343 So. 2d 934.

No. 77–6536. HAMMONS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed July 11, 1978. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 569 F. 2d 1155.

No. 77–6992. BISHOP *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case is remanded for further proceedings. See *Lockett* v. *Ohio,* 438 U. S. 586 (1978). Reported below: 118 Ariz. 263, 576 P. 2d 122.

No. 77–6910. DONOHO *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed September 5, 1978. MR. JUSTICE REHNQUIST dissents. Reported below: 575 F. 2d 718.

No. 77–6912. MILLER *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Taylor* v. *Kentucky*, 436 U. S. 478 (1978). Reported below: 563 S. W. 2d 10.

No. 77–7002. ADAMS *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case is remanded for further proceedings. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978). Reported below: 53 Ohio St. 2d 223, 374 N. E. 2d 137.

No. 78–87. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* EAST BAY MUNICIPAL UTILITY DISTRICT ET AL. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California* v. *United States*, 438 U. S. 645 (1978). Reported below: 20 Cal. 3d 327, 572 P. 2d 1128.

No. 78–5008. NABOZNY *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case is remanded for further proceedings. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978). Reported below: 54 Ohio St. 2d 195, 375 N. E. 2d 784.

No. 78–44. PEMBERTON *v.* SPERANDIO. Sup. Ct. Mo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kulko* v. *Superior Court of California*, 436 U. S. 84 (1978). Reported below: 568 S. W. 2d 935.

Miscellaneous Orders

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of Donald D. Stark for leave to file a brief as *amicus curiae* granted. [For earlier order herein, see, *e. g.*, 438 U. S. 912.]

No. 77, Orig. TENNESSEE *v.* ARKANSAS. Motion for leave to file bill of complaint granted and defendant allowed 60 days in which to answer.

No. 78, Orig. CALIFORNIA *v.* ARIZONA ET AL. Motion for leave to file bill of complaint set for oral argument in due course.

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. Motion for leave to file bill of complaint granted and defendant allowed 60 days in which to answer.

No. 76–1310. HOUCHINS, SHERIFF *v.* KQED, INC., ET AL., 438 U. S. 1. Motion to retax costs denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 77–120. DOUGHERTY COUNTY, GEORGIA, BOARD OF EDUCATION, ET AL. *v.* WHITE. D. C. M. D. Ga. [Probable jurisdiction noted, 435 U. S. 921.] Motion of appellee for divided argument granted.

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.] Motions of Harness Horsemen International, Inc., and Horsemen's Benevolent & Protective Assn. for leave to file briefs as *amici 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 of Gray Panthers and PROD et al. for leave to file briefs as *amici curiae* granted. Motions of AFL–CIO, the Solicitor General, and Stephen W. Holohan for leave to file briefs as *amici curiae* denied. Motion of American Bar Assn. for reconsideration of the July 3, 1978, order [438 U. S. 913] denying leave to file a brief as *amicus curiae* denied.

No. 77–952. GROUP LIFE & HEALTH INSURANCE CO., AKA BLUE SHIELD OF TEXAS, ET AL. *v.* ROYAL DRUG CO., INC., DBA ROYAL PHARMACY OF CASTLE HILLS ET AL., ET AL. C. A. 5th Cir. [Certiorari granted, 435 U. S. 903.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Petitioners also allotted an additional 15 minutes for oral argument.

No. 77–1202. MICHIGAN *v.* DORAN. Sup. Ct. Mich. [Certiorari granted, 435 U. S. 967.] Further consideration of suggestion of mootness deferred to hearing of case on the merits.

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, 436 U. S. 916.] Motions of Minnesota AFL–CIO, Conference of State Bank Supervisors, Consumer Bankers Assn., and First National Bank of Chicago for leave to file briefs as *amici curiae* granted.

No. 77–1659. CHASE MANHATTAN BANK, N. A. *v.* FINANCE ADMINISTRATION OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y.;

No. 77–1694. BENJAMIN FRANKLIN FEDERAL SAVINGS & LOAN ASSN. *v.* DERENCO, INC. Sup. Ct. Ore.;

No. 77–1866. BOSWELL ET AL. *v.* GEORGIA POWER CO. ET AL. C. A. 5th Cir.; and

No. 78–129. BRITISH EUROPEAN AIRWAYS *v.* BENJAMINS ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 77–1819. VAUGHN ET AL. *v.* VERMILION CORP. Ct. App. La., 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 78–5040. SCHAFFER *v.* ROBINSON, WARDEN; and

No. 78–5152. HOOD *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 77–6458. CARTER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS;

No. 77–6663. REYNOLDS *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT;

No. 77–6810. ROBINSON *v.* BYRNE, U. S. DISTRICT JUDGE;

No. 77–6841. MORRIS *v.* LINCOLN NATIONAL LIFE INSURANCE CO.;

No. 77–6894. MOUNT *v.* HAIGHT, U. S. DISTRICT JUDGE, ET AL.;

No. 77–6918. MOUNT *v.* SIFTON, U. S. DISTRICT JUDGE;

No. 77–6965. BROWN *v.* UNITED STATES; and

No. 78–5196. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. Motions for leave to file petitions for writs of mandamus denied.

No. 78–5186. SHADD *v.* UNITED STATES BOARD OF PAROLE ET AL. Motion for leave to file petition for writ of habeas corpus and/or mandamus denied.

No. 77–6717. LEE *v.* FAIRCHILD ET AL., U. S. CIRCUIT JUDGES; and

No. 77–6831. MCDONALD *v.* LEATHERS, CLERK, SUPREME COURT OF TENNESSEE, ET AL. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 77–6922. KRIKMANIS *v.* UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or certiorari denied.

No. 77–6960. JENKINS *v.* WILKEY, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 77–1439. HUGHES *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. Probable jurisdiction noted. Reported below: 572 P. 2d 573.

No. 77–1609. TORRES *v.* PUERTO RICO. Appeal from Sup. Ct. P. R. Probable jurisdiction noted. Reported below: 106 P. R. R. 588.

No. 77–1844. CITY OF MOBILE, ALABAMA, ET AL *v.* BOLDEN ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 571 F. 2d 238.

No. 78–3. PARHAM *v.* HUGHES. Appeal from Sup. Ct. Ga. Probable jurisdiction noted. Reported below: 241 Ga. 198, 243 S. E. 2d 867.

Certiorari Granted

No. 77–1554. COUNTY COURT OF ULSTER COUNTY, NEW YORK, ET AL. *v.* ALLEN ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 568 F. 2d 998.

No. 77–1724. BURKS ET AL. *v.* LASKER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 567 F. 2d 1208.

No. 77–1511. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ELLIOTT ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 564 F. 2d 1219.

No. 77–1571. DELAWARE *v.* PROUSE. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 382 A. 2d 1359.

No. 77–1680. MICHIGAN *v.* DEFILLIPPO. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 80 Mich. App. 197, 262 N. W. 2d 921.

No. 77–1701. ROSE, WARDEN *v.* MITCHELL ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 570 F. 2d 129.

No. 77–1829. BELL, ATTORNEY GENERAL, ET AL. *v.* WOLFISH ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 573 F. 2d 118.

No. 77–1575. FEDERAL COMMUNICATIONS COMMISSION *v.* MIDWEST VIDEO CORP. ET AL.;

No. 77–1648. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 77–1662. NATIONAL BLACK MEDIA COALITION ET AL. *v.* MIDWEST VIDEO CORP. ET AL. C. A. 8th Cir. Motion of Consumers Union of the United States, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 571 F. 2d 1025.

No. 78–201. GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. *v.* INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 576 F. 2d 1274.

No. 77–1578. BROADCAST MUSIC, INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 77–1583. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Reported below: 562 F. 2d 130.

No. 77–1644. UNITED STATES *v.* CRITTENDEN, DBA CRITTENDEN TRACTOR CO. C. A. 5th Cir. Certiorari granted and case set for oral argument with No. 77–1359, *United States* v. *Kimbell Foods, Inc.* [certiorari granted, 436 U. S. 903]. Reported below: 563 F. 2d 678.

No. 77–1722. DALIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 575 F. 2d 1344.

No. 77–1652. FEDERAL ENERGY REGULATORY COMMISSION *v.* SHELL OIL CO. ET AL.; and

No. 77–1654. CONSUMER FEDERATION OF AMERICA, ENERGY POLICY TASK FORCE *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 566 F. 2d 536.

No. 77–1686. LEO SHEEP CO. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 570 F. 2d 881.

Certiorari Denied. (See also Nos. 77–1036, 77–1592, 77–1631, 77–1642, 77–1726, 77–1825, 77–1854, 77–6671, 77–6745, 77–6837, 77–6900, 77–6914, 77–6988, 77–6999, 77–7003, 78–74, 78–5091, 78–5092, 78–5117, 78–5131, and 78–5185, *supra.*)

No. 77–1181. DEPARTMENT OF HUMAN RESOURCES OF TEXAS *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 326.

No. 77–1234. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* COMPAGNIE NATIONALE AIR FRANCE. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1291.

No. 77–1332. CITY OF VANCEBURG, KENTUCKY *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 196, 571 F. 2d 630.

No. 77–1360. BRACY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 649.

No. 77–1383. WATTS ET AL. *v.* BAYOU LANDING, LTD., DBA FLORIDA BOOK MART, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1172.

No. 77–1402. ALBRECHTSEN ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. Reported below: 570 F. 2d 906.

No. 77–1409. BAKER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 2d 924.

No. 77–1417. MAURICE P. FOLEY CO., INC., ET AL. *v.* BALDERSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 186 U. S. App. D. C. 301, 569 F. 2d 132.

No. 77–1430. STRICKLAND ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 128, 240 S. E. 2d 579.

No. 77–1432. KILRAIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 979.

No. 77–1435. SMITH *v.* UNITED STATES AIR FORCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 957.

No. 77–1447. RETAIL STORE EMPLOYEES UNION, LOCAL 876, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 586.

No. 77–1455. PENNSYLVANIA *v.* POWELL. Sup. Ct. Pa. Certiorari denied.

No. 77–1457. LLOYD WOOD CONSTRUCTION CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 946, 566 F. 2d 1191.

No. 77–1466. BOSWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1338.

No. 77–1468. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 949.

No. 77–1470. DELTA AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 335, 574 F. 2d 546.

No. 77–1476. ATLANTIC PRODUCE CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 772.

No. 77–1486. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–1499. NORTH *v.* UNITED STATES;
No. 77–1500. WALKER *v.* UNITED STATES;
No. 77–1501. PAPPAS *v.* UNITED STATES; and
No. 77–1502. CRAIG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 455.

No. 77–1504. MARKERT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 513.

No. 77–1506. ZAZZARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 589.

No. 77–1507. CHEYENNE RIVER SIOUX TRIBE OF INDIANS *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 566 F. 2d 1085.

No. 77–1512. ESTATE OF RYAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 568 F. 2d 531.

No. 77–1513. TALSKY *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 68 Ill. 2d 579, 370 N. E. 2d 173.

No. 77–1514. GEORGIA-PACIFIC CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 354, 568 F. 2d 1316.

No. 77–1518. EDGEWATER HOSPITAL, INC., ET AL. *v.* BIO-ANALYTICAL SERVICES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 565 F. 2d 450.

No. 77–1520. UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 438.

No. 77–1528. NEW YORK STATE COMMISSION ON CABLE TELEVISION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 571 F. 2d 95.

No. 77–1523. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 573.

No. 77–1533. WILLIAMS ET VIR *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1044.

No. 77–1538. ABRAHAMS, AKA CARR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 2d 3.

No. 77–1539. EASTON *v.* UNITED STATES;
No. 77–1770. HOCKRIDGE *v.* UNITED STATES; and
No. 77–6908. PETRI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 752.

No. 77–1542. MAGGY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 560 F. 2d 1372.

No. 77–1550. RECREATIONAL PRODUCTS MARKETING, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–1551. NATIONAL COMMISSION ON EGG NUTRITION ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 157.

No. 77–1552. WEIDMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 572 F. 2d 1199.

No. 77–1559. UNION MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 570 F. 2d 382.

No. 77–1562. DRESSER INDUSTRIES, INC. *v.* BONHAM. C. A. 3d Cir. Certiorari denied. Reported below: 569 F. 2d 187.

No. 77–1565. AETNA CASUALTY & SURETY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 2d 1197.

No. 77–1566. SARGENT-WELCH SCIENTIFIC CO. *v.* VENTRON CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 701.

No. 77–1569. CATALDO ET UX. *v.* LAND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1288.

No. 77–1573. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* O'CONNOR, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–1574. DEKELAITA *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 350.

No. 77–1576. BROWNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 572 F. 2d 720.

No. 77–1577. WILLIAMS *v.* CLAYTOR, SECRETARY OF THE NAVY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 427, 574 F. 2d 638.

No. 77–1580. GIST ET AL. *v.* STAMFORD HOSPITAL DISTRICT ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 557 S. W. 2d 556.

No. 77–1582. WALLS *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 391.

No. 77–1585. STEPHENSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 584.

No. 77–1586. KEECH ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 36.

No. 77–1588. NASH ET AL. *v.* FARMERS NEW WORLD LIFE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 570 F. 2d 558.

No. 77–1589. OLIVETI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 638.

No. 77–1590. THOMPSON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WISCONSIN *v.* HOLY TRINITY COMMUNITY SCHOOL, INC. Sup. Ct. Wis. Certiorari denied. Reported below: 82 Wis. 2d 139, 262 N. W. 2d 210.

No. 77–1593. COX *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 17 Wash. App. 896, 566 P. 2d 935.

No. 77–1594. RATCLIFF *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–1595. COSDEN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 18 Wash. App. 213, 568 P. 2d 802.

No. 77–1597. GELINAS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 573 F. 2d 1285.

No. 77–1598. HAMMOND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 354 So. 2d 280.

No. 77–1600. GILLRING OIL CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1323.

No. 77–1601. PERRY ET AL. *v.* WILSON ET AL. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 58, 240 S. E. 2d 290.

No. 77–1603. DAUGHERTY *v.* CITY OF LONG BEACH, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 75 Cal. App. 3d 972, 142 Cal. Rptr. 593.

No. 77–1604. KANTOR *v.* DUNN, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 581.

No. 77–1607. JOHNSON, DRAKE & PIPER, INC. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 43 N. Y. 2d 677, 371 N. E. 2d 786.

No. 77–1608. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–1610. ALMAND *v.* UNITED STATES; and
No. 77–6758. VILLAREAL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: No. 77–1610, 565 F. 2d 927; No. 77–6758, 565 F. 2d 932.

No. 77–1612. STIRLING ET AL. *v.* UNITED STATES; and
No. 77–1761. PHILLIPS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 571 F. 2d 708.

No. 77–1614. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 400.

No. 77–1616. NELSON *v.* DEFENSE LOGISTICS AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–1617. LACKLEN *v.* CAMPBELL, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 240, 571 F. 2d 674.

No. 77–1622. WRIGHT ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 2d 153.

No. 77–1624. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE *v.* SEACOAST ANTI-POLLUTION LEAGUE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 572 F. 2d 872.

No. 77–1628. CELEBRITY, INC. *v.* A & B INSTRUMENT CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 11.

No. 77–1629. WILKES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 77–1630. MACK TRUCKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1302.

No. 77–1632. TRUCK DRIVERS LOCAL UNION No. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, HELPERS & WAREHOUSEMEN OF AMERICA *v.* BOHACK CORP. C. A. 2d Cir. Certiorari denied. Reported below: 567 F. 2d 237.

No. 77–1633. WEINSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 77–1634. SECURITY SAVINGS & LOAN ASSOCIATION OF DICKINSON, TEXAS *v.* CITY SAVINGS ASSN. Sup. Ct. Tex. Certiorari denied. Reported below: 560 S. W. 2d 930.

No. 77–1635. FICKLIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–1636. REED *v.* CITY OF LOS ANGELES ET AL. App. Ct. Cal., 2d App. Dist. Certiorari denied.

No. 77–1637. ROBINSON *v.* KUSPER, CLERK OF COOK COUNTY, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 69 Ill. 2d 374, 372 N. E. 2d 66.

No. 77–1638. CRANE ET AL. *v.* BARTH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1289.

No. 77–1639. HAMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–1640. CLARK EQUIPMENT CO. *v.* KELLER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 778.

No. 77–1641. GUISTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–1643. HOULTIN *v.* UNITED STATES; and
No. 77–6728. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1027.

No. 77–1646. JONES ET AL. *v.* FARMERS ALLIANCE MUTUAL INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 570 F. 2d 1384.

No. 77–1647. MCGIRR *v.* DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 43 N. Y. 2d 635, 374 N. E. 2d 123.

No. 77–1651. YOUNGSTOWN CARTAGE CO. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 294, 571 F. 2d 1243.

No. 77–1655. HOWELL *v.* THOMAS, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 469.

No. 77–1656. BIANCONE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 249 Pa. Super. 34, 375 A. 2d 743.

No. 77–1657. TEXAS EMPLOYERS' INSURANCE ASSN. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 766 and 569 F. 2d 874.

No. 77–1658. CRICCHI *v.* NABER ET AL. C. C. P. A. Certiorari denied. Reported below: 567 F. 2d 382.

No. 77–1660. ABLE CONTRACTORS, INC. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1055.

No. 77–1661. MARCH ET UX. *v.* ALLIS-CHALMERS CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 572.

No. 77–1664. SHELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 917.

No. 77–1666. WARMINSTER TOWNSHIP, PENNSYLVANIA *v.* PITRONE. C. A. 3d Cir. Certiorari denied. Reported below: 572 F. 2d 98.

No. 77–1667. MULLIGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 775.

No. 77–1668. TAYLOR *v.* PERGEAU. C. A. 9th Cir. Certiorari denied.

No. 77–1669. FAZIO ET UX. *v.* ZONING HEARING BOARD OF EAST MARLBOROUGH TOWNSHIP. Pa. Commw. Ct. Certiorari denied. Reported below: 32 Pa. Commw. 243, 378 A. 2d 1299.

No. 77–1672. FIRST NATIONAL BANK OF OREGON, TRUSTEE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 609, 571 F. 2d 21.

No. 77–1673. HASENSTAB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 2d 1035.

No. 77–1675. MARION CIRCUIT COURT OF MARION COUNTY, INDIANA, ET AL. *v.* INDIANA EX REL. PUBLIC SERVICE COMMISSION OF INDIANA ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 422, 370 N. E. 2d 690.

No. 77–1678. BUCUVALAS *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. —, 373 N. E. 2d 221.

No. 77–1683. UNITED TELEGRAPH WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 231, 571 F. 2d 665.

No. 77–1682. LISA-JET, INC. *v.* DUNCAN AVIATION, INC. C. A. 8th Cir. Certiorari denied. Reported below: 569 F. 2d 1044.

No. 77–1684. BROADUS *v.* LOTT, ADMINISTRATRIX. Sup. Ct. Miss. Certiorari denied. Reported below: 353 So. 2d 749.

No. 77–1685. ROCHE *v.* UNITED STATES; and
No. 78–5125. RAMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 2d 56.

No. 77–1689. LITTON SYSTEMS, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 195.

No. 77–1691. WAN SHIH HSIEH *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 569 F. 2d 1179.

No. 77–1692. RONWIN *v.* SUPREME COURT OF ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 77–1693. PELLITIERI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 749.

No. 77–1695. UNIFICATION CHURCH ET AL. *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 92, 581 F. 2d 870.

No. 77–1698. WESTERN PENNSYLVANIA MOTOR CARRIERS ASSN. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 249. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 2d 783.

No. 77–1699. DIEM *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–1700. WESTPORT TAXI SERVICE, INC., ET AL. *v.* ADAMS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 571 F. 2d 697.

No. 77–1702. KANSAS CITY SOUTHERN RAILWAY CO. ET AL. *v.* CITY OF SHREVEPORT ET AL. Sup. Ct. La. Certiorari denied. Reported below: 354 So. 2d 1362.

No. 77–1705. DUNGAN, TRUSTEE IN BANKRUPTCY *v.* MORGAN DRIVE-AWAY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 867.

No. 77–1706. JANICH BROS., INC. *v.* AMERICAN DISTILLING CO. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 848.

No. 77–1707. STARR ET AL. *v.* NIXON ET AL. C. A. 10th Cir. Certiorari before judgment denied.

No. 77–1708. BULLINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–1709. THOMAS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 77–1712. MARINA MANAGEMENT CORP. *v.* BREWER. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 43.

No. 77–1713. TAERGHODSI *v.* IMMIGRATION AND NATURALIZATION SERVICE; AND YOUSEFI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1154.

No. 77–1714. KIDDER *v.* ANDERSON ET AL. Sup. Ct. La. Certiorari denied. Reported below: 354 So. 2d 1306.

No. 77–1716. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 928.

No. 77–1718. CITY OF PHILADELPHIA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 802.

No. 77–1719. NOLAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 355 So. 2d 516.

No. 77–1720. STEWART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 1350.

No. 77–1721. LYSEK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 77–1725. COLECO INDUSTRIES, INC. *v.* BERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 567 F. 2d 569.

No. 77–1728. SHIFFMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 576 F. 2d 703.

No. 77–1729. UNITED STATES *v.* KELLEY ET VIR. C. A. 2d Cir. Certiorari denied. Reported below: 568 F. 2d 259.

No. 77–1730. CLINTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 574 F. 2d 464.

No. 77–1731. DAVISTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–1732. AGNEW *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 294 N. C. 382, 241 S. E. 2d 684.

No. 77–1734. WARDEN, WEST VIRGINIA PENITENTIARY *v.* JONES. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 241 S. E. 2d 914.

No. 77–1738. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1383.

No. 77–1739. RYAN ET AL. *v.* DONNELLY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 348 So. 2d 970.

No. 77–1740. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 495.

No. 77–1741. HOLLADAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1018.

No. 77–1742. STATE TAX COMMISSION, DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK *v.* HOLLY S. CLARENDON TRUST. Ct. App. N. Y. Certiorari denied. Reported below: 43 N. Y. 2d 933, 374 N. E. 2d 1242.

No. 77–1744. BARNES, COMMISSIONER OF CORPORATIONS OF CALIFORNIA *v.* HEWLETT-PACKARD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 502.

No. 77–1745. GDOWIK *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 352 So. 2d 183.

No. 77–1746. FAYER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 741.

No. 77–1747. NATIONAL LAND FOR PEOPLE, INC. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–1748. MCCULLOCH GAS PROCESSING CORP. *v.* CANADIAN HIDROGAS RESOURCES, LTD., ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 577 F. 2d 712.

No. 77–1749. PEREZ *v.* BORCHERS, DISTRICT ATTORNEY, 49TH JUDICIAL DISTRICT, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 285.

No. 77–1750. MICHIGAN NATIONAL BANK *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied.

No. 77–1751. LACEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1371.

No. 77–1752. RAUCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 706.

No. 77–1753. SLIDELL FORD TRACTOR, INC. *v.* FORD MOTOR CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 947.

No. 77–1754. WILDLIFE PRESERVES, INC. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 771.

No. 77–1755. MERCER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 564 F. 2d 1317.

No. 77–1757. HEATH TEC DIVISION/SAN FRANCISCO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1367.

No. 77–1759. M. J. KELLY CO. ET AL. *v.* CIPRA, INC. C. A. 10th Cir. Certiorari denied.

No. 77–1760. DILLON MATERIALS HANDLING, INC. *v.* ALBION INDUSTRIES, A DIVISION OF KING-SEELEY THERMOS CO. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 1299.

No. 77–1762. THOMPSON *v.* SHAW ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 582.

No. 77–1763. SUTTON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 77–1766. LINCOLN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 315, 580 F. 2d 578.

No. 77–1764. McLAUGHLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–1768. THOMAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 562 S. W. 2d 240.

No. 77–1769. EASTERN SCIENTIFIC CO. *v.* WILD HEERBRUGG INSTRUMENTS, INC. C. A. 1st Cir. Certiorari denied. Reported below: 572 F. 2d 883.

No. 77–1771. LUSTGARTEN *v.* BAKER, ADMINISTRATOR, HIGHLAND DISTRICT HOSPITAL, ET AL. Ct. App. Ohio, Highland County. Certiorari denied.

No. 77–1772. KAHAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 923.

No. 77–1773. PRUNE BARGAINING ASSN. ET AL. *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 1132.

No. 77–1774. FORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–1776. BEARDSLEE ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 562 F. 2d 1016.

No. 77–1777. PELTZMAN *v.* AMERICAN RADIO ASSN. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 77–1778. GUIFFRE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 2d 126.

No. 77–1781. RABCO METAL PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 566 F. 2d 1182.

No. 77–1782. ARTHUR ANDERSEN & CO. *v.* OHIO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 570 F. 2d 1370.

No. 77–1787. GIACALONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 328.

No. 77–1789. SATTERWHITE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 560 S. W. 2d 697.

No. 77–1791. BARDWELL ET AL. *v.* SPRING WOODS BANK. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1153.

No. 77–1793. CITY OF WARREN ET AL. *v.* KELLY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 740.

No. 77–1795. SVENSKA ORIENT LINEN *v.* TEN. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 772.

No. 77–1796. METRO CLUB, INC. *v.* METRO PASSBOOK, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 582.

No. 77–1797. DICARLO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 2d 952.

No. 77–1798. PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 571 F. 2d 359.

No. 77–1799. UNITED FEDERATION OF TEACHERS WELFARE FUND *v.* STATE HUMAN RIGHTS APPEAL BOARD ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 826, 398 N. Y. S. 2d 775.

No. 77–1800. SUPERIOR OIL CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 971.

No. 77–1801. RITTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1331.

No. 77–1802. ARMS ET UX. *v.* WATSON ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 263 N. W. 2d 610.

No. 77–1803. DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA *v.* BONANNI SHIP SUPPLY, INC. Sup. Ct. Fla. Certiorari denied. Reported below: 356 So. 2d 308.

No. 77–1804. THOMSON *v.* ONSTAD, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 77–1805. LEGRAND *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 815, 402 N. Y. S. 2d 209.

No. 77–1807. BURGIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1045.

No. 77–1808. GENERAL INSURANCE COMPANY OF AMERICA *v.* OKLAHOMA CITY HOUSING AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 571 F. 2d 1140.

No. 77–1811. ALLIED FIDELITY CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 572 F. 2d 1190.

No. 77–1812. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–1813. VON LUETZOW *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 2d 346.

No. 77–1814. PENNSYLVANIA *v.* SMITH. Super. Ct. Pa. Certiorari denied. Reported below: 250 Pa. Super. 436, 378 A. 2d 1015.

No. 77–1815. PAYNE ET AL. *v.* TRAVENOL LABORATORIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 895.

No. 77–1816. DiGilio et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 725 and 728.

No. 77–1817. In re McPartlin. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 77–1820. Interstate Natural Gas Association of America et al. *v.* Federal Energy Regulatory Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 426, 574 F. 2d 637.

No. 77–1821. Davis *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 576 F. 2d 1065.

No. 77–1823. Cook *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 281.

No. 77–1827. Flickinger *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1349.

No. 77–1828. Union Pacific Railroad Co. et al. *v.* Cohn et al. C. A. 8th Cir. Certiorari denied. Reported below: 572 F. 2d 650.

No. 77–1830. Haskin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 77–1836. Tidmore *v.* City of Birmingham. Ct. Crim. Ala. Certiorari denied. Reported below: 356 So. 2d 231.

No. 77–1838. Save Our Cemeteries, Inc., et al. *v.* Archdiocese of New Orleans, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 320.

No. 77–1839. Decaturville Sportswear Co., Inc., et al. *v.* National Labor Relations Board et al. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 929.

No. 77–1837. AVANT, INC. *v.* POLAROID CORP. C. A. 1st Cir. Certiorari denied. Reported below: 572 F. 2d 889.

No. 77–1840. MURPHY *v.* SMITH, AKA DAVENPORT, ADMINISTRATRIX. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 77–1841. TORO *v.* MALCOLM, CORRECTIONS COMMISSIONER, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 44 N. Y. 2d 146, 375 N. E. 2d 739.

No. 77–1843. HOLSHOUSER ET AL. *v.* BOLDING ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 575 F. 2d 461.

No. 77–1847. BANGOR & AROOSTOOK RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 574 F. 2d 1096.

No. 77–1850. GRACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 77–1851. VERDONCK *v.* FREEDING, DBA FREEDING DISPOSAL, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 56 Ill. App. 3d 575, 371 N. E. 2d 1109.

No. 77–1852. OSBORN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 53 Ill. App. 3d 312, 368 N. E. 2d 608.

No. 77–1853. MAY DEPARTMENT STORES CO. *v.* VETERANS' ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 572 F. 2d 1275.

No. 77–1855. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 77–1856. WOODFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1046.

No. 77–1858. BEAVER ET AL. *v.* ALANIZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 657.

No. 77–1857. NORTH BY NORTHWEST CIVIC ASSN., INC., ET AL. *v.* CATES ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 241 Ga. 39, 243 S. E. 2d 32.

No. 77–1864. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1339.

No. 77–1869. ELI LILLY & Co. *v.* SMITHKLINE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 575 F. 2d 1056.

No. 77–6155. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6375. MARTIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–6396. MATTISON *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 576.

No. 77–6398. MASSEY *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 1173.

No. 77–6403. TREADWAY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 558 S. W. 2d 646.

No. 77–6405. MILLER *v.* HARVEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 566 F. 2d 879.

No. 77–6407. MCCURRY *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–6418. PISANI *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 352 So. 2d 1043.

No. 77–6434. CORTEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 1066, 399 N. Y. S. 2d 158.

No. 77–6442. GREER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6473. MARTIN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 223 Kan. clxix, 573 P. 2d 612.

No. 77–6480. REDDY ET AL. *v.* JONES, SECRETARY, DEPARTMENT OF CORRECTION OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 572 F. 2d 979.

No. 77–6493. TAPIA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 77–6496. HERRERA *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 77–6508. DEASON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 56, 562 S. W. 2d 79.

No. 77–6510. WILSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 281 Md. 640, 382 A. 2d 1053.

No. 77–6511. COOK *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 281 Md. 665, 381 A. 2d 671.

No. 77–6519. GRIFFIN *v.* CRUMP. C. A. 10th Cir. Certiorari denied.

No. 77–6522. CHAMBLISS *v.* FOOTE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1015.

No. 77–6532. OLSON *v.* ALLEN, JUDGE. Sup. Ct. Kan. Certiorari denied.

No. 77–6537. SPEARS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 568 F. 2d 799.

No. 77–6541. STILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–6573. THRASHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 894.

No. 77–6574. YANNI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1300.

No. 77–6594. REGAN *v.* CALIFORNIA; and
No. 77–6598. CARR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6599. RIGGS *v.* FLAMM, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1311.

No. 77–6600. SATTERFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 687.

No. 77–6602. DESKINS *v.* BORDENKIRCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 740.

No. 77–6603. WILSON *v.* UNITED STATES; and
No. 77–6605. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 560 F. 2d 861.

No. 77–6610. COULSTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–6612. BECKER *v.* UNITED STATES; and
No. 77–6646. BECKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 914.

No. 77–6615. THWEATT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 77–6621. ARNOLD *v.* HOGAN, WARDEN. Ct. App. D. C. Certiorari denied.

No. 77–6624. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 1343.

No. 77–6625. PAYNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 77–6641. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 77–6644. MINNIFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6651. INDIAN BOY X *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 565 F. 2d 585.

No. 77–6652. SMITH ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6654. THOMAS *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6661. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 344.

No. 77–6662. SHELBY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 971.

No. 77–6666. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 1215.

No. 77–6667. TOWNES *v.* COLEMAN, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1306.

No. 77–6675. INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX *v.* GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 1368.

No. 77–6676. HILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1301.

No. 77–6679. HART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 77–6683. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 583.

No. 77–6684. WELCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 1359.

No. 77–6685. EVERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 77–6689. YELARDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 567 F. 2d 863.

No. 77–6692. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 574 F. 2d 505.

No. 77–6694. WILLIAMS *v.* UNITED STATES; and
No. 78–5027. MCGRAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 2d 388.

No. 77–6696. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1298.

No. 77–6698. IMBRUGLIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 564 F. 2d 87.

No. 77–6699. LUDWIG *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 18 Wash. App. 50, 566 P. 2d 946.

No. 77–6704. MONTGOMERY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 457.

No. 77–6710. STRICKLAND *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 275.

No. 77–6711. BRAGG *v.* MID-AMERICA FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 347.

No. 77–6712. BRIDGES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 381 A. 2d 1073.

No. 77–6718. CARTER *v.* STETSON, SECRETARY OF THE AIR FORCE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–6721. PAPRSKAR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1277.

No. 77–6723. PIERRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 77–6724. BARKET *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 356 So. 2d 263.

No. 77–6725. LEE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1365.

No. 77–6726. LIPSCOMB *v.* AMERICAN EXPRESS CO. Ct. App. Mich. Certiorari denied.

No. 77–6729. HAWTHORNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6730. MCKINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6731. BATTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 77–6733. HALLMAN *v.* UNITED STATES; and
No. 77–6742. DIGIOVANNI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–6734. GUARIN *v.* CLELAND, ADMINISTRATOR, VETERANS' AFFAIRS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 77–6735. HUGHES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 77–6736. MUSTACCHIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 566 F. 2d 1170.

No. 77–6738. JONES *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–6739. WAITES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 384.

No. 77–6740. JORGENSEN ET AL. *v.* CUPP, PENITENTIARY SUPERINTENDENT. Ct. App. Ore. Certiorari denied. Reported below: 31 Ore. App. 157, 570 P. 2d 86.

No. 77–6746. CARTER *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 414.

No. 77–6748. JONES *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–6750. GRACE *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 507.

No. 77–6751. GLENN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 890, 402 N. Y. S. 2d 700.

No. 77–6753. THOMAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 354 So. 2d 372.

No. 77–6755. BAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1370.

No. 77–6756. CANNEY *v.* WAINWRIGHT, DIRECTOR, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1365.

No. 77–6757. STEWART ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 77–6759. O'LEARY *v.* PALMER ET AL. Ct. App. Ohio, Summit County. Certiorari denied.

No. 77–6760. BALDARRAMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 560.

No. 77–6761. BROWN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 77–6762. SPEAR *v.* HOGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 77–6763. DORROUGH ET AL. *v.* MULLIKIN, ASSOCIATE WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 187.

No. 77–6764. WILSON *v.* WILLOWBROOK, INC. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1154.

No. 77–6765. SMITH *v.* DODSON, SUPERINTENDENT OF UNIT #11, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 577.

No. 77–6767. PEACOCK *v.* COX ET VIR. Ct. App. Ga. Certiorari denied. Reported below: 143 Ga. App. 762, 240 S. E. 2d 97.

No. 77–6770. HOCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6771. CLEVELAND *v.* UNITED STATES;
No. 77–6773. TANNER *v.* UNITED STATES; and
No. 77–6938. SWAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 334.

No. 77–6772. UNDERWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6775. RAU *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6777. FREEMAN ET AL. *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 570 F. 2d 813.

No. 77–6778. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 77–6779. WEBER *v.* OHIO. Ct. App. Ohio, Medina County. Certiorari denied.

No. 77–6780. CORBITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–6781. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6783. K. G. W. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 251, 240 S. E. 2d 755.

No. 77–6784. TUCKER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 118 Ariz. 76, 574 P. 2d 1295.

No. 77–6785. STEVENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6787. DALTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6788. HARGROVE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 60 App. Div. 2d 636, 400 N. Y. S. 2d 184.

No. 77–6789. ROBERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 319.

No. 77–6792. MADDOX *v.* INTERNAL REVENUE SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 562 F. 2d 1259.

No. 77–6793. PETERSON *v.* MOORE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6794. PALASCHAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 77–6795. JONES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 44 N. Y. 2d 76, 375 N. E. 2d 41.

No. 77–6797. PAYTON *v.* PAYTON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 270 S. C. 275, 241 S. E. 2d 901.

No. 77–6799. PEREIRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 103.

No. 77–6801. BRAWER *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1301.

No. 77–6802. OLSON *v.* RAINES ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6804. RICHARDS *v.* BUTLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 77–6805. SIMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 744.

No. 77–6806. SMITH *v.* ROGERS MEMORIAL HOSPITAL, NOW CAPITOL HILL HOSPITAL. Ct. App. D. C. Certiorari denied. Reported below: 382 A. 2d 1025.

No. 77–6807. WYATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 77–6808. STINSON *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 77–6811. FRANKLIN *v.* CROSBY TYPESETTING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1098.

No. 77–6812. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 506.

No. 77–6813. ALONZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 1384.

No. 77–6815. SANDERS *v.* WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 77–6816. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 263.

No. 77–6818. BERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6820. PETERS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 241 Ga. 152, 243 S. E. 2d 883.

No. 77–6821. LANDRUM *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 77–6822. RIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1264.

No. 77–6823. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 571 F. 2d 589.

No. 77–6824. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 77–6825. SHAVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 578.

No. 77–6826. DANCY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6827. LOWENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 77–6828. CLARK *v.* CURRAN ET UX. Sup. Ct. Ariz. Certiorari denied. Reported below: 118 Ariz. 111, 575 P. 2d 310.

No. 77–6829. ROBINSON *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 77–6830. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 1006.

No. 77–6832. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 77–6833. POLK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 964.

No. 77–6834. WOOLDRIDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1027.

No. 77–6836. GAMBLE *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 77–6838. OROPEZA-BRIONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 224.

No. 77–6839. BRIGHTWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 F. 2d 569.

No. 77–6840. CLIFTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 77–6842. DOWNS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 342, 369 N. E. 2d 1079.

No. 77–6843. FORMICOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–6844. FORMICOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–6845. SWANSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 523.

No. 77–6846. CROSBY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 383 A. 2d 351.

No. 77–6847. COLEMAN *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 77–6848. COUSINO *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 77–6849. DEFEVERE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 77–6850. BRAKE *v.* WOMBLE, SHERIFF, ET AL.; and BRAKE *v.* NASH COUNTY SUPERIOR COURT. C. A. 4th Cir. Certiorari denied. Reported below: 570 F. 2d 345 (first case); 571 F. 2d 574 (second case).

No. 77–6851. CARLEO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 2d 846.

No. 77–6852. MATHIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 77–6853. HENDRICKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 1308.

No. 77–6854. DORROUGH ET AL. *v.* HOGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1259.

No. 77–6856. WILSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 91, 373 N. E. 2d 1095.

No. 77–6857. HOLCOMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 77–6858. BRODY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1045.

No. 77–6859. WEINSTEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 1147.

No. 77–6860. HAYNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 236.

No. 77–6861. PARISIEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 974.

No. 77–6862. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 432.

No. 77–6863. GUZMAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6864. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1027.

No. 77–6865. KOWALAK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 77–6866. VALLIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 77–6867. BATTLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6870. STOKES *v.* FAIR, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 77–6871. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 77–6872. DEFALCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–6873. HARO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 661.

No. 77–6874. TRAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 744.

No. 77–6875. THOMAS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 1302.

No. 77–6877. CRAWFORD *v.* UNITED STATES; and
No. 77–6906. BIARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 794.

No. 77–6878. GREEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 1341.

No. 77–6880. MUNOZ *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1153.

No. 77–6881. FONTAINE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 2d 970.

No. 77–6882. SHEPHERD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 2d 719.

No. 77–6883. WILLIAMS *v.* UNITED STATES; and
No. 77–6902. KOMOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 574 F. 2d 988.

No. 77–6884. COUSER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 282 Md. 125, 383 A. 2d 389.

No. 77–6886. BROWN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 248 Pa. Super. 595, 374 A. 2d 700.

No. 77–6887. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 351.

No. 77–6888. DRAGER *v.* PANZA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 568 F. 2d 768.

No. 77–6890. WOJNO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 566 F. 2d 105.

No. 77–6891. MADURO *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 726.

No. 77–6892. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1370.

No. 77–6893. PIOUS *v.* CURRY, JUDGE. Sup. Ct. Ill. Certiorari denied.

No. 77–6895. MACKLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 2d 1046.

No. 77–6896. LUNA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 585 F. 2d 1.

No. 77–6897. KENNICK *v.* PLAIN DEALER PUBLISHING CO. ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 77–6898. DUMAS *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 740.

No. 77–6901. MATTHEWS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–6903. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 77–6904. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–6907. PITTMAN *v.* GEORGIA POWER CO. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 947.

No. 77–6909. CHILES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–6911. MORICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1371.

No. 77–6913. PETERS *v.* BANK OF AMERICA NT & SA ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–6915. LOPEZ-ZARAGOZA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 77–6917. CHEATWOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 575 F. 2d 821.

No. 77–6919. JONES *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 77–6921. RANSONETTE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 77–6923. GRAHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 739.

No. 77–6924. ASHLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 975.

No. 77–6925. MICHELE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 77–6926. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6927. BALDRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 1343.

No. 77–6928. CARTER *v.* BLUMENTHAL, SECRETARY OF THE TREASURY. C. A. 10th Cir. Certiorari denied.

No. 77–6929. LIPPINCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 551.

No. 77–6930. CANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 77–6931. GLASBY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 576 F. 2d 734.

No. 77–6932. COOMES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 572 F. 2d 554.

No. 77–6933. BENAVIDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 77–6934. MUTYAMBIZI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 37 Md. App. 148, 376 A. 2d 1125.

No. 77–6935. REEVES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 241 Ga. 44, 243 S. E. 2d 24.

No. 77–6936. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 573 F. 2d 827.

No. 77–6937. CLARY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 575 F. 2d 1310.

No. 77–6939. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 1286.

No. 77–6940. McKenzie *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 729.

No. 77–6941. Johnson *v.* Johnson et al. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 741.

No. 77–6942. Porter *v.* City of Chicago et al. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 77–6943. Fulwiley *v.* Califano, Secretary of Health, Education, and Welfare. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1153.

No. 77–6944. Holmes *v.* Califano, Secretary of Health, Education, and Welfare. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 318.

No. 77–6945. Rogers *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 77–6947. Alden *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 772.

No. 77–6948. Turnage *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 35 N. C. App. 774, 242 S. E. 2d 400.

No. 77–6950. Harris et al. *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6951. Contreras-Diaz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 740.

No. 77–6954. Pizanie *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 318.

No. 77–6955. Perry *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 158.

No. 77–6957. Esquivel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 1343.

No. 77–6958. KIRBY *v.* METZ, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1044.

No. 77–6959. VALENTINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 299.

No. 77–6961. WILLIAMS *v.* LIBERTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 1341.

No. 77–6963. PAUL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 353.

No. 77–6964. LOUIS *v.* DEES, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 357 So. 2d 1149.

No. 77–6966. WILLIS *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1390.

No. 77–6967. LANIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1246.

No. 77–6969. KNOPF *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 318.

No. 77–6970. MCCLINDON *v.* WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 108.

No. 77–6971. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1152.

No. 77–6972. KEAN *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 77–6973. SMITH *v.* COMMUNICATIONS SATELLITE CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 426, 574 F. 2d 637.

No. 77–6974. BOALBEY *v.* NORRIS ET UX. C. A. 7th Cir. Certiorari denied.

No. 77–6975. HARVEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–6976. ALLEGREZZA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 77–6978. KNEE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 298.

No. 77–6980. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6981. SEYMOUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 1345.

No. 77–6982. ROSSI *v.* UNITED STATES; and
No. 78–5011. DUBOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 77–6983. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 77–6984. KALEC *v.* DELLINGER, PROSECUTOR OF WHITE COUNTY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 77–6985. DOLEN *v.* NEW HAMPSHIRE. C. A. 1st Cir. Certiorari denied.

No. 77–6986. RANSIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 77–6987. ROYA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 574 F. 2d 386.

No. 77–6990. MAYE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1046.

No. 77–6991. HOWARD *v.* SANDOCK ET AL. C. A. 5th Cir. Certiorari denied.

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No. 77–6993. BRISCOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 406.

No. 77–6994. CLARK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 55 Ill. App. 3d 379, 370 N. E. 2d 1111.

No. 77–6995. PERKOV *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 77–6996. ANTHONY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 77–6997. LOWER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 55 Ill. App. 3d 1014, 370 N. E. 2d 1278.

No. 77–6998. ELLIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 77–7000. JERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 573.

No. 77–7005. DUNLAP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 867.

No. 77–7006. RIM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 359 So. 2d 1218.

No. 77–7007. TRUJILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 578 F. 2d 285.

No. 77–7008. GASTON *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 77–7010. ALLARD *v.* HELGEMOE, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 572 F. 2d 1.

No. 77–7011. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1152.

No. 77–7013. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 749.

No. 77–7014. NOLEN *v.* BROWN, SECRETARY OF DEFENSE. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 78–4. POPE ET AL. *v.* CINCINNATI GAS & ELECTRIC CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 54 Ohio St. 2d 12, 374 N. E. 2d 406.

No. 78–5. JAYS FOODS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 438.

No. 78–8. GARLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 78–9. PACIFIC GAS & ELECTRIC CO. *v.* CITY OF SANTA CLARA, CALIFORNIA, ET AL.; and

No. 78–35. CITY OF SANTA CLARA, CALIFORNIA *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 660.

No. 78–11. FREDONIA BROADCASTING CORP., INC. *v.* RCA CORP. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 251.

No. 78–14. SAKOL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 694.

No. 78–15. CREEK NATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 216 Ct. Cl. 455, 578 F. 2d 1389.

No. 78–16. RUNKLES *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 174 Conn. 405, 389 A. 2d 730.

No. 78–18. BATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 599.

No. 78–20. FITZGERALD *v.* INTERMOUNTAIN FARMERS ASSN. Sup. Ct. Utah. Certiorari denied. Reported below: 574 P. 2d 1162.

No. 78–21. MANNING ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 78–23. MATTHIAS *v.* ENDRES. Sup. Ct. Fla. Certiorari denied. Reported below: 353 So. 2d 843.

No. 78–24. GREENFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 305.

No. 78–26. SEARS, ROEBUCK & CO. *v.* ROBERTS; and
No. 78–29. ROBERTS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. Reported below: 573 F. 2d 976.

No. 78–27. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL NO. 358, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 187 U. S. App. D. C. 425, 574 F. 2d 636.

No. 78–30. MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, ET AL. *v.* ARTHUR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 134.

No. 78–31. JOHNSON *v.* MEIGS, JUDGE. Sup. Ct. Ky. Certiorari denied. Reported below: 567 S. W. 2d 311.

No. 78–33. ALDENS, INC. *v.* RYAN, ADMINISTRATOR OF CONSUMER AFFAIRS OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 571 F. 2d 1159.

No. 78–36. LUCOM *v.* REID, PROPERTY APPRAISER OF PALM BEACH COUNTY, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 358 So. 2d 132.

No. 78–37. TITUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 210.

No. 78–41. LUGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–43. BIRMINGHAM ET UX. *v.* ALLISON ET UX., DBA ALLISON'S RESTAURANT. Ct. App. Tenn. Certiorari denied.

No. 78–46. GATLING ET AL. *v.* ATLANTIC RICHFIELD CO. C. A. 2d Cir. Certiorari denied. Reported below: 577 F. 2d 185.

No. 78–47. SCHULKE *v.* SCHULKE. Ct. App. Colo. Certiorari denied. Reported below: 40 Colo. App. 473, 579 P. 2d 90.

No. 78–48. SPIEGEL *v.* MOYE, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 78–50. WELLS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 562 S. W. 2d 622.

No. 78–52. PIERCE *v.* CAPITAL CITIES COMMUNICATIONS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 576 F. 2d 495.

No. 78–56. HATCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–59. PRAETZ ET AL. *v.* PETERSEN, DIRECTOR, DEPARTMENT OF PUBLIC HEALTH OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 78–62. NORDBY SUPPLY CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 1377.

No. 78–68. NAVARRO *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 574 F. 2d 379.

No. 78–69. MOHAWK TOWING CO., INC., ET AL. *v.* STREET, ADMINISTRATOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 299.

No. 78–71. SILVER DOLLAR MINING CO. ET AL. *v.* PVO INTERNATIONAL, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 609.

No. 78–75. BATTIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 77 Cal. App. 3d 635, 143 Cal. Rptr. 731.

No. 78–76. ELLIOTT *v.* ARKANSAS STATE MEDICAL BOARD. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 86, 563 S. W. 2d 427.

No. 78–77. RASMUSSEN DRILLING, INC. *v.* KERR-MCGEE NUCLEAR CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 571 F. 2d 1144.

No. 78–82. GRAY *v.* UNITED STATES; and
No. 78–5045. ROOKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 33.

No. 78–85. BOONE ET AL. *v.* J & M MCKEE. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 20, 563 S. W. 2d 409.

No. 78–86. LEE, ACTING GOVERNOR OF MARYLAND, ET AL. *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 1273.

No. 78–95. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION ET AL. *v.* PACCAR, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 632.

No. 78–98. GRAVES TRUCK LINE, INC. *v.* APPLETON ELECTRIC CO. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 78–102. BARNA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–103. SMITH *v.* FORRESTER, DBA IDEAL HOME & DEVELOPMENT. Ct. App. Ga. Certiorari denied. Reported below: 145 Ga. App. 281, 243 S. E. 2d 575.

No. 78–105. GORDON *v.* GORDON. Sup. Ct. Okla. Certiorari denied. Reported below: 577 P. 2d 1271.

No. 78–106. HANSON *v.* UNITED STATES STEEL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 78–109. THOMPSON *v.* KENTON COUNTY BOARD OF ELECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 78–111. UNITED MINE WORKERS OF AMERICA *v.* SCOTIA COAL CO. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 78–112. MIEBACH *v.* UNITED STATES; and
No. 78–5082. MARAVILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–113. BOYD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–115. INLAND OIL & TRANSPORT CO. *v.* ADAMS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 184.

No. 78–116. OKLAHOMA PUBLISHING CO. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.; and OKLAHOMA PUBLISHING CO. ET AL. *v.* WALSH, ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 66 (second case).

No. 78–118. ROLL ET UX. *v.* WEST SIDE FEDERAL SAVINGS & LOAN ASSOCIATION OF NEW YORK CITY. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1294.

No. 78–122. SHULER *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 78–124. MCINTYRE ET UX. *v.* EVEREST & JENNINGS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 155.

No. 78–126. GUTHARTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 225.

No. 78–127. MESSINA *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 78–130. COLE ET AL. *v.* KLASMEIER, FIRE ADMINISTRATOR. Cir. Ct. of Anne Arundel County, Md. Certiorari denied.

No. 78–132. SOLBORO KNITTING MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 936.

No. 78–133. RUBY ET AL. *v.* GILES, ADMINISTRATOR, BUREAU OF EMPLOYMENT SERVICES OF OHIO, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 78–136. WHOLESALE MATERIALS CO., INC. *v.* MAGNA CORP., DBA MISSISSIPPI STEEL. Sup. Ct. Miss. Certiorari denied. Reported below: 357 So. 2d 296.

No. 78–141. OVERMYER *v.* FORSYTHE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 779.

No. 78–142. BOTKIN ET AL. *v.* DELTA AIR LINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 1376.

No. 78–143. BECKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 951.

No. 78–146. VAN PELT ET AL. *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 2 Kan. App. 2d xxiv, 575 P. 2d 577.

No. 78–151. MUELLER ET AL. *v.* HUBBARD MILLING CO. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 2d 1029.

No. 78–152. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* WILLIAMS, DIRECTOR, ENVIRONMENTAL PROTECTION AGENCY OF OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 55 Ohio App. 2d 272, 380 N. E. 2d 1342.

No. 78–153. WASTE MANAGEMENT OF WISCONSIN, INC., DBA CITY DISPOSAL CO. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 81 Wis. 2d 555, 261 N. W. 2d 147.

No. 78–164. ROCHELLE, ADMINISTRATRIX *v.* FRENCH ET AL. Ct. App. Tenn. Certiorari denied.

No. 78–170. BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT *v.* STATE BOARD OF EDUCATION OF OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 2d 173, 373 N. E. 2d 1238.

No. 78–175. LOUISIANA *v.* FALKINS. Sup. Ct. La. Certiorari denied. Reported below: 356 So. 2d 415.

No. 78–183. MINIX *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 78–184. LUCEY ET AL. *v.* LISTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 1325.

No. 78–185. AMERICAN INTERNATIONAL REINSURANCE CO., INC. *v.* AIRCO, INC. C. C. P. A. Certiorari denied. Reported below: 570 F. 2d 941.

No. 78–192. OLITT *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 416, 402 N. Y. S. 2d 410.

No. 78–195. REICHEL *v.* DISTRICT 27, UNITED STEELWORKERS, ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 78–197. WILKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–202. DEASON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 574 F. 2d 504.

No. 78–204. RABON *v.* GUARDSMARK, INC. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 1277.

No. 78–206. NUNLEY *v.* GUIDO, COMMISSIONER OF POLICE OF NASSAU COUNTY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 62 App. Div. 2d 1000, 403 N. Y. S. 2d 301.

No. 78–208. SITKIN SMELTING & REFINING CO., INC., ET AL. *v.* FMC CORP. C. A. 3d Cir. Certiorari denied. Reported below: 575 F. 2d 440.

No. 78–214. DUNCAN ET AL. *v.* BRONDES FORD SALES, INC., ET AL. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 78–219. MISSOURI EX REL. UTILITY CONSUMERS COUNCIL OF MISSOURI, INC. *v.* PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 562 S. W. 2d 688.

No. 78–250. WAHL ET AL. *v.* REXNORD, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 731.

No. 78–262. GANNON, EXECUTRIX *v.* MOBIL OIL CO., A DIVISION OF SOCONY OIL CO., INC. C. A. 10th Cir. Certiorari denied. Reported below: 573 F. 2d 1158.

No. 78–263. EUTECTIC CORP. ET AL. *v.* METCO, INC. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 1.

No. 78–322. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–323. LANE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 574 F. 2d 1019.

No. 78–325. KELLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–331. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1371.

No. 78–5002. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5003. ROTARDIER ET AL. *v.* FLAXMAN. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1295.

No. 78–5009. EVANS *v.* MCCLUSKEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 567 F. 2d 755.

No. 78–5012. YOUNG *v.* YOUNGER, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 78–5013. CARUTHERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5014. BLANKNER *v.* GOODWIN, COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 78–5016. SAYLES *v.* SALES. Ct. App. D. C. Certiorari denied.

No. 78–5017. POLLARD *v.* INDUSTRIAL RELATIONS COMMISSION ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 355 So. 2d 520.

No. 78–5018. RHODES *v.* SCHOEN, CORRECTIONS COMMISSIONER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 968.

No. 78–5019. POPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 320.

No. 78–5020. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–5024. SEAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5029. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 577 F. 2d 188.

No. 78–5030. ROLLINS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 420.

No. 78–5031. COOPER ET AL. *v.* UNITED STATES, C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 1079.

No. 78–5032. WAINSCOTT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 562 S. W. 2d 628.

No. 78–5033. TREFREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–5036. ARIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 253.

No. 78–5037. WHITE *v.* CHRISTIAN THEOLOGICAL SEMINARY. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 1341.

No. 78–5038. VILLARREAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5039. BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 78–5042. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 743.

No. 78–5043. READ *v.* BAKER ET AL., TRUSTEES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 728.

No. 78–5044. LOWE *v.* UNITED STATES; and
No. 78–5052. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1193.

No. 78–5046. WINFIELD *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 571 F. 2d 164.

No. 78–5048. MARTINO *v.* AMERICAN AIRLINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1292.

No. 78–5049. FERRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5050. MCINTYRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5053. BURKE *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 574.

No. 78–5054. HORTON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 879.

No. 78–5055. MAZZEFFI *v.* SCHWANKE, DBA ASHLAND & WAVELAND SERVICE STATION, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 52 Ill. App. 3d 1032, 368 N. E. 2d 441.

No. 78–5056. FORD ET AL. *v.* SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 408.

No. 78–5059. CHAVIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–5060. MASONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–5064. YOUNG *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 89 Wash. 2d 613, 574 P. 2d 1171.

No. 78–5068. TATE *v.* UNITED STATES; and
No. 78–5088. GENT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 455.

No. 78–5069. PRUITT *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 956.

No. 78–5071. GOINS *v.* MISSOURI PACIFIC RAILROAD. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 204.

No. 78–5073. GEISLER *v.* SHERIFF OF ALEXANDRIA, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 568 F. 2d 772.

No. 78–5075. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1186.

No. 78–5083. BROADSWORD *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 32 Ore. App. 331, 574 P. 2d 670.

No. 78–5085. HAMILTON *v.* DEPARTMENT OF SOCIAL SERVICES OF NEW YORK CITY, HUMAN RESOURCES ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1367.

No. 78–5090. CARD *v.* DENTON, REHABILITATION AND CORRECTION DIRECTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 740.

No. 78–5096. HERRERA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5098. NOONE *v.* DART DRUG CORP. Sup. Ct. Va. Certiorari denied.

No. 78–5102. CARTER *v.* REESE, CHAIRPERSON, STATE BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied.

No. 78–5105. BUEGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 187.

No. 78–5107. REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 515.

No. 78–5108. BAILEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 385 A. 2d 32.

No. 78–5109. REED *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 383 A. 2d 316.

No. 78–5116. SINOHUE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–5118. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–5119. NEARY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 78–5122. WYNDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 2d 1088.

No. 78–5124. SCOTT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 78–5127. MOSKOWITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 581 F. 2d 14.

No. 78–5130. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1374.

No. 78–5132. ZUNIGA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 78–5133. UBBEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 730.

No. 78–5137. BRINSON *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1380.

No. 78–5139. CALHOUN ET UX. *v.* FRANCHISE TAX BOARD. Sup. Ct. Cal. Certiorari denied. Reported below: 20 Cal. 3d 881, 574 P. 2d 763.

No. 78–5140. FRANCIS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 375 Mass. 211, 375 N. E. 2d 1221.

No. 78–5142. SHABASS, AKA DENSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 78–5144. REYNOLDS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 78–5145. DOWNTON *v.* OHIO. Ct. App. Ohio, Allen County. Certiorari denied.

No. 78–5146. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5147. BALOUN *v.* HELFERTY. C. A. 6th Cir. Certiorari denied.

No. 78–5148. FRENCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 677.

No. 78–5149. BEACHEM *v.* HIGGINBOTHAM, U. S. CIRCUIT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–5154. ANDRADE *v.* SIMPSON. Ct. App. D. C. Certiorari denied.

No. 78–5155. AILSTOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5157. LINDSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5158. LOCKETT *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 309.

No. 78–5161. PARKER, AKA COLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–5164. KELLEY *v.* UNITED STATES; and
No. 78–5173. FISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 145.

No. 78–5165. ALSTON *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1304.

No. 78–5169. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 78 Cal. App. 3d 247, 144 Cal. Rptr. 176.

No. 78–5170. BUTLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1386.

No. 78–5174. HENRY *v.* HENRY. Ct. App. La., 4th Cir. Certiorari denied.

No. 78–5176. SCEIFERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 687, 373 N. E. 2d 131.

No. 78–5183. FREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1221.

No. 78–5187. CALLISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 53.

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No. 78–5191. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1306.

No. 78–5197. WILLINGHAM *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 870.

No. 78–5199. GAINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5202. EMERY *v.* MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 177 Mont. 73, 580 P. 2d 445.

No. 78–5205. JACKSON, AKA SHABAZZ *v.* MCCUNE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 751.

No. 78–5206. KRUEGER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 84 Wis. 2d 272, 267 N. W. 2d 602.

No. 78–5207. GARLAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 357 So. 2d 1157.

No. 78–5209. RIDDELL *v.* VINZANT, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–5211. RAMSEY *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 78–5217. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 598.

No. 78–5224. HOCHMAN *v.* BOARD OF EDUCATION OF THE CITY OF NEWARK ET AL. Super. Ct. N. J. Certiorari denied.

No. 78–5231. DOZIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5234. ANDRADE-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1386.

No. 78–5245. ALLEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–5252. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 915.

No. 78–5281. YOUNGBEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1384.

No. 78–5284. PALMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 721.

No. 77–1288. QUAGLINO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motions of Martin T. Orne and California Attorneys for Criminal Justice for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 77–1483. NATIONAL AUTOMOBILE DEALERS ASSN., INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 187 U. S. App. D. C. 240, 571 F. 2d 674.

No. 77–1696. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 571 F. 2d 1283.

No. 77–1540. INTERNATIONAL BUSINESS MACHINES CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 77–1690. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 572 F. 2d 17.

No. 77–1783. AMERICAN NATIONAL BANK *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 574 F. 2d 1173.

No. 77–1620. FIRST NATIONAL BANK & TRUST COMPANY IN ALTON, EXECUTOR *v.* BERKE, RECEIVER. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 570 F. 2d 187.

No. 77–1758. ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS *v.* AIRLINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 573 F. 2d 960.

No. 78–10. CHARLES O. FINLEY & CO., INC. *v.* KUHN, COMMISSIONER OF BASEBALL, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 569 F. 2d 527.

No. 78–148. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* COLUMBIA METAL CULVERT CO., INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 579 F. 2d 20.

No. 77–6460. FRAZIER *v.* WEATHERHOLTZ, SHERIFF; and

No. 77–6528. DOOLEY *v.* SHEFFER, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 572 F. 2d 994.

No. 78–5135. LARKIN *v.* QUINN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 570 F. 2d 348.

No. 77–1650. GARZA *v.* RODRIGUEZ. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 559 F. 2d 259.

No. 77–6782. MCCRIMMON ET AL. *v.* LESTER, JUDGE, ET AL. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 354 So. 2d 381.

No. 77–1679. ESTATE OF WILSON ET AL. *v.* AIKEN INDUSTRIES, INC. Sup. Ct. Pa. Certiorari denied. Reported below: 477 Pa. 34, 383 A. 2d 808.

MR. JUSTICE BLACKMUN, concurring.

Mr. Justice Black prefaced his dissent in *Boddie* v. *Connecticut,* 401 U. S. 371, 389 (1971), with the observation: "This is a strange case and a strange holding." I would apply the Justice's observation to what legal theorizing has effectuated here.

Thomas A. Wilson was the sole shareholder of National Carbide Die Company. In 1967, respondent, Aiken Industries, Inc., purchased Carbide's assets in exchange for Aiken stock. It was agreed that Mr. Wilson would be employed by Aiken and that, while so employed, he would refrain from competition.

Subsequently, Aiken instituted an equity action in a Pennsylvania state court against Wilson. An injunction and damages were sought. While the suit was pending, Wilson died, and the executors of his will were substituted as defendants. The claim for injunctive relief was then withdrawn. The chancellor found that the decedent had violated both his con-

tractual and his fiduciary duties, and awarded damages of $196,576.75 [1] to Aiken. A court en banc affirmed.

The executors appealed to the Supreme Court of Pennsylvania. That tribunal affirmed the judgment by an equally divided vote. Such a result, of course, is no stranger to appellate procedure and in itself raises no constitutional issue. See, *e. g., Carter* v. *Miller,* 434 U. S. 356 (1978); *Williams & Wilkins Co.* v. *United States,* 420 U. S. 376 (1975).

What is strange, however, and what surely will be inexplicable to many laymen if not to some lawyers, is that *all* participating justices of the Supreme Court of Pennsylvania, six in number, concluded that the judgment, in its determination of damages, was erroneous. Three voted to affirm on the issue of liability, "but would vacate the award insofar as it fixes the amount of damages and would remand for the recalculation of damages." 477 Pa. 34, 37, 383 A. 2d 808, 809 (1978). The other three "would reverse the decree below on the ground the non-competition agreement was not breached." *Id.,* at 38, 383 A. 2d, at 809. One opinion was filed for the first group of justices. *Ibid.* Each of the three who would reverse filed a separate opinion. *Id.,* at 46, 48, 383 A. 2d, at 814, 815.

The trial court's judgment, although all six reviewing justices agreed that it was erroneous, nonetheless was affirmed.[2] The executors, as petitioners here, understandably complain, and with some vigor, about what they feel is "a patent miscarriage of justice." Pet. for Cert. 4. They concede that no federal question was raised during the state-court proceedings, but they assert that this was because "the denial of due process occurred in the order of the state appellate court." *Ibid.*

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[1] The parties in their submissions here employ the figure of $193,576.75. Pet. for Cert. 4; Brief in Opposition 1. For present purposes the $3,000 difference is of no significance.

[2] "The Court being equally divided with respect to the question of appellant's liability, the decree below is affirmed." 477 Pa., at 37, 383 A. 2d, at 809.

I suppose that this Court necessarily is correct in denying the petition for certiorari. It is well established that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. *Moore* v. *Illinois,* 408 U. S. 786, 799 (1972); *Cardinale* v. *Louisiana,* 394 U. S. 437, 438–439 (1969). There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized. *Herndon* v. *Georgia,* 295 U. S. 441, 443–444 (1935); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 366–367 (1932).

Petitioners in fact applied to the Supreme Court of Pennsylvania for reargument. Their application, reproduced in the App. to Brief in Opposition 1a, refers, to be sure, to "a patent miscarriage of justice." *Id.,* at 2a. But the stress is on "a substantial conflict of opinion among the Justices on the scope of appellate review of an equity adjudication," and on "the law of restrictive covenants in Pennsylvania." *Ibid.* In all this, any deprival of federal due process is not suggested in so many words. In any event, the Pennsylvania court denied reargument without explanatory comment. I fear that, as a consequence, petitioners fall short of placing themselves within the protective exception recognized in the *Herndon* and *Sunburst* cases. See *Beck* v. *Washington,* 369 U. S. 541, 553–554 (1962).

I therefore join the Court in its denial of the petition for certiorari. I must confess, however, that when a State's highest court unanimously *agrees* that a judgment is wrong but nevertheless affirms that judgment by an equally divided vote, I am left with substantial discomfort. That, I suspect, is not something this Court can resolve or cure on the record before us. I observe only that there ought to be some way on the state side—such as rehearing and definitive decision by a full complement of justices—for this obviously, and conced-

edly, unjust result to be corrected. Otherwise, I fear that there will be new recruits to be added to those members of the public who already are inclined to agree with Mr. Bumble's well-known remark.[3]

No. 77–1697. MARSHALL, SECRETARY OF LABOR *v.* DANIEL CONSTRUCTION CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 563 F. 2d 707.

No. 77–1703. BEATTY *v.* LYCOMING COUNTY CHILDREN'S SERVICES ET AL.; and

No. 77–1704. LEHMAN *v.* LYCOMING COUNTY CHILDREN'S SERVICES ET AL. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 477 Pa. 322, 383 A. 2d 1228.

No. 77–1710. NATIONAL WILDLIFE ART EXCHANGE, INC., ET AL. *v.* FRANKLIN MINT CORP. C. A. 3d Cir. Certiorari denied. Motion of Ambassador Graphic Arts, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 575 F. 2d 62.

No. 77–1780. PENNSYLVANIA *v.* UNITED STATES TOBACCO CO. Sup. Ct. Pa. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 478 Pa. 125, 386 A. 2d 471.

No. 77–1785. KERR-MCGEE CHEMICAL CORP. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 187 U. S. App. D. C. 426, 574 F. 2d 637.

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[3] " 'If the law supposes that,' said Mr. Bumble, . . . 'the law is a ass—a idiot.' " C. Dickens, Oliver Twist 377 (1912).

No. 77–1790. DAVIS *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 60 App. Div. 2d 613, 402 N. Y. S. 2d 335.

No. 77–1809. SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 8th Cir. Motions of Commuter Airline Association of America and Airline Industrial Relations Conference et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 574 F. 2d 394.

No. 77–1826. KAISER ALUMINUM & CHEMICAL CORP. *v.* CONSUMER PRODUCT SAFETY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 574 F. 2d 178.

No. 77–6484. BAKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 240 Ga. 431, 241 S. E. 2d 187.

No. 77–6607. JOHNSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 240 Ga. 526, 242 S. E. 2d 53.

No. 77–6953. SCHMIDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 573 F. 2d 1057.

No. 77–6709. MANSFIELD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 568 F. 2d 1366.

No. 78–72. COX *v.* FLOTA MERCANTE GRANCOLOMBIANA, S. A. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 577 F. 2d 798.

No. 77–6774. HULSEY *v.* ARKANSAS. Sup. Ct. Ark.;
No. 77–6691. ALDRIDGE *v.* FLORIDA. Sup. Ct. Fla.;
No. 77–6385. PEEK *v.* GEORGIA. Sup. Ct. Ga.;
No. 77–6702. CAMPBELL *v.* GEORGIA. Sup. Ct. Ga.;
No. 77–6744. STANLEY *v.* GEORGIA. Sup. Ct. Ga.;
No. 78–5089. ISAACS ET AL. *v.* HOPPER, WARDEN. Sup. Ct. Ga.;
No. 78–6809. PEERY *v.* NEBRASKA. Sup. Ct. Neb.;
No. 77–6563. DUNSDON *v.* UTAH. Sup. Ct. Utah;
No. 77–6578. MARVELL *v.* UTAH. Sup. Ct. Utah;
No. 77–6579. CODIANNA *v.* UTAH. Sup. Ct. Utah;
No. 77–6583. PIERRE *v.* UTAH. Sup. Ct. Utah; and
No. 77–6743. ANDREWS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: No. 77–6774, 261 Ark. 449, 549 S. W. 2d 73; No. 77–6691, 351 So. 2d 942; No. 77–6385, 239 Ga. 422, 238 S. E. 2d 12; No. 77–6702, 240 Ga. 352, 240 S. E. 2d 828; No. 77–6744, 240 Ga. 341, 241 S. E. 2d 173; No. 78–5089, 241 Ga. 236, 244 S. E. 2d 849; No. 77–6809, 199 Neb. 656, 261 N. W. 2d 95; No. 77–6563, 573 P. 2d 343; No. 77–6578, 573 P. 2d 343; No. 77–6579, 573 P. 2d 343; No. 77–6583, 572 P. 2d 1338; No. 77–6743, 574 P. 2d 709.

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. 77–6715. LARSON *v.* MILLER. Sup. Ct. Ark. Certiorari and other relief denied.

No. 77–6869. STUART *v.* EMORY UNIVERSITY, INC., ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 78–49. SOUTHERN RAILWAY CO. ET AL. *v.* ELLINGTON, GOVERNOR OF TENNESSEE, ET AL. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 78–66. ANGELINO ET AL. *v.* DODSON ET AL. C. A. 3d Cir. Motion of respondents Dodson et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 571 F. 2d 571.

No. 78–92. FIRST NATIONAL BANK OF MEMPHIS *v.* SMITH ET AL. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would grant certiorari. Reported below: 263 Ark. 304, 564 S. W. 2d 521.

No. 78–135. JAGO, CORRECTIONAL SUPERINTENDENT *v.* JONES. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE STEWART would grant certiorari. Reported below: 575 F. 2d 1164.

Rehearing Denied

No. 76–1382. UNITED STATES *v.* SCOTT, 437 U. S. 82;

No. 76–1650. OHRALIK *v.* OHIO STATE BAR ASSN., 436 U. S. 447;

No. 77–444. PENN CENTRAL TRANSPORTATION CO. ET AL. *v.* NEW YORK CITY ET AL., 438 U. S. 104;

No. 77–528. FEDERAL COMMUNICATIONS COMMISSION *v.* PACIFICA FOUNDATION, 438 U. S. 726;

No. 77–1217. SIMKOVICH *v.* UNITED STATES, 436 U. S. 925;

No. 77–1253. NIMMO ET AL. *v.* GRAINGER ET AL., 436 U. S. 932; and

No. 77–1304. MCADAMS *v.* BELL, ATTORNEY GENERAL, ET AL., 435 U. S. 997. Petitions for rehearing denied.

No. 77–1431. FRINK *v.* FRINK, 436 U. S. 926;

No. 77–1516. PELTZMAN *v.* CENTRAL GULF LINES, INC., 436 U. S. 927;

No. 77–1535. HEILMAN *v.* A & M RECORDS, INC., 436 U. S. 952;

No. 77–6307. MCCRAVY *v.* LANE, WARDEN, 436 U. S. 947;

No. 77–6416. JAMES *v.* HOGAN, WARDEN, 436 U. S. 947;

No. 77–6463. BUTTORFF ET AL. *v.* UNITED STATES, 437 U. S. 906;

No. 77–6466. CASSIDY *v.* UNITED STATES, 436 U. S. 951;

No. 77–6470. SMITH *v.* HOPPER, WARDEN, 436 U. S. 950;

No. 77–6512. KICKASOLA *v.* JIM WALLACE OIL CO. ET AL., 436 U. S. 921;

No. 77–6517. WILSON *v.* ARMSTRONG ET AL., 436 U. S. 928;

No. 77–6566. CARTER *v.* PROPERTY SERVICES OF AMERICA, INC., ET AL., 436 U. S. 948;

No. 77–6582. CARTER *v.* ROMINES ET AL., 436 U. S. 948;

No. 77–6639. CHAPMAN *v.* FEDERAL NATIONAL MORTGAGE ASSN., 436 U. S. 961;

No. 77–6648. NASIM *v.* COMMISSIONER OF INTERNAL REVENUE, 437 U. S. 907; and

No. 77–6660. TAYLOR *v.* POEHLING, ASSISTANT CIRCUIT ATTORNEY, CITY OF ST. LOUIS, 437 U. S. 908. Petitions for rehearing denied.

No. 76–1726. MOBIL OIL CORP. *v.* HIGGINBOTHAM, ADMINISTRATRIX, ET AL., 436 U. S. 618. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 77–11. SHELL OIL CO. *v.* GOVERNOR OF MARYLAND ET AL.; and

No. 77–12. CONTINENTAL OIL CO. ET AL. *v.* GOVERNOR OF MARYLAND ET AL., 437 U. S. 117. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 76–1114. CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.;

No. 76–1133. EL PASO NATURAL GAS CO. *v.* SOUTHLAND ROYALTY CO. ET AL.; and

No. 76–1587. FEDERAL ENERGY REGULATORY COMMISSION *v.* SOUTHLAND ROYALTY CO. ET AL., 436 U. S. 519. Motion of Natural Gas Producing Industry Assns. et al., for leave to file a brief as *amici curiae* granted. Motion of respondents not to recuse MR. JUSTICE STEWART and MR. JUSTICE POWELL denied. Motion of Crane County Development Co. for leave to file petition for rehearing denied. Petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these motions and petition.

No. 76–1484. ZURCHER, CHIEF OF POLICE OF PALO ALTO, ET. AL. *v.* STANFORD DAILY ET AL.; and

No. 76–1600. BERGNA, DISTRICT ATTORNEY OF SANTA CLARA COUNTY, ET AL. *v.* STANFORD DAILY ET AL., 436 U. S. 547. Motions of American Civil Liberties Union et al. and Reporters Committee for Freedom of the Press et al. for leave to file briefs as *amici curiae* granted. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these motions and petition.

No. 77–89. LUCOM *v.* REID ET AL., 434 U. S. 857. Motion for leave to file petition for rehearing denied.

No. 77–454. MOORMAN MANUFACTURING CO. *v.* BAIR, DIRECTOR OF REVENUE OF IOWA, 437 U. S. 267. Motions of Financial Executives Institute, Committee on State Taxation of the Council of State Chambers of Commerce, and Motor Vehicle Manufacturers Association of the United States, Inc., for leave to file briefs as *amici curiae* granted. Petition for rehearing denied.

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No. 77–747. ALLIED STRUCTURAL STEEL CO. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL., 438 U. S. 234. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 77–955. POWELL, CHIEF, U. S. CAPITOL POLICE *v.* DELLUMS ET AL.; and

No. 77–1129. WILSON, FORMER CHIEF, METROPOLITAN POLICE DEPARTMENT, ET AL. *v.* DELLUMS ET AL., 438 U. S. 916. Petition for rehearing denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

OCTOBER 6, 1978

Miscellaneous Order

No. A–284 (78–540). NEW YORK TIMES CO. ET AL. *v.* NEW JERSEY ET AL. Sup. Ct. N. J. Motion to vacate stay granted, and it is ordered that the order of MR. JUSTICE STEWART, dated September 26, 1978, is hereby vacated. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

MR. JUSTICE MARSHALL, dissenting.

I dissent from the decision of the Court to vacate the stay entered by MR. JUSTICE STEWART on September 26, 1978.

The motion to vacate provides a third occasion for me to consider the merits of the contentions raised by the New York Times and Myron Farber in their petition for certiorari. On the first occasion, I denied their reapplication for a stay because of the premature stage of the state-court proceedings. *New York Times Co.* v. *Jascalevich, post,* p. 1304. Upon petitioners' reapplication for a stay after they had been held in contempt, I expressed my opinion that:

> "Given the likelihood that forced disclosure even for *in camera* review will inhibit the reporter's and newspaper's exercise of First Amendment rights, I believe that some threshold showing of materiality, relevance, and ne-

> cessity should be required. . . . Examination of the record submitted with this application discloses that the Superior Court did not make any independent determinations of materiality, relevance, or necessity prior to ordering the applicants to submit the subpoenaed materials for *in camera* review." *New York Times Co.* v. *Jascalevich, post,* at 1335.

I was compelled to deny that reapplication for a stay, however, because I could not conclude in good faith that four Members of this Court would vote to grant a writ of certiorari, a criterion that must be satisfied before a single Justice can grant an application for a stay. Now that the matter is presented to the entire Court for decision, I am no longer so constrained.

I adhere to my view, notwithstanding the intervening decision by the Supreme Court of New Jersey, that petitioners have raised substantial claims under the First and Fourteenth Amendments. Under the circumstances, I believe that both the criminal and civil contempt penalties should be stayed until this Court disposes of the petition for certiorari.

October 10, 1978

Dismissal Under Rule 60

No. 78–22. Ambassador International Cultural Foundation et al. *v.* Superior Court of California, County of Los Angeles (Soll, Real Party in Interest). Ct. App. Cal., 2d App. Dist. Appeal dismissed under this Court's Rule 60.

Appeals Dismissed

No. 77–1711. Simpson *v.* Georgia. Appeal from Ct. App. Ga. dismissed for want of substantial federal question. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would reverse the conviction. Reported below: 144 Ga. App. 657, 242 S. E. 2d 265.

No. 77–1849. CHICAGO SHERATON CORP. *v.* ZABAN ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 71 Ill. 2d 85, 373 N. E. 2d 1318.

No. 78–236. METROPOLITAN DEVELOPMENT & HOUSING AGENCY *v.* SOUTH CENTRAL BELL TELEPHONE CO. ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question.

No. 78–5267. WHITE *v.* STUBBS. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 359 So. 2d 354.

No. 78–5296. HORNICK *v.* YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF MADISON, WISCONSIN, INC. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question.

No. 78–246. ARMSTRONG *v.* NEW MEXICO. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 91 N. M. 751, 580 P. 2d 972.

No. 78–276. LERNER *v.* HYNES, DEPUTY ATTORNEY GENERAL OF NEW YORK; and FAR ROCKAWAY NURSING HOME ET AL. *v.* HYNES, DEPUTY ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Appeal as to first case dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Appeal as to second case dismissed for want of substantial federal question. Reported below: 44 N. Y. 2d 329, 376 N. E. 2d 1294 (first case); 44 N. Y. 2d 383, 377 N. E. 2d 446 (second case).

No. 78–248. SESSOMS *v.* REDEVELOPMENT AUTHORITY OF BEAVER COUNTY, BEAVER, PENNSYLVANIA, ET AL. Appeal from D. C. W. D. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–102 (78–427). GAETANO ET AL. *v.* SILBERT, U. S. ATTORNEY. C. A. D. C. Cir. Application for injunction presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. A–215. UNBORN CHILD ROE, BY ERNEST *v.* SIRICA, U. S. DISTRICT JUDGE. D. C. D. C. Application for injunction, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. 77–654. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. [Certiorari granted, 435 U. S. 922.] Motion of Samuel E. Parker et al. for leave to file brief as *amici curiae* denied. Motion of Small Business Legislative Council for leave to file brief as *amicus curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 77–742. MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF ILLINOIS, ET AL. *v.* YOUAKIM ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 434 U. S. 1060.] Motion of American Orthopsychiatric Assn. et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 77–920. THOR POWER TOOL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. [Certiorari granted, 435 U. S. 914.] Motion of petitioner for additional time for oral argument denied.

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.] Motion of Securities and Exchange Commission for leave to participate in oral argument as *amicus curiae* granted, and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 77–922. CHRYSLER CORP. *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. [Certiorari granted, 435 U. S. 914.] Motion of Federation of American Hospitals for leave to file a brief as *amicus curiae* denied.

No. 77–961. NEW YORK TELEPHONE CO. ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. [Certiorari granted, 435 U. S. 941.] Motion of National Lawyers Guild for leave to file a brief as *amicus curiae* granted.

No. 77–1105. HERBERT *v.* LANDO ET AL. C. A. 2d Cir. [Certiorari granted, 435 U. S. 922.] Motion of Time Inc. for leave to file a brief as *amicus curiae* denied.

No. 77–1255. ANDERS, SOLICITOR OF RICHLAND COUNTY *v.* FLOYD. Appeal from D. C. S. C. Motion of Alan Ernest to be appointed counsel or guardian *ad litem* for unborn children denied.

No. 77–6067. DUREN *v.* MISSOURI. Sup. Ct. Mo. [Certiorari granted, 435 U. S. 1006.] Motion of petitioner for divided argument granted.

No. 78–238. DICK *v.* UNITED STATES. Motion for leave to file petition for writ of prohibition denied.

No. 77–6431. CABAN *v.* MOHAMMED ET UX. Ct. App. N. Y. [Probable jurisdiction noted, 436 U. S. 903.] Motion of the Legal Aid Society of New York City for leave to file a brief as *amicus curiae* denied.* Motion of Attorney General of New York for leave to present oral argument as *amicus curiae* in support of appellees granted.

Probable Jurisdiction Noted or Postponed

No. 77–1810. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* SNEAD, DIRECTOR OF REVENUE DIVISION, DEPARTMENT OF TAXATION AND REVENUE OF NEW MEXICO, ET AL. Appeal from Sup. Ct. N. M. Probable jurisdiction noted. Reported below: 91 N. M. 485, 576 P. 2d 291.

No. 78–233. PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. *v.* FEENEY. Appeal from D. C. Mass. Probable jurisdiction noted. Reported below: 451 F. Supp. 143.

No. 78–225. BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL. Appeal from D. C. Ariz. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 449 F. Supp. 449.

Certiorari Granted

No. 77–1497. ARKANSAS *v.* SANDERS. Sup. Ct. Ark. Certiorari granted. Reported below: 262 Ark. 595, 559 S. W. 2d 704.

No. 77–1806. FORD MOTOR CO. (CHICAGO STAMPING PLANT) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 571 F. 2d 993.

No. 78–91. JONES ET AL. *v.* WOLF ET AL. Sup. Ct. Ga. Certiorari granted. Reported below: 241 Ga. 208, 243 S. E. 2d 860.

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*[REPORTER'S NOTE: On October 30, 1978, this portion of the order was vacated and the *amicus curiae* brief was ordered filed, *post*, p. 924.]

No. 77–6540. RAMSEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 61 App. Div. 2d 891, 401 N. Y. S. 2d 671.

No. 78–17. UNITED GAS PIPE LINE CO. *v.* MCCOMBS ET AL.; and

No. 78–249. FEDERAL ENERGY REGULATORY COMMISSION *v.* MCCOMBS ET AL. C. A. 10th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 570 F. 2d 1376.

No. 78–38. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. *v.* FOUST. C. A. 10th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 572 F. 2d 710.

Certiorari Denied. (See also Nos. 78–246, 78–248, and 78–276, *supra.*)

No. 77–1613. EASTERN CENTRAL MOTOR CARRIERS ASSN., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL.; and

No. 77–1727. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 784.

No. 77–1824. HORNE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 1363.

No. 77–5343. BARCLAY ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 343 So. 2d 1266.

No. 77–6543. JONES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 218 Va. 757, 240 S. E. 2d 658.

No. 77–6790. OCHOA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1366.

No. 77–6899. SANTIFER *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied.

No. 77–7001. RUDERER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 749.

No. 77–7015. RAUCH *v.* UNITED STATES; and
No. 78–5022. CORSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 706.

No. 78–51. J. RAY MCDERMOTT & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 850.

No. 78–65. INDEPENDENT COSMETIC MANUFACTURERS & DISTRIBUTORS, INC. *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. D. C. Cir. Reported below: 187 U. S. App. D. C. 342, 574 F. 2d 553.

No. 78–88. DR. JOHN T. MACDONALD FOUNDATION, INC., DBA DOCTORS' HOSPITAL *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 328.

No. 78–93. RUMPF ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 2d 818.

No. 78–108. CHAPMAN, ADMINISTRATOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 575 F. 2d 147.

No. 78–137. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 232.

No. 78–149. WALLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 690.

No. 78–174. M. W. ZACK METAL CO. *v.* THE SEVERN RIVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 727.

No. 78–177. BURKE, COMMISSIONER OF EDUCATION OF NEW JERSEY, ET AL. *v.* NEW JERSEY EDUCATION ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 2d 764.

No. 78–181. SIZEMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–196. SWEENEY *v.* COTE & RENEY LUMBER CO., INC. C. A. 1st Cir. Certiorari denied.

No. 78–200. WORKMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–212. ROUBAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 55 Ill. App. 3d 1119, 375 N. E. 2d 588.

No. 78–226. MOODY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 223 Kan. 699, 576 P. 2d 637.

No. 78–227. GATES *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 268 N. W. 2d 652.

No. 78–228. FLORIDA EAST COAST PROPERTIES, INC. *v.* METROPOLITAN DADE COUNTY. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1108.

No. 78–235. PITTSBURGH & NEW ENGLAND TRUCKING CO. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–243. MARTIN THEATRES OF TEXAS, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.; and

No. 78–260. ABC INTERSTATE THEATRES, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 557 S. W. 2d 337.

No. 78–251. WRIGHT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 267 Ind. 590, 372 N. E. 2d 453.

No. 78–252. FEDERAL REALTY ESTATES CO., NOW KNOWN AS TIMBERS DEVELOPMENT CO. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 78–255. SUTHERLAND MARINE CO. *v.* PENN CENTRAL TRANSPORTATION CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1375.

No. 78–256. FLAIM *v.* ILLINOIS. Ct. Cl. of Ill. Certiorari denied.

No. 78–261. INDEPENDENT INVESTOR PROTECTIVE LEAGUE ET AL. *v.* TOUCHE ROSS & CO. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 530.

No. 78–269. MILGO ELECTRONIC CORP. ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1203 and 573 F. 2d 255.

No. 78–285. IVIMEY *v.* BOURQUE, DBA DICK'S AUTO BODY. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 721.

No. 78–286. FRAZIER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 78–366. FRIED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 787.

No. 78–368. GLORIOSO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1050.

No. 78–371. BERNSTEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–387. HOOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 496.

No. 78–395. TERRY ET UX. *v.* KLAMATH PRODUCTION CREDIT ASSN. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–5006. OLSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 1267.

No. 78–5028. BRAGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 399.

No. 78–5047. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5067. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1371.

No. 78–5076. SELF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 363.

No. 78–5084. LOUDERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 1383.

No. 78–5087. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 1184.

No. 78–5093. POLETO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–5095. POPEJOY *v.* UNITED STATES C. A. 10th Cir. Certiorari denied. Reported below: 578 F. 2d 1346.

No. 78–5113. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5128. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5136. ABBOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5141. MCGINNIS *v.* UNITED STATES; and
No. 78–5171. MIROYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 489.

No. 78–5153. JAFREE *v.* CLEVELAND STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1337.

No. 78–5189. DICKSON *v.* COLMAN, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 1310.

No. 78–5214. JACKSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 1071, 403 N. Y. S. 2d 132.

No. 78–5215. LARSON *v.* MILLER. Sup. Ct. Ark. Certiorari denied.

No. 78–5219. MAYO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5220. SLOCUM *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–5221. JOHNSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 78–5222. KING, AKA MCCULLOUGH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1284.

No. 78–5229. TRACY, DECEASED, BY VOIGT *v.* UNIVERSITY OF UTAH HOSPITAL ET AL. Sup. Ct. Utah. Certiorari denied.

No. 78–5236. GAMBLE *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5238. KAVANAUGH *v.* GRUNDMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 78–5239. RUETZ *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 42, 373 N. E. 2d 152.

No. 78–5244. MARTIN *v.* CORPUS CHRISTI PARISH CREDIT UNION. Sup. Ct. La. Certiorari denied. Reported below: 358 So. 2d 295.

No. 78–5246. RICE *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 40 Colo. App. 357, 579 P. 2d 647.

No. 78–5257. MCFARLAND *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 144.

No. 78–5259. TARRANCE *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 78–5261. HAWKINS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5269. BOLTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 558 F. 2d 316.

No. 78–5280. GOOD SHIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1287.

No. 78–5287. GROGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1133.

No. 78–5300. GONZALES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1284.

No. 78–5301. GIBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 556.

No. 78–5306. CRUZ-BELTRAN *v.* UNITED STATES; and
No. 78–5308. CRUZ-BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 870.

No. 78–5309. MITCHELL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 735.

No. 78–5312. PINCKNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 78–5315. PHILLIPS *v.* SNYDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 869.

No. 78–5319. AUTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1284.

No. 78–5325. DOBSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 585 F. 2d 55.

No. 78–5353. CAMPBELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 77–1756. SHERWOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petition and reverse the conviction. Reported below: 568 F. 2d 771.

No. 77–6946. ALLEN ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petition and reverse the conviction. Reported below: 144 Ga. App. 233, 240 S. E. 2d 754.

No. 77–6962. WOOD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petition and reverse the conviction. Reported below: 144 Ga. App. 236, 240 S. E. 2d 743.

No. 78–131. MASCOLO ET AL. *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petition and reverse the conviction. Reported below: —— Mass. App. ——, 375 N. E. 2d 17.

No. 78–207. DOBBS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petition and reverse the conviction. Reported below: 145 Ga. App. 14, 243 S. E. 2d 275.

No. 77–1822. INDIANA *v.* MARTIN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 577 F. 2d 749.

No. 78–188. MELLON BANK, N. A. *v.* SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC., ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 270 S. C. 525 and 527, 244 S. E. 2d 211 and 212.

MR. JUSTICE BLACKMUN, dissenting.

This case raises a substantial issue concerning state-court venue of a transitory cause of action asserted against a national bank. For me, the issue merits plenary consideration, and I dissent from the Court's denial of certiorari insofar as the case concerns one of the two respondents.

Petitioner Mellon Bank, N. A., is a national banking association with principal place of business in Pittsburgh, Pa. In 1972, respondent Associates Financial Services Company, Inc., and Mellon executed an agreement under which Associates was to seek out mobile-home dealers whose time-sale contracts for retail sales of mobile homes could be financed by Mellon. Respondent Southland Mobile Homes of South Carolina, Inc., operated mobile-home retail sales lots in the State of South Carolina and was induced by Associates to enter Mellon's mobile-home service program. As a consequence, Mellon directly financed a number of Southland's sales. The program provided for Mellon's release to Southland of something less than the full purchase price of any mobile home so sold, with the balance to be held in reserve for six months, after which only a 2% contingency fund was retained. At Southland's request, the total reserve later was limited to $20,000 in return for a personal guarantee from Southland's president and other security.

Southland subsequently instituted in the Court of Common

Pleas for Sumter County, S. C., this breach-of-contract action against both Mellon and Associates. The latter answered and filed a cross-complaint against Mellon. Mellon, by special appearance as allowed by state law, challenged the state court's jurisdiction over it on the grounds that it was "located" in Allegheny County, Pa., and that, under Rev. Stat. § 5198, 12 U. S. C. § 94,[1] a state-court suit against it could be brought only in Allegheny County.[2] The court, however, ruled that it had jurisdiction over Mellon. It concluded that branch banking for the benefit of Mellon was taking place at Associates' office; that South Carolina's long-arm statute, S. C. Code § 36–2–803 (1977), applied; and that Mellon by its conduct had waived any immunity from suit in South Carolina it may have possessed.

Mellon appealed to the Supreme Court of South Carolina. In an opinion concerning Associates, 270 S. C. 527, 244 S. E. 2d 212 (1978), that court, without considering waiver, affirmed.[3]

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[1] "Suits, actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

[2] A supporting affidavit from an officer of Mellon recited that Mellon maintained no office in South Carolina; that there were no employees or agents of Mellon, or of a subsidiary or affiliate, in that State; that Mellon purchased commercial paper from financial institutions throughout the country; and that Associates was one of those institutions.

[3] In a separate opinion concerning Southland, 270 S. C. 525, 244 S. E. 2d 211 (1978), the court ruled that, although there was timely notice of intention to appeal, service upon Southland of the "proposed case and exceptions" was untimely under S. C. Code § 18–9–70 (1976) and Circuit Court Rule 49, and it therefore "was the duty of the circuit judge to dismiss the appeal." The plausible argument that this untimeliness feature provides an adequate state ground for the court's decision is sufficient to convince me that the case with respect to respondent Southland is nonreviewable. See R. Stern & E. Gressman, Supreme Court Practice § 3.31 (5th ed. 1978). No claim of untimeliness, however, is raised with respect to Associates.

The proliferation of branch banking has produced problems of state-court venue with respect to national banks not envisioned when § 94's predecessor statutes were enacted more than a century ago. Just last Term we considered the application of § 94 to a bank's conduct of banking business at an authorized branch within the State of its "location," and held that venue need not be restricted to the county where the bank's charter had been issued. *Citizens & Southern Nat. Bank* v. *Bougas,* 434 U. S. 35 (1977). And the Court recently held that § 94 was mandatory, not permissive, in its operation and, absent waiver, that a national bank with principal place of business in New York and with no office or agent in Utah, and not regularly conducting business in that State, could not be sued in a Utah state court for breach of contract. *National Bank* v. *Associates of Obstetrics,* 425 U. S. 460 (1976). See also *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555 (1963), and *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591 (1963). The latter case on its facts is not dissimilar to the present one, for it concerned notes and lien instruments delivered to a local dealer upon purchases of house trailers in Nebraska, followed by the dealer's negotiating the notes and instruments to a national bank in Michigan. The Court held that, absent waiver, the bank could not be sued in Nebraska. See *Bank of America* v. *Whitney Bank,* 261 U. S. 171 (1923), and *First Nat. Bank* v. *Dickinson,* 396 U. S. 122 (1969).

Whether, as the South Carolina courts held, Associates was Mellon's agent in South Carolina and, as a consequence, Mellon was engaged in branch banking in that State to an extent sufficient to sustain venue there under § 94 is, for this Court at least, a new issue. I think that issue is sufficiently important for national banks generally, and for those doing business with national banks or in competition with them, that it receive plenary consideration here. The South Carolina courts, of course, may be correct in their rulings, but I am uncertain enough about their result in the light of this Court's

cases cited above that I would grant certiorari. I therefore dissent from the Court's refusal to take this case.

No. 78–247. MANATEE CABLEVISION CORP. *v.* FLORIDA POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 573 F. 2d 83.

No. 78–5143. SEIDENBERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 577 F. 2d 738.

No. 78–5159. MOORE *v.* GEORGIA. Sup. Ct. Ga.; and

No. 78–5240. HUGHES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 78–5159, 240 Ga. 807, 243 S. E. 2d 1; No. 78–5240, 562 S. W. 2d 857.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 77–555. BUCK *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL., 438 U. S. 904. Petition for rehearing denied.

No. 77–6569. GONZALEZ *v.* UNITED STATES ET AL., 436 U. S. 960. Motion for leave to file petition for rehearing denied.

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Miscellaneous Orders

No. A–322. COBERLY ET AL. *v.* MCCARTNEY ET AL. Sup. Ct. App. W. Va. Application for stay, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–338. ESPINOZA *v.* UNITED STATES. Application for stay of proceedings in the United States District Court for the Southern District of West Virginia, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

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Appeals Dismissed

No. 77–6835. WAYLAND *v.* TOWN OF IPSWICH. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Monell* v. *Department of Social Services of New York City,* 436 U. S. 658 (1978).

No. 77–6868. RUNYAN *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of final judgment.

No. 78–265. WILLMAN *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 266 N. W. 2d 187.

No. 78–278. TORRES, CONSERVATOR *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d 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: 56 Ill. App. 3d 1003, 372 N. E. 2d 445.

No. 78–5255. KELLEY *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 136 Vt. 322, 388 A. 2d 379.

No. 78–294. Southern California Edison Co. *v.* Public Utilities Commission of California. Appeal from Sup. Ct. Cal. dismissed for want of properly presented federal question. Reported below: 20 Cal. 3d 813, 576 P. 2d 945.

Certiorari Granted—Reversed and Remanded. (See No. 77–1515, *ante,* p. 1.)

Certiorari Granted—Vacated and Remanded. (See No. 77–6835, *supra.*)

Miscellaneous Orders

No. A–315 (77–1844). City of Mobile, Alabama, et al. *v.* Bolden et al. C. A. 5th Cir. [Probable jurisdiction noted, *ante,* p. 815.] Application of appellees to vacate order issued by the United States District Court for the Southern District of Alabama, on October 3, 1978, presented to Mr. Justice Powell, and by him referred to the Court, denied.

No. D–129. In re Disbarment of Fitzpatrick. Disbarment entered. [For earlier order herein, see 434 U. S. 980.]

No. D–132. In re Disbarment of Esser. Disbarment entered. [For earlier order herein, see 435 U. S. 949.]

No. D–134. In re Disbarment of Beitling. Disbarment entered. [For earlier order herein, see 435 U. S. 993.]

No. D–136. In re Disbarment of Bremers. It is ordered that Ralph R. Bremers, of Omaha, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–137. In re Disbarment of Gilbert. It is ordered that Ira Stuart Gilbert, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–138. In re Disbarment of Mueller. It is ordered that Paul C. Mueller, of Plantation, 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. D–139. In re Disbarment of Wandel. It is ordered that John Joseph Wandel, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–140. In re Disbarment of Ray. It is ordered that Samuel B. Ray, Jr., of Barnwell, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–141. In re Disbarment of Gasque. It is ordered that J. Ralph Gasque, of Marion, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–142. In re Disbarment of Foster. It is ordered that Marvin F. Foster, Jr., of San Antonio, Tex., 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. 73, Orig. California *v.* Nevada. State of Nevada's answer to amended complaint and its counterclaim and State of California's reply to the counterclaim are referred to the Special Master. [For earlier order herein, see, *e. g.*, 438 U. S. 913.]

No. 76–808. AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL. *v.* NORWICK ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted *sub nom. Nyquist* v. *Norwick*, 436 U. S. 902.] Motion of Washington Lawyers' Committee for Civil Rights Under Law et al. for leave to file a brief as *amici curiae* granted.

No. 77–648. FEDERAL ENERGY REGULATORY COMMISSION *v.* PENNZOIL PRODUCING CO. ET AL. C. A. 5th Cir. [Certiorari granted, 436 U. S. 955.] Motion of respondents for divided argument granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 77–926. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 438 U. S. 914.] Motion of petitioner for additional time for oral argument denied.

No. 77–1119. ORR *v.* ORR. Ct. Civ. App. Ala. [Probable jurisdiction noted, 436 U. S. 924.] Motion of American Civil Liberties Union 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, 436 U. S. 903.] Motion of Claude Pepper et al. for leave to file a brief as *amici curiae* granted.

No. 77–1327. LAKE COUNTRY ESTATES, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. [Certiorari granted, 436 U. S. 943.] Motion of respondents for divided argument granted. Alternative request for additional time for oral argument denied.

No. 77–1388. MASSACHUSETTS *v.* WHITE. Sup. Jud. Ct. Mass. [Certiorari granted, 436 U. S. 925.] Motion of Americans for Effective Law Enforcement, Inc., for leave to file a brief as *amicus curiae* granted.

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No. 77–1378. JAPAN LINE, LTD., ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Sup. Ct. Cal. [Probable jurisdiction postponed, 436 U. S. 955.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Appellees also allotted an additional 15 minutes for oral argument.

No. 77–1413. ARONSON *v.* QUICK POINT PENCIL CO. C. A. 8th Cir. [Certiorari granted, 436 U. S. 943.] Motions of Licensing Executives Society (U. S. A.), Inc., Patent, Trademark and Copyright Section of the State Bar of Texas, and American Patent Law Assn. for leave to file briefs as *amici curiae*, granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Respondent also allotted 15 additional minutes for oral argument.

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, 436 U. S. 955.] Motion of American Insurance Assn. et al. for leave to file a brief as *amici curiae* granted. Motion of petitioners to dispense with printing appendix granted.

No. 77–5992. ADDINGTON *v.* TEXAS. Sup. Ct. Tex. [Probable jurisdiction noted, 435 U. S. 967.] Motion of American Psychiatric Assn. for divided argument granted.

No. 78–5351. GREEN *v.* RALSTON, U. S. MAGISTRATE, ET AL.; and

No. 78–5368. VICK *v.* UNITED STATES. Motions for leave to file petitions for writs of mandamus denied.

No. 78–5407. GREEN *v.* MISSOURI BOARD OF PROBATION AND PAROLE. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 77–6673. BROWN *v.* TEXAS. Appeal from County Ct. at Law No. 2, El Paso County. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument together with No. 77–1680, *Michigan* v. *DeFillippo* [certiorari granted, *ante*, p. 816].

Certiorari Granted

No. 77–983. WASHINGTON ET AL. *v.* WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN. ET AL.; and WASHINGTON ET AL. *v.* PUGET SOUND GILLNETTERS ASSN. ET AL. Sup. Ct. Wash. Certiorari granted and case set for oral argument with *Washington* v. *United States*, No. 78–119, and *Puget Sound Gillnetters Assn.* v. *United States District Court for the Western District of Washington*, No. 78–139, immediately *infra*. Reported below: 88 Wash. 2d 677, 565 P. 2d 1151 (first case); 89 Wash. 2d 276, 571 P. 2d 1373 (second case).

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL.; and

No. 78–139. PUGET SOUND GILLNETTERS ASSN. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Cases set for oral argument with *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.* and *Washington* v. *Puget Sound Gillnetters Assn.*, No 77–983, immediately *supra*. Reported below: No. 78–119, 573 F. 2d 1118 and 1123; No. 78–139, 573 F. 2d 1123.

Certiorari Denied. (See also Nos. 78–265, 78–278, and 78–5255, *supra.*)

No. 77–1649. EARLY *v.* PALM BEACH NEWSPAPERS, INC., ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 334 So. 2d 50.

No. 77–1733. CULLUM ELECTRIC & MECHANICAL, INC. *v.* MECHANICAL CONTRACTORS ASSOCIATION OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 821.

No. 77–1788. GOLDSTEIN *v.* COLLIN ET AL. Sup. Ct. Ill. Certiorari denied.

No. 77–1842. HAGAN ET AL. *v.* DOWNS; and
No. 78–165. DOWNS *v.* SAWTELLE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 574 F. 2d 1.

No. 77–6876. HAZEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 77–6977. MCKINNEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–83. TIMKEN CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and
No. 78–84. CLEVELAND ELECTRIC ILLUMINATING CO. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 572 F. 2d 1150.

No. 78–100. FITZGIBBON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 2d 279.

No. 78–110. MOODY *v.* ALABAMA EX REL. PAYNE, COMMISSIONER OF INSURANCE, ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 355 So. 2d 1116.

No. 78–121. CURTIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 562 F. 2d 1153.

No. 78–125. ROBERTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1283.

No. 78–134. SEXTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 1059, 578 F. 2d 1388.

No. 78–154. ELECTRI-FLEX CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 570 F. 2d 1327.

No. 78–163. L. D. MCFARLAND CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 572 F. 2d 256.

No. 78–189. COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 2d 311.

No. 78–191. FASSNACHT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 246 Pa. Super. 42, 369 A. 2d 800.

No. 78–273. DERBOFEN ET AL. *v.* T. L. JAMES & CO., INC. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 355 So. 2d 963.

No. 78–280. SWIMLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 57 Ill. App. 3d 116, 372 N. E. 2d 887.

No. 78–291. LINDLEY, TAX COMMISSIONER OF OHIO *v.* AMERICAN MODULARS CORP. Sup. Ct. Ohio. Certiorari denied. Reported below: 54 Ohio St. 2d 273, 376 N. E. 2d 575.

No. 78–298. ALLEN *v.* ATLANTIC NATIONAL BANK ET AL. Sup. Ct. Va. Certiorari denied.

No. 78–299. FONTANA AVIATION, INC. *v.* BALDINELLI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1194.

No. 78–300. GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (BARR ET AL., REAL PARTIES IN INTEREST). Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 78–301. ROSENTHAL ET AL. *v.* BRADFORD TRUST CO. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–304. ALARSHI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 57 Ill. App. 3d 464, 373 N. E. 2d 516.

No. 78–312. SKIDMORE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 56 Ill. App. 3d 862, 372 N. E. 2d 723.

No. 78–313. BOORAS ET AL. *v.* WAUKEGAN PORT DISTRICT. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 55 Ill. App. 3d 790, 371 N. E. 2d 321.

No. 78–338. DOOLEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 145 Ga. App. 539, 244 S. E. 2d 55.

No. 78–345. MOATS ET AL. *v.* LANDRUM, SPECIAL ADMINISTRATRIX. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 1320.

No. 78–350. UNION OIL COMPANY OF CALIFORNIA *v.* CANADIAN AMERICAN OIL CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 468.

No. 78–416. GRIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–434. HANSEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 325.

No. 78–5010. GALLAWAY *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari denied.

No. 78–5021. GOLDSMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 412.

No. 78–5065. HURT *v.* LORTON COMPLEX ET AL. C. A. D. C. Cir. Certiorari denied.

No. 78–5097. JANKO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 578 F. 2d 1332.

No. 78–5103. GILBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 346.

No. 78–5112. CERASE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 2d 292.

No. 78–5129. NORRIS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 352 So. 2d 875.

No. 77–5160. SCHROEDER *v.* KILLORAN. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 78–5163. SPEARS *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5172. ARROYO-ANGULO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1137.

No. 78–5175. BARKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 2d 135, 372 N. E. 2d 1324.

No. 78–5201. EPPERSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 264 N. W. 2d 753.

No. 78–5237. WILSON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 78–5241. BONNER ET AL. *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 563 F. 2d 1293.

No. 78–5243. WOODSUM *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5249. GATES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 479 Pa. 461, 388 A. 2d 747.

No. 78–5256. FOURNIER *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–5265. CARTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 2d 866, 404 N. Y. S. 2d 933.

No. 78–5278. BOYD *v.* MABRY, CORRECTION COMMISSIONER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1384.

No. 78–5282. YOUNG *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5291. MCBREEN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 54 Ohio St. 2d 315, 376 N. E. 2d 593.

No. 78–5299. LIPSCOMB *v.* KALOSIS ET AL. C. A. 6th Cir. Certiorari denied.

No. 78–5304. LEDESMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–5310. MAGOUIRK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 870.

No. 78–5323. CRUZ-OJEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 960.

No. 78–5334. WHETZEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 78–5337. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–5338. CAPPS ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5345. MCMILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5347. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 78–5352. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 197.

No. 78–5363. JUAREZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 267.

No. 78–5364. CARSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 1269.

No. 78–5366. PULIDO-SANTOYO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 352.

No. 78–5411. LONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 579.

No. 77–1681. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* SUGGS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 570 F. 2d 1092.

No. 77–1865. WARD, CORRECTIONAL COMMISSIONER, ET AL. *v.* BULGER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 575 F. 2d 407.

No. 78–287. NEW YORK *v.* BLANKS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 62 App. Div. 2d 1021, 403 N. Y. S. 2d 553.

No. 77–1687. DOST *v.* UNITED STATES; and

No. 78–5007. KILFOYLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the petitions and reverse the convictions. Reported below: 575 F. 2d 1303.

No. 77–1736. SMITH, PRESIDENT OF THE VILLAGE OF SKOKIE, ILLINOIS, ET AL. *v.* COLLIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 1197.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

It is a matter of regret for me that the Court denies certiorari in this case, for this is litigation that rests upon critical, disturbing, and emotional facts, and the issues cut down to the very heart of the First Amendment.

The village of Skokie, Ill., a suburb of Chicago, in 1974 had a population of approximately 70,000 persons. A majority were Jewish; of the Jewish population a substantial number were survivors of World War II persecution. In March 1977, respondents Collin and the National Socialist Party of America, which Collin described as a "Nazi organization," publicly announced plans to hold an assembly in front of the Skokie Village Hall. On May 2, the village enacted three ordinances. The first established a permit system for parades and public assemblies and required applicants to post public liability and property damage insurance. The second prohibited the dissemination of material that incited racial or religious hatred with intent so to incite. The third prohibited public demonstrations by members of political parties while wearing military-style uniforms.

On June 22, respondent Collin applied for a permit under the first ordinance. His application stated that a public assembly would take place on July 4, would consist of persons demonstrating in front of the Village Hall, would last about a

half hour, and would not disrupt traffic. It also stated that the participants would wear uniforms with swastikas and would carry placards proclaiming free speech for white persons, but would not distribute handbills or literature. The permit was denied.

Skokie's Village Hall stood on a street that was zoned commercial. There were residential areas, however, adjoining to the North, South, and West. The front of the Village Hall was visible from dwellings in those areas.

Upon the rejection of the permit application, respondents filed a complaint in the United States District Court for the Northern District of Illinois against the president of the village of Skokie, its manager, its corporation counsel, and the village itself. Respondents asked that the ordinances be declared void and their enforcement enjoined. The District Court, after receiving evidence, ruled that the ordinances were unconstitutional on their face, and granted the requested declaratory and injunctive relief. It filed a comprehensive opinion. 447 F. Supp. 676 (1978). The United States Court of Appeals for the Seventh Circuit, with one judge dissenting in part, affirmed. 578 F. 2d 1197 (1978).

A permit then was issued to respondents for a demonstration on the afternoon of June 25, 1978, in front of the Village Hall. Respondents, however, shifted their assembly from Skokie to Chicago where activities took place on June 24 and July 9.

Other aspects of the controversy already have reached this Court. In April 1977, the Circuit Court of Cook County, Ill., entered an injunction against respondents prohibiting them, within the village, from parading in the National Socialist uniform, displaying the swastika, or displaying materials that incite or promote hatred against persons of the Jewish or any other faith. The Illinois Appellate Court denied an application for stay pending appeal. The Supreme Court of Illinois, in turn, denied a stay and also denied leave for an expedited appeal. Relief was sought here. This Court, *per curiam* but

by a divided vote, reversed the denial of a stay and remanded the case for further proceedings. *National Socialist Party* v. *Skokie,* 432 U. S. 43 (1977).

On remand, the Illinois Appellate Court reviewed and modified the injunction the Circuit Court had entered and this time upheld only that portion thereof that prevented the display of swastikas "in the course of a demonstration, march, or parade." *Village of Skokie* v. *National Socialist Party,* 51 Ill. App. 3d 279, 295, 366 N. E. 2d 347, 359 (1977). The Supreme Court of Illinois denied an application for stay pending expedited review. MR. JUSTICE STEVENS, as Circuit Justice, denied a stay of the injunction as so modified. 434 U. S. 1327 (1977). The Illinois Supreme Court ultimately reversed the remaining injunctive feature, "albeit reluctantly," and with one justice dissenting. 69 Ill. 2d 605, 619, 373 N. E. 2d 21, 26 (1978).

Thereafter, the village and its codefendants in the present federal litigation filed an application to stay the Seventh Circuit's mandate or, in the alternative, to stay enforcement of the injunction entered by the District Court. This Court, with two Justices dissenting, denied the application. 436 U. S. 953 (1978).

These facts and this chronology demonstrate, I believe, the pervading sensitivity of the litigation. On the one hand, we have precious First Amendment rights vigorously asserted and an obvious concern that, if those asserted rights are not recognized, the precedent of a "hard" case might offer a justification for repression in the future. On the other hand, we are presented with evidence of a potentially explosive and dangerous situation, enflamed by unforgettable recollections of traumatic experiences in the second world conflict. Finally, Judge Sprecher of the Seventh Circuit observed that "each court dealing with these precise problems (the Illinois Supreme Court, the District Court and this Court) feels the need to apologize for its result." 578 F. 2d, at 1211.

Furthermore, in *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952), this Court faced up to an Illinois statute that made it a crime to exhibit in any public place a publication that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion," thereby exposing such citizens "to contempt, derision, or obloquy." The Court, by a divided vote, held that, as construed and applied, the statute did not violate the liberty of speech guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment.

I stated in dissent when the application for stay in the present litigation was denied, 436 U. S., at 953, that I feel the Seventh Circuit's decision is in some tension with *Beauharnais.* That case has not been overruled or formally limited in any way.

I therefore would grant certiorari in order to resolve any possible conflict that may exist between the ruling of the Seventh Circuit here and *Beauharnais.* I also feel that the present case affords the Court an opportunity to consider whether, in the context of the facts that this record appears to present, there is no limit whatsoever to the exercise of free speech. There indeed may be no such limit, but when citizens assert, not casually but with deep conviction, that the proposed demonstration is scheduled at a place and in a manner that is taunting and overwhelmingly offensive to the citizens of that place, that assertion, uncomfortable though it may be for judges, deserves to be examined. It just might fall into the same category as one's "right" to cry "fire" in a crowded theater, for "the character of every act depends upon the circumstances in which it is done." *Schenck* v. *United States,* 249 U. S. 47, 52 (1919).

No. 78–289. Federal Deposit Insurance Corp. *v.* First Empire Bank-New York et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 572 F. 2d 1361.

No. 77–7009. HOY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 353 So. 2d 826.

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. 78–5213. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 577 F. 2d 747.

OCTOBER 20, 1978

Dismissal Under Rule 60

No. 78–5442. PROFFITT *v.* FLORIDA. Sup. Ct. Fla. Certiorari dismissed under this Court's Rule 60. Reported below: 360 So. 2d 771.

OCTOBER 24, 1978

Dismissal Under Rule 60

No. 78–5228. CALZADA *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 579 F. 2d 1358.

OCTOBER 30, 1978

Affirmed on Appeal

No. 78–64. NEW YORK *v.* UNITED STATES. Affirmed on appeal from C. A. 2d Cir. MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 574 F. 2d 128.

Appeals Dismissed

No. 78–55. Broadway Books, Inc. *v.* Virginia et al. Appeal from Cir. Ct., City of Richmond, dismissed for want of substantial federal question. Mr. Justice Stewart would dismiss for want of a properly presented federal question. Mr. Justice Brennan and Mr. Justice Marshall would reverse the judgment.

No. 78–259. Boston Edison Co. *v.* Department of Public Utilities of Massachusetts et al. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 375 Mass. 1, 375 N. E. 2d 305.

No. 78–5342. Jenkins *v.* Evening Star Newspaper Co. et al. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5380. Hemmerle et ux. *v.* First Federal Savings & Loan Association of DeSoto County. Appeal from Dist. Ct. App. Fla., 2d 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: 358 So. 2d 1195.

No. 78–293. Avery Federal Savings & Loan Assn. et al. *v.* Meyers et al., Commissioners, Sinking Fund of the City of Louisville. Appeal from Ct. App. Ky. dismissed for want of final judgment. (See 28 U. S. C. § 1257.) Reported below: 567 S. W. 2d 320.

No. 78–372. Moskowitz et al. *v.* Hynes, Deputy Attorney General of New York. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 44 N. Y. 2d 383, 377 N. E. 2d 446.

No. 78–359. HORD ET AL. *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 359 So. 2d 455.

No. 78–376. PABST *v.* COMMISSIONER OF TAXES OF VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. Reported below: 136 Vt. 126, 388 A. 2d 1181.

No. 78–377. SCUDDER *v.* FLORIDA POWER CORP. ET AL. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. Reported below: 350 So. 2d 106.

No. 78–386. CITY OF ROCHESTER ET AL. *v.* WALDERT. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 44 N. Y. 2d 831, 378 N. E. 2d 115.

No. 78–389. KAYE ET AL. *v.* WHALEN, COMMISSIONER OF HEALTH OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 44 N. Y. 2d 754, 376 N. E. 2d 1327.

Certiorari Granted—Vacated and Remanded. (See also No. 78–80, *ante,* p. 9.)

No. 78–40. WESTERN OIL & GAS ASSN. ET AL. *v.* ALASKA ET AL. C. A. D. C. Cir. Certiorari granted. Part II–C of decision below is vacated and case is remanded to the United States District Court for the District of Columbia for dismissal of paragraph 37 (j) of the complaint. Reported below: 188 U. S. App. D. C. 202, 580 F. 2d 465.

No. 78–327. CALIFORNIA *v.* JESSE W., A MINOR. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Swisher* v. *Brady,* 438 U. S. 204 (1978). Reported below: 20 Cal. 3d 893, 576 P. 2d 963.

Miscellaneous Orders

No. A–285. RUTH *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–305. INTERNATIONAL TELEPHONE & TELEGRAPH CORP. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–354 (78–657). KIMBLE ET AL. *v.* SWACKHAMER, SECRETARY OF STATE OF NEVADA, ET AL. Sup. Ct. Nev. Application for injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 77–1248. ILLINOIS STATE BOARD OF ELECTIONS *v.* SOCIALIST WORKERS PARTY ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 435 U. S. 994.] Motion of Socialist Workers Party for divided argument 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, 436 U. S. 916.] Motion of petitioners for divided argument granted.

No. 77–1493. GLADSTONE, REALTORS ET AL. *v.* VILLAGE OF BELLWOOD ET AL. C. A. 7th Cir. [Certiorari granted, 436 U. S. 956.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 77–1547. DOUGLAS OIL COMPANY OF CALIFORNIA ET AL. *v.* PETROL STOPS NORTHWEST ET AL. C. A. 9th Cir. [Certiorari granted, 437 U. S. 902.] Motion of the Solicitor General for divided argument granted.

No. 77–1578. BROADCAST MUSIC, INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 77–1583. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motion of Columbia Broadcasting System, Inc., for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 77–6217. STACY *v.* FLORIDA, 436 U. S. 924. Appellee is invited to file a response to petition for rehearing within 30 days.

No. 77–6431. CABAN *v.* MOHAMMED ET UX. Ct. App. N. Y. [Probable jurisdiction noted, 436 U. S. 903.] Order heretofore entered on October 10, 1978 [*ante*, p. 891], is vacated and the *amicus curiae* brief of the Legal Aid Society of New York City is ordered filed.

No. 78–201. GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. *v.* INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 817.] Motion of respondents for appointment of counsel granted, and it is ordered that Brian K. Ridenour, Esquire, of Lincoln, Neb., be appointed to serve as counsel in this case.

No. 78–428. GAETANO ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (SILBERT, UNITED STATES ATTORNEY, REAL PARTY IN INTEREST). Motion for leave to file petition for writ of mandamus denied.

No. 78–5184. SELLARS *v.* PROCUNIER, MEN'S COLONY SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 78–6. MOORE ET AL. *v.* SIMS ET UX. D. C. S. D. Tex. Probable jurisdiction noted. Reported below: 438 F. Supp. 1179.

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 78–330. HUNERWADEL *v.* BAIRD ET AL. Appeals from D. C. Mass. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 450 F. Supp. 997.

No. 78–357. WILLIAMS ET AL. *v.* BROWN ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted and case set for oral argument with No. 77–1844, *City of Mobile* v. *Bolden* [probable jurisdiction noted, *ante*, p. 815]. Reported below: 575 F. 2d 298.

Certiorari Granted

No. 78–58. BROWN *v.* FELSEN. C. A. 10th Cir. Certiorari granted.

No. 78–90. BURCH ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. Reported below: 360 So. 2d 831.

No. 78–275. OSCAR MAYER & CO. ET AL. *v.* EVANS. C. A. 8th Cir. Certiorari granted. Reported below: 580 F. 2d 298.

No. 78–334. FARE, ACTING CHIEF PROBATION OFFICER *v.* MICHAEL C. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 21 Cal. 3d 471, 579 P. 2d 7.

No. 78–5072. DAVIS *v.* PASSMAN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 571 F. 2d 793.

Certiorari Denied. (See also Nos. 78–259, 78–5342, and 78–5380, *supra,* and No. 78–80, *ante,* p. 9.)

No. 77–1735. THOMAS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 34 N. C. App. 594, 239 S. E. 2d 288.

No. 77–1767. RISS INTERNATIONAL CORP. *v.* BAKER ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 53 Ill. App. 3d 1101, 373 N. E. 2d 120.

No. 77–1818. RAMAPURAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 77–1832. SKINNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 77–1846. RANQUIST *v.* DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 55 Ill. App. 3d 545, 370 N. E. 2d 1198.

No. 77–1867. CRANFORD *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 282 Md. 255, 383 A. 2d 687.

No. 77–6798. EVANS *v.* BENSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–6879. GENTRY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 563 S. W. 2d 10.

No. 77–6889. OAXACA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 518.

No. 77–6905. MITCHELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 356 So. 2d 974.

No. 77–6952. WASHINGTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 77–6989. WILSON *v.* OHIO; and

No. 78–5023. WILSON *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 55 Ohio App. 2d 64, 379 N. E. 2d 273.

No. 78–12. CONIGLIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1045.

No. 78–96. LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL. *v.* FROSCH, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 233, 580 F. 2d 496.

No. 78–107. WHITNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1384.

No. 78–114. TSOUMAS, DIRECTOR, DEPARTMENT OF FINANCIAL INSTITUTIONS OF ILLINOIS *v.* GLEN ELLYN SAVINGS & LOAN ASSN. ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 71 Ill. 2d 493, 377 N. E. 2d 1.

No. 78–150. GONZALES ET AL. *v.* FAIRFAX-BREWSTER SCHOOL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 569 F. 2d 1294.

No. 78–158. BESBRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 1350.

No. 78–172. JIN WON PARK ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 751.

No. 78–176. HALL *v.* DIMARZO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 575 F. 2d 15.

No. 78–187. DAVID ET VIR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1373.

No. 78–193. CAPANEGRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 973.

No. 78–203. SNAPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 744.

No. 78–205. GIFT WRAPPINGS & TYINGS ASSN. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 200, 578 F. 2d 442.

No. 78–211. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS *v.* NEWPORT TANKERS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 575 F. 2d 477.

No. 78–215. STEELE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 576 F. 2d 111.

No. 78–218. CARBON FUEL CO. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 110, 581 F. 2d 888.

No. 78–230. KALAV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 78–232. BUFALINO *v.* UNITED STATES; and
No. 78–5218. SPARBER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 446.

No. 78–245. LEHIGH LUMBER CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 727.

No. 78–272. SCRUGGS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 566 S. W. 2d 405.

No. 78–274. WILCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–307. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1280.

No. 78–319. AVIS RENT A CAR SYSTEM, INC., ET AL. *v.* CITY OF CHICAGO; and

No. 78–320. HERTZ COMMERCIAL LEASING CORP. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. Reported below: 71 Ill. 2d 333, 375 N. E. 2d 1285.

No. 78–337. SHAPIRO *v.* TOWNSHIP OF EAST WINDSOR ET AL. Sup. Ct. N. J. Certiorari denied.

No. 78–346. OXLEY ET AL. *v.* LITTLE SWITZERLAND BREWING CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1306.

No. 78–348. BURNETT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 225, 564 S. W. 2d 211.

No. 78–355. SAUDCO LIMITED ET AL. *v.* TWENTIETH CENTURY-FOX FILM CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 299.

No. 78–358. FARRELL LINES, INC. *v.* CANIZZO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 682.

No. 78–374. STILL, TRUSTEE IN BANKRUPTCY, ET AL. *v.* CHATTANOOGA MEMORIAL PARK. C. A. 6th Cir. Certiorari denied. Reported below: 574 F. 2d 349.

No. 78–375. HADDAD *v.* CROSBY CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 200, 578 F. 2d 442.

No. 78–380. TUZMAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 145 Ga. App. 761, 244 S. E. 2d 882,

No. 78–383. FENNELL *v.* BUTLER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1384.

No. 78–392. TRACY ET AL. *v.* RUTCOSKY ET UX. Sup. Ct. Wash. Certiorari denied. Reported below: 89 Wash. 2d 606, 574 P. 2d 382.

No. 78–400. HAHN-DIGUISEPPE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 45, 379 N. E. 2d 191.

No. 78–404. FIRST PENNSYLVANIA BANK N. A. *v.* MONSEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 2d 793.

No. 78–405. NOGALES SERVICE CENTER *v.* ATLANTIC RICHFIELD CO. Ct. App. Ariz. Certiorari denied. Reported below: 119 Ariz. 552, 582 P. 2d 642.

No. 78–415. MAGNUSON *v.* BURLINGTON NORTHERN, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 1367.

No. 78–426. GARZIA ET UX. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 44 N. Y. 2d 867, 378 N. E. 2d 1045.

No. 78–427. GAETANO ET AL. *v.* SILBERT, UNITED STATES ATTORNEY. C. A. D. C. Cir. Certiorari denied.

No. 78–452. WOODWARD STATE HOSPITAL-SCHOOL ET AL. *v.* AUXIER. Sup. Ct. Iowa. Certiorari denied. Reported below: 266 N. W. 2d 139.

No. 78–473. STANDARD *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–508. IZSAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–543. FRAZIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 580 F. 2d 229.

No. 78–550. FREZZELL *v.* UNITED STATES. Ct. App. D. C. Reported below: 380 A. 2d 1382.

No. 78–5004. MANGAN *v.* UNITED STATES; and
No. 78–5025. MANGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 2d 32.

No. 78–5035. JOHNSON *v.* OHIO. Ct. App. Ohio, Greene County. Certiorari denied.

No. 78–5058. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 209.

No. 78–5062. PIPPEN *v.* UNITED STATES;
No. 78–5079. RICKS *v.* UNITED STATES; and
No. 78–5080. NICHOLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–5070. RAMIREZ-VENEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–5078. JOHNSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 578 F. 2d 1352.

No. 78–5099. DYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 737.

No. 78–5100. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 308.

No. 77–5104. TWO BULLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 63.

No. 78–5110. CRISAFI *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 383 A. 2d 1.

No. 78–5111. POOLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5114. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 78–5115. GARRISON *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 78–5123. WEST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 78–5126. CHRISCO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1383.

No. 78–5150. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–5162. HOOKER *v.* KLEIN, U. S. MARSHAL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1360.

No. 78–5182. MUNFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 78–5188. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–5210. HARGETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 380 A. 2d 1005.

No. 78–5226. JACOBSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 578 F. 2d 863.

No. 78–5230. MCCOY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–5233. ABOUZAHR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5235. LANGSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 1138.

No. 78–5248. PARRILLA *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 726.

No. 78–5253. GRASER *v.* GOLDBERG ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 78–5264. COLYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 941 and 576 F. 2d 1249.

No. 78–5272. TAYLOR *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 358 So. 2d 1284.

No. 78–5285. SOLTERO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 81 Cal. App. 3d 423, 146 Cal. Rptr. 457.

No. 78–5297. WOLFRATH *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 965.

No. 78–5298. MAYNOR *v.* SUTTONS. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 735.

No. 78–5303. CAMPELLONE *v.* ADULT PROBATION DEPARTMENT OF PIMA COUNTY, ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1315.

No. 78–5314. DUNAGAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 145 Ga. App. 68, 243 S. E. 2d 254.

No. 78–5316. RAY *v.* PROXMIRE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 220, 581 F. 2d 998.

No. 78–5318. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 579 F. 2d 531.

No. 78–5322. LINGHAM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 78–5332. VALDIVIA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 78–5339. BREEST *v.* HELGEMOE, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 579 F. 2d 95.

No. 78–5340. ROSENBERG *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: 62 App. Div. 2d 1065, 406 N. Y. S. 2d 492.

No. 78–5344. DALE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 78 Cal. App. 3d 722, 144 Cal. Rptr. 338.

No. 78–5346. ROMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 478 Pa. 619, 387 A. 2d 661.

No. 78–5348. STARKEY *v.* VERMILLION ET AL. C. A. 8th Cir. Certiorari denied.

No. 78–5349. FOSTER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 78–5354. EDWARDS *v.* SUPERIOR COURT OF POLK COUNTY, IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 78–5361. JOHNSON *v.* HOWARD, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 78–5362. CAMPBELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5367. BEASLEY *v.* JOHN BUIST CHESTER HOSPITAL SCHOOL OF VOCATIONAL NURSING. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 879.

No. 78–5376. BARBER *v.* KIMBRELL'S, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 216.

No. 78–5378. POSTON ET AL. *v.* HIGH POINT BANK & TRUST CO. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1048.

No. 78–5379. LIPPITT *v.* BOARD OF EDUCATION, SOUTH EUCLID-LYNDHURST CITY SCHOOL DISTRICT. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5385. LAM LEK CHONG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 64, 379 N. E. 2d 200.

No. 78–5390. WATSON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1382.

No. 78–5397. EMERY *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied.

No. 78–5399. LORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–5404. BALITIAN *v.* KUTA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 78–5406. RICH, AKA LUNCEFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 929.

No. 78–5423. BUSTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 368.

No. 78–5438. BLANKENSHIP *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 78–5444. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–5448. RESTREPO-GRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 524.

No. 78–5450. CHIMPRAPIBOON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–5455. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 78–5456. MIRELES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 583 F. 2d 1115.

No. 78–5466. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 578 F. 2d 1379.

No. 78–5469. STEWART ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 356.

No. 78–5472. BARBARIN *v.* ALL U. S. JUDGES OF THE EASTERN DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 144.

No. 78–5478. WINTERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1152.

No. 78–5487. SIERRA-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 760.

No. 78–5496. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 369.

No. 78–5511. CAMPBELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1287.

No. 77–1545. MCKETHAN *v.* UNITED STATES; and
No. 77–1557. GARNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 574 F. 2d 1141.

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

These petitioners contend that the admission into evidence at their trial of the grand jury testimony of an unavailable witness violated both the Federal Rules of Evidence and the Sixth Amendment. The Courts of Appeals have differed as to the admissibility of such evidence in similar cases. I would grant certiorari to resolve these questions.[1]

[1] Garner also contends that the prosecution proved that he participated in no more than one conspiracy. Thus, he argues that he should not have received consecutive sentences after conviction on the two con-

The petitioners were convicted of conspiracy and substantive offenses stemming from their alleged importation of heroin. An alleged accomplice named Robinson was allowed to plead guilty to two lesser offenses in return for his testimony against the petitioners before a grand jury. The prosecution intended to rely heavily on Robinson's testimony at the petitioners' trial. Before the trial, however, Robinson stated that he would not testify. Although the court granted Robinson use immunity, he persisted in his refusal to testify. Over the petitioners' objections, the trial judge then admitted the transcript of Robinson's grand jury testimony under Fed. Rule Evid. 804 (b)(5).[2] After this transcript was read to the trial jury, Robinson did take the witness stand. He stated that he knew the petitioners and that his grand jury testimony had been false. The Court of Appeals characterized his comments as

> "giv[ing] one the general impression not that the grand jury testimony was false but that, whatever pressures were brought upon him, [he] was unwilling to testify,

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spiracy counts. I believe the Court of Appeals properly decided this issue, and would limit the grant of certiorari to the evidentiary question.

[2] Rule 804 (b)(5) provides:

"(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

. . . . . .

"(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

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and particularly unwilling to say anything which would incriminate either of these defendants." 574 F. 2d 1141, 1143 (1978).

The grand jury testimony was the main support for the jury's guilty verdict against one of the petitioners, and an important part of the prosecution's case against the other.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed the petitioners' convictions, concluding that neither the Federal Rules of Evidence nor the Confrontation Clause barred the admission of Robinson's grand jury testimony because it possessed "strong indicators of reliability." *Id.*, at 1144. The Court of Appeals found that Robinson's story was corroborated by testimony at the trial from another member of the alleged conspiracy and by documentary evidence of the petitioners' overseas travels.

Although they are not coextensive, the Confrontation Clause and the hearsay rule "stem from the same roots." *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970). Considered under either the Sixth Amendment or the Federal Rules of Evidence, I have grave doubts about the admissibility of Robinson's grand jury testimony.

That the evidence was first given before a grand jury adds little to its reliability. In grand jury proceedings, the ordinary rules of evidence do not apply. Leading questions and multiple hearsay are permitted and common. Grand jury investigations are not adversary proceedings. No one is present to cross-examine the witnesses, to give the defendant's version of the story, or to expose weaknesses in the witnesses' testimony.

The only factor that generally makes grand jury testimony more trustworthy than other out-of-court statements is the fact that it is given under oath. The witnesses speak under the threat of prosecution for material false statements. But that usual indication of trustworthiness was missing here.

Robinson recanted his grand jury testimony at the trial. By disclaiming under oath his earlier sworn statements, he put himself in a position where one of his two sworn statements had to be false. Without further proof, Robinson would appear to have violated federal law, and, after the petitioners' trial, the Government did, indeed, indict Robinson for violation of 18 U. S. C. § 1623. The charges were dismissed only after he pleaded guilty to a contempt citation.

The Courts of Appeals are struggling with the problem of the admissibility of hearsay evidence not falling within one of the traditional exceptions to inadmissibility. The Fourth Circuit has taken a relatively liberal view of the admissibility of grand jury testimony, both in this case and in *United States* v. *West,* 574 F. 2d 1131 (1978). In a similar situation the Fifth Circuit concluded that grand jury testimony was inadmissible. *United States* v. *Gonzalez,* 559 F. 2d 1271 (1977). Before the adoption of the Federal Rules of Evidence, the Second Circuit held that the use of grand jury testimony in a situation like this violated both the hearsay rule and the Sixth Amendment. *United States* v. *Fiore,* 443 F. 2d 112 (1971). The Eighth Circuit, in a case in which the grand jury witness had not recanted his testimony, allowed the grand jury testimony to be admitted. *United States* v. *Carlson,* 547 F. 2d 1346 (1976).

While those cases may be factually distinguishable, the conflict in interpretation among the Circuits remains.[3] In some Circuits Rule 804 (b)(5) is being used to admit grand jury testimony when the witness is unavailable at trial; in others, it is not. Here, the witness recanted his grand jury testimony under oath at the trial, yet it was the crucial evidence in these petitioners' convictions.

I would grant certiorari to determine the limits placed upon

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[3] It seems to me open to serious doubt whether Rule 804 (b)(5) was intended to provide case-by-case hearsay exceptions, rather than only to permit expansion of the hearsay exceptions by categories.

the admissibility of this kind of evidence by either the Federal Rules of Evidence or the Constitution.

No. 78–78. SINGLETON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 863.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

The issue in this federal income tax case is whether a cash distribution that petitioner husband (hereafter petitioner) received in 1965 with respect to his shares in Capital Southwest Corporation (CSW) was taxable to him as a dividend, as the United States Court of Appeals for the Fifth Circuit held, or whether that distribution was a return of capital and therefore not taxable, as the Tax Court held. I regard the issue as of sufficient importance in the administration of the income tax laws to justify review here, and I dissent from the Court's failure to grant certiorari.

CSW was the parent of a group of affiliated corporations. Consolidated returns were filed for CSW and the group for the fiscal years ended March 31, 1964 and 1965. This was advantageous taxwise, for it enabled income of Capital Wire & Cable Corporation (CW), one of the subsidiaries, to be offset against losses sustained by CSW. CW's board formally recognized a saving in tax of about $863,000 through the filing of consolidated returns for the two fiscal years. That board then distributed $1 million in March 1965, not solely to CSW, its principal shareholder, but ratably to all its shareholders. As primary shareholder, CSW received $803,750 of that distribution.

The Internal Revenue Service subsequently determined that the consolidated returns for fiscal 1964 and 1965 did not accurately reflect the earnings of the group. Asserted deficiencies were settled in 1972 for approximately $900,000. Of this amount, about $755,000 was allocated to CW.

Petitioner takes the position that CW's allocable share of the 1965 tax must be accrued to that fiscal year; that CW's 1965 payment to CSW was thus not a dividend entering into the determination of CSW's earnings and profits at all, but was a constructive payment of CW's share of the tax bill; that this left CSW with no earnings and profits for 1965; and that, as a consequence, CSW's 1965 distribution to petitioner could only be a nontaxable return of capital and could not be a taxable dividend. The Tax Court, in a reviewed decision, with six judges dissenting, accepted this view. 64 T. C. 320 (1975). The Fifth Circuit reversed. 569 F. 2d 863 (1978).

As is not infrequently the situation in tax cases, the parties initially wage a battle of maxims. Petitioner speaks of "substance and realities" and cites, among other cases, *Helvering* v. *Lazarus & Co.*, 308 U. S. 252, 255 (1939), and *Frank Lyon Co.* v. *United States*, 435 U. S. 561, 573 (1978). The Commissioner asserts that a taxpayer must accept the tax consequences of his structural choice and cites *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U. S. 134, 149 (1974). In addition, however, it is clear that CW's distribution was definitely intended to compensate CSW for the tax saving effected by the beneficial use of CSW's loss in the consolidated return. On the other hand, that compensatory action was accomplished by a pro rata distribution not only to CSW but to minority shareholders as well.

For me, the answer to this tax question is by no means immediately apparent. Each side advances a forceful argument. The deep division among the judges of the Tax Court is indicative and significant. I cannot regard the issue as one that is too fact-specific or incapable of precedential effect. On the contrary, it features important aspects of tax accounting and tax law. CSW and CW, after all, were accrual-basis taxpayers. Normally, when a deficiency in tax of an accrual-basis taxpayer is ultimately determined, it is to be accrued as of the tax year of the deficiency and it affects earnings and

profits accordingly. A consideration opposing this accepted proposition is the fact that the portion of CW's 1965 distribution paid to minority shareholders obviously qualified and apparently was reported as taxable dividends; it would be at least somewhat anomalous to have the portion paid to CSW constitute, in contrast, a return of capital.

I hope that the Court's decision to pass this case by is not due to a natural reluctance to take on another complicated tax case that is devoid of glamour and emotion and that would be remindful of the recent struggles, upon argument and reargument, in *United States* v. *Foster Lumber Co.*, 429 U. S. 32 (1976), and *Laing* v. *United States*, 423 U. S. 161 (1976).*

Opinion of MR. JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

What is the significance of this Court's denial of certiorari? That question is asked again and again; it is a question that is likely to arise whenever a dissenting opinion argues that certiorari should have been granted. Almost 30 years ago Mr. Justice Frankfurter provided us with an answer to that question that should be read again and again.

> "This Court now declines to review the decision of the Maryland Court of Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' Rule 38, paragraph 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari

*The point MR. JUSTICE STEVENS would make by his separate opinion was answered effectively 25 years ago by Mr. Justice Jackson, concurring in the result, in *Brown* v. *Allen*, 344 U. S. 443, 542–544 (1953).

to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

"Since there are these conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. In order that the Court may be enabled to discharge its indispensable duties, Congress has placed the control of the Court's business, in effect, within the Court's discretion. During the last three terms the Court disposed of 260, 217, 224 cases, respectively, on their merits. For the same three terms the Court denied, respectively, 1,260, 1,105, 1,189 petitions calling for discretionary review. If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable. It becomes relevant here to note that failure to record a dissent from a denial of a petition for writ of certiorari in nowise

implies that only the member of the Court who notes his dissent thought the petition should be granted.

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Opinion respecting the denial of the petition for writ of certiorari in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 917–919.

When those words were written, Mr. Justice Frankfurter and his colleagues were too busy to spend their scarce time writing dissents from denials of certiorari. Such opinions were almost nonexistent.[1] It was then obvious that if there was no need to explain the Court's action in denying the writ, there was even less reason for individual expressions of opinion about why certiorari should have been granted in particular cases.

Times have changed. Although the workload of the Court has dramatically increased since Mr. Justice Frankfurter's day,[2] most present Members of the Court frequently file written dissents from certiorari denials. It is appropriate to ask whether the new practice serves any important goals or contributes to the strength of the institution.

One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They

[1] There were none in 1945 or 1946, and I have been able to find only one in the 1947 Term. See dissent in *Chase National Bank* v. *Cheston,* and companion cases, 332 U. S. 793, 800.

[2] By way of comparison to the figures cited by Mr. Justice Frankfurter, the Court during the three most recent Terms reviewed and decided 362, 483, and 323 cases respectively. And during each of these Terms, the Court denied certiorari in well over 3,000 cases.

are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.

Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.

In this case, for example, the dissenting opinion suggests that the Court may have refused to grant certiorari because the case is "devoid of glamour and emotion." I am puzzled by this suggestion because I have never witnessed any indication that any of my colleagues has ever considered "glamour and emotion" as a relevant consideration in the exercise of his discretion or in his analysis of the law. With respect to the Court's action in this case, the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari. Moreover, in allocating the Court's scarce resources, I consider it entirely appropriate to disfavor complicated cases which turn largely on unique facts. A series of decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court. As Mr. Justice Frankfurter reminded us, "wise adjudication has its own time for ripening."

Admittedly these dissenting opinions may have some beneficial effects. Occasionally a written statement of reasons for granting certiorari is more persuasive than the Justice's oral contribution to the Conference. For that reason the written document sometimes persuades other Justices to change their

votes and a petition is granted that would otherwise have been denied. That effect, however, merely justifies the writing and circulating of these memoranda within the Court; it does not explain why a dissent which has not accomplished its primary mission should be published.

It can be argued that publishing these dissents enhances the public's understanding of the work of the Court. But because they are so seldom answered, these opinions may also give rise to misunderstanding or incorrect impressions about how the Court actually works. Moreover, the selected bits of information which they reveal tend to compromise the otherwise secret deliberations in our Conferences. There are those who believe that these Conferences should be conducted entirely in public or, at the very least, that the votes on all Conference matters should be publicly recorded. The traditional view, which I happen to share, is that confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process; such confidentiality is especially valuable in the exercise of the kind of discretion that must be employed in processing the thousands of certiorari petitions that are reviewed each year. In my judgment, the importance of preserving the tradition of confidentiality outweighs the minimal educational value of these opinions.

In all events, these are the reasons why I have thus far resisted the temptation to publish opinions dissenting from denials of certiorari.

No. 78–335. CHESAPEAKE & OHIO RAILWAY CO. *v.* LAFONTAINE. C. A. 6th Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 575 F. 2d 1337.

No. 78–347. ORECK CORP. *v.* WHIRLPOOL CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 579 F. 2d 126.

No. 78–384. PARRY, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ORANGE COUNTY, ET AL. *v.* GEORGE ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 578 F. 2d 1367.

No. 78–5106. CORNELL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 266 N. W. 2d 15.

No. 78–5192. FRITZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 580 F. 2d 370.

No. 78–5321. ADAMS *v.* FLORIDA. Sup. Ct. Fla.; and

No. 78–5335. DAVIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 78–5321, 355 So. 2d 1205; No. 78–5335, 241 Ga. 376, 247 S. E. 2d 45.

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. 78–5327. HOSTETLER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 145 Ga. App. 55, 243 S. E. 2d 256.

No. 78–5402. HAYS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 145 Ga. App. 65, 243 S. E. 2d 263.

NOVEMBER 1, 1978

Dismissal Under Rule 60

No. 78–5540. BUCHANAN *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60.

NOVEMBER 3, 1978

Miscellaneous Orders

No. A–417. ROGERS ET AL. *v.* LODGE ET AL. Application for stay of order of United States District Court for the Southern District of Georgia, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending final disposition of the appeal to the United States Court of Appeals for the Fifth Circuit.

No. A–382 (78–710). KLEIN *v.* UNITED STATES. C. A. 2d Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

NOVEMBER 6, 1978

Appeals Dismissed

No. 78–123. ACKER *v.* BOARD OF TRUSTEES OF PASS CHRISTIAN MUNICIPAL SEPARATE SCHOOL DISTRICT. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 357 So. 2d 292.

No. 78–446. DUNHAM ET UX. *v.* CLACKAMAS COUNTY. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 282 Ore. 419, 579 P. 2d 223.

No. 78–465. NAPOLITANO ET UX. *v.* WYOMING STATE HIGHWAY DEPARTMENT ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 578 P. 2d 1342.

No. 78–297. MANCHESTER NEWS CO., INC. *v.* NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of final judgment. See 28 U. S. C. § 1257. Reported below: 118 N. H. 255, 387 A. 2d 324.

No. 78–381. HOLDING *v.* BVA CREDIT CORP. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–397. GARFINKLE ET VIR *v.* SUPERIOR COURT OF CONTRA COSTA COUNTY (WELLS FARGO BANK ET AL., REAL PARTIES IN INTEREST). Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 21 Cal. 3d 268, 578 P. 2d 925.

Certiorari Granted—Reversed in Part and Remanded. (See No. 77–6885, *ante,* p. 14.)

Certiorari Granted—Vacated and Remanded

No. 77–6817. MCELWEE *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Crist* v. *Bretz,* 437 U. S. 28 (1978). Reported below: 563 S. W. 2d 274.

Miscellaneous Orders

No. A–376. PFISTER *v.* ANDERSON CLINIC, INC., ET AL. Application for stay of orders of the United States Court of Appeals for the Fourth Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–73. IN RE DISBARMENT OF MCGOVERN. Disbarment entered. [For earlier order herein, see 429 U. S. 936.]

No. D–102. IN RE DISBARMENT OF PAPPAS. Disbarment entered. [For earlier order herein, see 430 U. S. 981.]

No. D–117. IN RE DISBARMENT OF EISENBERG. Disbarment entered. [For earlier order herein, see 434 U. S. 885.]

No. D–131. In re Disbarment of Gibson. Disbarment entered. [For earlier order herein, see 435 U. S. 901.]

No. D–133. In re Disbarment of Chu. Disbarment entered. [For earlier order herein, see 435 U. S. 949.]

No. D–143. In re Disbarment of Beasley. It is ordered that Alton S. Beasley, of Okeechobee, 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. 77–1410. Butner *v.* United States et al. C. A. 4th Cir. [Certiorari granted, 436 U. S. 955.] Motion of the Solicitor General for divided argument granted.

No. 77–1497. Arkansas *v.* Sanders. Sup. Ct. Ark. [Certiorari granted, *ante,* p. 891.] Motion of Bill Clinton, Esquire, to permit Joseph H. Purvis, Esquire, to present oral argument *pro hac vice* granted.

No. 77–1553. County of Los Angeles et al. *v.* Davis et al. C. A. 9th Cir. [Certiorari granted, 437 U. S. 903.] Motion of California Organization of Police & Sheriffs, Inc., for leave to file a brief as *amicus curiae* granted.

No. 77–1578. Broadcast Music, Inc., et al. *v.* Columbia Broadcasting System, Inc., et al.; and

No. 77–1583. American Society of Composers, Authors & Publishers et al. *v.* Columbia Broadcasting System, Inc., et al. [Certiorari granted, *ante,* p. 817.] Motion of petitioners to dispense with printing appendix granted.

No. 78–136. Wholesale Materials Co., Inc. *v.* Magna Corp., dba Mississippi Steel, *ante,* p. 864. Motion of respondent for damages for delay denied.

No. A–355 (78–649). CITY OF BOSTON ET AL. *v.* ANDERSON ET AL. Sup. Jud. Ct. Mass. Motion to vacate stay order heretofore entered by MR. JUSTICE BRENNAN on October 20, 1978, denied.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

Because the Court in practical effect has summarily reversed the unanimous holding of the Supreme Judicial Court of Massachusetts on a question of Massachusetts law, it is appropriate to note my dissent. The highest court of the State held that a Massachusetts "municipality has no authority to appropriate funds for the purpose of taking action to influence the result of a referendum proposed to be submitted to the people at a State election." [1]

Unless state action has violated some federal law, a federal court has no power to compel a State to spend its money or to grant a political subdivision of the State authority which the State has withheld.[2] Federal questions may, of course, arise

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[1] — Mass. —, —, 380 N. E. 2d 628, 632 (1978).

[2] "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State

when a State regulates the communicative activities of third parties, whether they be individuals or private corporations. Such questions may also arise if a State authorizes expenditures to advance or explain a particular point of view. But in this case we are merely confronted with "a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination." [3] I consider it frivolous to suggest that the First Amendment, or any other provision of the United States Constitution, empowers this Court to interfere with that determination. I would therefore grant the motion to vacate the stay entered by MR. JUSTICE BRENNAN as Circuit Justice on October 20, 1978.

No. 78–5181. KOVACS *v.* BOLT ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 77–1645. TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL. *v.* LEWIS. C. A. 9th Cir. Certiorari granted. Reported below: 575 F. 2d 237.

No. 78–479. EDMONDS *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. C. A. 4th Cir. Certiorari granted. Reported below: 577 F. 2d 1153.

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is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178–179.

[3] —— Mass., at ——, 380 N. E. 2d, at 637.

Certiorari Denied. (See also No. 78–381, *supra,* and No. 77–6885, *ante,* p. 14.)

No. 77–1677. RICHMAN *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 354 So. 2d 1200.

No. 77–1859. HELFAT *v.* SECURITIES AND EXCHANGE COMMISSION ET AL.; and

No. 78–295. KORACORP INDUSTRIES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 692.

No. 77–1868. IN RE JANAVITZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 576 F. 2d 1071.

No. 77–6776. WARD ET UX. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 17 Wash. App. 1034.

No. 78–7. DELPH ET AL. *v.* UNITED STATES; and

No. 78–34. HAWKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 880.

No. 78–19. FRUEHAUF CORP. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 1038.

No. 78–42. CHOATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 165.

No. 78–45. GEORGE HANTSCHO CO., INC. *v.* WANSOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1202.

No. 78–54. KEENER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 224 Kan. 100, 577 P. 2d 1182.

No. 78–63. MOON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–89. GOELLER *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 264 N. W. 2d 472.

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No. 78–117. GRAY-TAYLOR, INC., DBA JIMMIE GREEN CHEVROLET *v.* HARRIS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 893.

No. 78–120. CLAVEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 1219.

No. 78–171. FERNANDEZ-GUZMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 1093.

No. 78–198. GUTIERREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 576 F. 2d 269.

No. 78–210. WALTON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 282 Md. 514, 385 A. 2d 806.

No. 78–254. OHIO *v.* RUPPERT; and
No. 78–483. RUPPERT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 54 Ohio St. 2d 263, 375 N. E. 2d 1250.

No. 78–264. WEDELSTEDT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 263 N. W. 2d 894 and 265 N. W. 2d 626.

No. 78–266. SYUFY ENTERPRISES *v.* NATIONAL GENERAL THEATRES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 233.

No. 78–277. DOYON, LTD., ET AL. *v.* BRISTOL BAY NATIVE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 569 F. 2d 491.

No. 78–306. UNITED VAN LINES, INC. *v.* VONDER LINDEN ET UX. Sup. Ct. N. M. Certiorari denied.

No. 78–332. 83RD REALTY CO. *v.* JAMAICA SAVINGS BANK. C. A. 2d Cir. Certiorari denied.

No. 78–356. SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA *v.* LICKLIDER, CHAIRMAN, STATE CONSERVATION COMMISSION OF IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 145.

No. 78–420. CAESAR'S HEALTH CLUB ET AL. *v.* ST. LOUIS COUNTY, MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 565 S. W. 2d 783.

No. 78–422. WESTINGHOUSE ELECTRIC CORP. *v.* KERR-McGEE CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 2d 1311.

No. 78–429. HASTE ET UX. *v.* AMERICAN HOME PRODUCTS CORP. C. A. 10th Cir. Certiorari denied. Reported below: 577 F. 2d 1122.

No. 78–456. STATEWIDE CONTRACTORS, INC., ET AL. *v.* FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER ET AL. Sup. Ct. Pa. Certiorari denied.

No. 78–460. LIS ET AL. *v.* ROBERT PACKER HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 2d 819.

No. 78–475. FRIED ET AL. *v.* CAREY, STATE'S ATTORNEY OF COOK COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1283.

No. 78–499. WARDEN, STATE PRISON OF SOUTHERN MICHIGAN AT JACKSON *v.* BERRIER. C. A. 6th Cir. Certiorari denied. Reported below: 583 F. 2d 515.

No. 78–502. FLISK ET AL. *v.* KELLY, JUDGE. Cir. Ct., Cook County, Ill. Certiorari denied.

No. 78–520. ROSS *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1316.

No. 78–559. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (McDOWELL ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–588. VAN WEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1387.

No. 78–637. GALANTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 973.

No. 78–5026. NELSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 277.

No. 78–5034. RUVIWAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1072.

No. 78–5051. CARTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5061. GRAHAM *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 78–5077. BELL *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 576 F. 2d 564.

No. 78–5086. BUCKINGHAM *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1380.

No. 78–5121. MOORE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 83 Wis. 2d 285, 265 N. W. 2d 540.

No. 78–5134. CROWELL *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 1257.

No. 78–5167. CANET *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 356 So. 2d 63.

No. 78–5179. SAYLOR ET AL. *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied.

No. 78–5194. YOUNG *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 91 N. M. 647, 579 P. 2d 179.

No. 78–5227. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 145.

No. 78–5251. MCGUIRE *v.* UNITED STATES; and
No. 78–5288. BLACKWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 578 F. 2d 1379.

No. 78–5254. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 201, 578 F. 2d 443.

No. 78–5260. NAHAVANDI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 78–5266. KEARNS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5395. ROBINSON *v.* RICHARDSON, DISTRICT ATTORNEY OF CADDO PARISH, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5398. TYLER ET AL. *v.* GRADY, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 78–5400. D'AGOSTIN *v.* ENOMOTO, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1315.

No. 78–5405. HAWKINS *v.* CRIST, WARDEN, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 583 P. 2d 396.

No. 78–5413. CORPUS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 1378.

No. 78–5424. ROCHE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 78, 379 N. E. 2d 208.

No. 78–5428. DENNY *v.* FOREMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–5430. JENSEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5432. HALL *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 194.

No. 78–5434. GARZA *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 78–5437. POSTON *v.* MORGAN-SCHULTHEISS, INC. Ct. App. N. C. Certiorari denied.

No. 78–5449. CONROY *v.* BOMBARD, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–5480. MANCILLAS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 2d 1301.

No. 78–5493. BOHR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 2d 1294.

No. 78–5502. SANDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–167. AMERICAN AIR FILTER CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL.;

No. 78–168. GOODYEAR TIRE & RUBBER CO. ET AL. *v.* FEDERAL TRADE COMMISSION ET AL.; and

No. 78–169. MILLIKEN & CO. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 193 U. S. App. D. C. 300, 595 F. 2d 685.

No. 78–5527. McNAIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–190. ELI LILLY & Co. *v.* STAATS, COMPTROLLER GENERAL, ET AL. C. A. 7th Cir. Motion of Abbott Laboratories for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 574 F. 2d 904.

No. 78–237. AQUA MEDIA, LTD., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari and/or motion for leave to file petition for writ of certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 575 F. 2d 222.

No. 78–351. CLAY ET AL. *v.* HAYWARD ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 573 F. 2d 187.

No. 78–407. HAKE ET AL. *v.* HELTON, ADMINISTRATRIX, ET AL. Ct. App. Mo., Kansas City Dist. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 564 S. W. 2d 313.

No. 78–5250. JONES *v.* TEXAS. Ct. Crim. App. Tex.; and No. 78–5311. RAULERSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 78–5250, 568 S. W. 2d 847; No. 78–5311, 358 So. 2d 826.

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. 78–5193. KNIGHT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 352 So. 2d 179.

No. 78–629. HICKEY *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied. Certiorari denied. Reported below: 575 F. 2d 880.

Rehearing Denied

No. 77–1636. REED *v.* CITY OF LOS ANGELES ET AL., *ante,* p. 825;

No. 77–6574. YANNI *v.* UNITED STATES, *ante,* p. 840;

No. 77–6683. CAMPBELL *v.* UNITED STATES, *ante,* p. 841;

No. 77–6914. DAVIS *v.* LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OF MINNESOTA ET AL., *ante,* p. 807;

No. 77–6984. KALEC *v.* DELLINGER, PROSECUTOR OF WHITE COUNTY, ET AL., *ante,* p. 857;

No. 78–5045. ROOKS *v.* UNITED STATES, *ante,* p. 862;

No. 78–5139. CALHOUN ET UX. *v.* FRANCHISE TAX BOARD OF CALIFORNIA, *ante,* p. 872; and

No. 78–5176. SCEIFERS *v.* INDIANA, *ante,* p. 873. Petitions for rehearing denied.

No. 77–1003. NAPOLI ET AL. *v.* UNITED STATES, 436 U. S. 912. Motion for leave to file petition for hearing denied.

NOVEMBER 13, 1978

Appeals Dismissed

No. 78–431. GODSY *v.* GODSY. Appeal from Ct. App. Mo., Kansas City District, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 565 S. W. 2d 726.

No. 78–5458. WAYLAND *v.* TOWN OF TOPSFIELD. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 582 F. 2d 1269.

No. 78–5507. HARTO *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–467. ENNTEX OIL & GAS CO. (OF NEVADA) ET AL. *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 6th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 560 S. W. 2d 494.

No. 78–5329. HENRY *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 195 Colo. 309, 578 P. 2d 1041.

Miscellaneous Orders

No. A–364. SCHAFER ET AL. *v.* TRUSTEES OF PROPERTY OF PENN CENTRAL CO. C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE, and referred to the Court, denied.

No. 76–419. VERMONT YANKEE NUCLEAR POWER CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–528. CONSUMERS POWER CO. *v.* AESCHLIMAN ET AL., 435 U. S. 519. Motions of respondents for elimination or reduction of taxed costs denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 77–983. WASHINGTON ET AL. *v.* WASHINTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN. ET AL.; and WASHINGTON ET AL. *v.* PUGET SOUND GILLNETTERS ASSN. ET AL. Sup. Ct. Wash. [Certiorari granted, *ante*, p. 909]; and

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL.; and

No. 78–139. PUGET SOUND GILLNETTERS ASSN. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. [Certiorari granted, *ante*, p. 909.] Motion of the Solicitor General and motion of respondent Indian Tribes (except Yakima Indian Nation) to consolidate cases for purpose of briefing and argument granted. Briefing schedule of the Solicitor General as set out in his motion is adopted by the Court. Total time of two hours heretofore granted by the Court in these cases is reduced to one and one-half hours and is divided as follows: 30 minutes to the Solicitor General; 30 minutes to the State of Washington; 15 minutes to the Indian Tribes; and 15 minutes to the association of non-Indian fishermen.

No. A–395 (78–729). ARROW FOOD DISTRIBUTORS, INC. *v.* LOVE, CONSERVATOR. Sup. Ct. Miss. Application for stay, addressed to MR. JUSTICE REHNQUIST, and referred to the Court, denied.

No. A–420 (78–761). AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* UNITED STATES. C. A. D. C. Cir. That portion of the order by THE CHIEF JUSTICE on November 2, 1978, which stayed the order of the United States Court of Appeals for the District of Columbia Circuit, entered October 31, 1978, pending filing of a response, is vacated and the application is denied.

No. A–372 (78–5600). GIBBS *v.* UNITED STATES. C. A. 4th Cir. Application for recall and stay of mandate, addressed to MR. JUSTICE MARSHALL, and referred to the Court, denied.

Certiorari Granted—Vacated and Remanded. (See No. 77–1792, *ante,* p. 24.)

Certiorari Granted

No. 78–482. SMITH, JUDGE, ET AL. *v.* DAILY MAIL PUBLISHING CO. ET AL. Sup. Ct. App. W. Va. Certiorari granted. Reported below: —— W. Va. ——, 248 S. E. 2d 269.

No. 78–160. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and

No. 78–161. IOWA ET AL. *v.* OMAHA INDIAN TRIBE ET AL. C. A. 8th Cir. Petition for writ of certiorari in No. 78–160 is granted limited to Questions 2 and 3 presented by the petition. Petition for writ of certiorari in No. 78–161 is granted limited to Questions 1 and 4 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 575 F. 2d 620.

Certiorari Denied. (See also Nos. 78–431, 78–5458, and 78–5507, *supra.*)

No. 77–1779. PARIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1371.

No. 77–6570. WILSON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION. C. A. 6th Cir. Certiorari denied.

No. 77–6754. HOBGOOD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 262 Ark. 725, 562 S. W. 2d 41.

No. 77–6814. HOPPMAN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 82 Wis. 2d 811, 266 N. W. 2d 435.

No. 77–6916. URIARTE *v.* UNITED STATES; and

No. 78–316. RAMIREZ-URIARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 575 F. 2d 215.

No. 77–6920. CLARKE *v.* PERCY, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICE OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 83 Wis. 2d 349, 265 N. W. 2d 285.

No.77–6968. HARDWICK *v.* WELDON ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–13. SCHOENHUT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 576 F. 2d 1010.

No. 78–32. REEVES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 227, 564 S. W. 2d 503.

No. 78–61. HITCHEVA *v.* DIVISION OF STATE LANDS OF OREGON. Ct. App. Ore. Certiorari denied. Reported below: 31 Ore. App. 839, 572 P. 2d 625.

No. 78–144. MENDEL *v.* UNITED STATES; and
No. 78–5156. REEVES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied Reported below: 578 F. 2d 668.

No. 78–147. CHAMPAGNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1045.

No. 78–186. RICH *v.* UNITED STATES; and
No. 78–314. PELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 701.

No. 78–220. BRAVERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1386.

No. 78–288. WENCKE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 619.

No. 78–290. HERRERA-VINEGAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 1308.

No. 78–292. Ute Indian Tribe *v.* State Tax Commission of Utah. C. A. 10th Cir. Certiorari denied. Reported below: 574 F. 2d 1007.

No. 78–315. Neaveill *v.* Andolsek, Commissioner, United States Civil Service Commission, et al. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 749.

No. 78–362. Western Waterproofing Co., Inc. *v.* Marshall, Secretary of Labor, et al. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 139.

No. 78–367. Quigley *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–378. St. Elizabeth's Hospital of Boston *v.* Weiner, Chairman, Rate Setting Commission, Office of Human Services of Massachusetts, et al. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 722.

No. 78–409. Vallance *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1282.

No. 78–424. Cunningham *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 78–438. McMasters et al. *v.* Chase. C. A. 8th Cir. Certiorari denied. Reported below: 573 F. 2d 1011.

No. 78–444. Ronk et al. *v.* Ahlert et ux. Sup. Ct. Ark. Certiorari denied.

No. 78–457. Nietert et al. *v.* Citizens Bank & Trust Co. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 251, 565 S. W. 2d 4.

No. 78–459. Rosee *v.* Board of Trade of Chicago et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 57 Ill. App. 3d 228, 372 N. E. 2d 1000.

No. 78–470. PORTNER *v.* COMMUNITY STATE BANK & TRUST CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1375.

No. 78–471. NELSON *v.* PENTECOSTAL CHURCH OF GOD, INC., M. I., ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–472. LEMM *v.* WASHINGTON SUBURBAN SANITARY COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 78–474. PRINCETON COMMUNITY PHONE BOOK, INC., ET AL. *v.* BATE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 706.

No. 78–476. FLORIDA POWER & LIGHT CO. *v.* GAINESVILLE UTILITIES DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 292.

No. 78–480. BLANCO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Ventura. Certiorari denied.

No. 78–481. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 6, AFL–CIO *v.* SAN FRANCISCO ELECTRICAL CONTRACTORS ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 529.

No. 78–485. TEXAS COMMITTEE ON NATURAL RESOURCES *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 201.

No. 78–501. KOROS ET UX. *v.* CREDIT BUREAU, INC., OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 144.

No. 78–509. 28 EAST JACKSON ENTERPRISES, INC. *v.* ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 748.

No. 78–590. BLASCO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 681.

No. 78–632. BULLOCK ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 2d 1116.

No. 78–645. MARTIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1359.

No. 78–5005. EASLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 564 S. W. 2d 742.

No. 78–5074. RANGER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5094. MIGNONA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–5101. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 924.

No. 78–5120. SMITH *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 466.

No. 78–5138. LEWIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5151. WIGGINS *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5178. BOYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 574 F. 2d 951.

No. 78–5270. PROCTOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–5276. MOWAT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1194.

No. 78–5295. ETLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 850.

No. 78–5305. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 579 F. 2d 840.

No. 78–5307. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 883.

No. 78–5331. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 78–5336. HARPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 1235.

No. 78–5365. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 744.

No. 78–5394. MYERS *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 504.

No. 78–5439. RAWLEY *v.* RAWLEY ET AL. Sup. Ct. La. Certiorari denied. Reported below: 357 So. 2d 1154.

No. 78–5459. LARUFFA *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1368.

No. 78–5461. MAHLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–5462. HEBERT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: See 566 S. W. 2d 798.

No. 78–5463. WHITE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 78–5467. JAKOB *v.* FIRST ALABAMA BANK OF MONTGOMERY. Sup. Ct. Ala. Certiorari denied. Reported below: 361 So. 2d 1017.

No. 78–5468. TURPEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 94 Nev. 576, 583 P. 2d 1083.

No. 78–5470. MCKIBBEN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 144.

No. 78–5473. ALVAREZ *v.* AMERICAN EXPORT LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 580 F. 2d 1179.

No. 78–5474. LOMAX *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 359 So. 2d 832.

No. 78–5476. NABKEY *v.* MICHIGAN STATE HIGHWAY COMMISSION. Ct. App. Mich. Certiorari denied.

No. 78–5477. WEST *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–5479. HAMMER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 605, 377 N. E. 2d 638.

No. 78–5481. BOYD *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 389 A. 2d 1282.

No. 78–5484. GREEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5485. MCDANIEL *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 582 F. 2d 1242.

No. 78–5492. FOWLER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 78–5497. CHILDS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 78–5499. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5503. HALL *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 78–5517. CLAYTON *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 78–5528. SCHAFER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 774.

No. 78–5546. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 360.

No. 78–5557. RITCH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 583 F. 2d 1179.

No. 78–5579. BRADLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 265.

No. 78–5585. STURGIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1296.

No. 77–1863. MITCHELL, WARDEN *v.* NOTTINGHAM. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 193.

No. 78–180. LEEKE, CORRECTIONS COMMISSIONER, ET AL. *v.* GORDON; and COLLINS, WARDEN *v.* YOUNG. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 574 F. 2d 1147.

No. 78–182. SERWOLD ET UX. *v.* NELSON. C. A. 9th Cir. Motion of Stephen W. Holohan for leave to file a brief as *amicus curiae* and certiorari denied. Reported below: 576 F. 2d 1332.

No. 78–317. DUPONT GLORE FORGAN, INC., ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 578 F. 2d 1367.

No. 78–5177. HARRIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

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

In 1971 a grocery store clerk in Tulsa, Okla., was shot and killed during the course of a robbery of the store. Petitioner has undergone two separate trials based on two separate

charges arising out of this event. Petitioner was convicted of armed robbery in the District Court of Tulsa County, Case No. CRF–73–228, on July 19, 1973. On November 21, 1973, petitioner was convicted in a second trial of the crime of felony murder, the armed robbery providing an essential element of the crime. Case No. CRF–73–227. Claiming that his rights under the Double Jeopardy Clause of the Fifth Amendment had been violated, petitioner sought postconviction relief in the District Court of Tulsa County, Okla. This relief was denied.

Petitioner then appealed to the Oklahoma Court of Criminal Appeals, which ordered petitioner's conviction for felony murder vacated because of the Double Jeopardy Clause. The Court stated:

> "This order is made without prejudice to the trial of the said Floyd Harris on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in *Brown* v. *Ohio,* 432 U. S. 161, . . . and *Harris* v. *Oklahoma,* [433 U. S. 682]." Order Reversing Denial of Post-Conviction Relief, No. PC–78–93 (June 5, 1978).

Petitioner subsequently filed with the Oklahoma Court of Criminal Appeals an application entitled Writ of Habeas Corpus or alternatively, Petition for Rehearing *sua sponte,* alleging that the court's order in No. PC–78–93 was erroneous because in contravention of *Harris* v. *Oklahoma,* 433 U. S. 682 (1977). The court denied petitioner's application, stating:

> "As petitioner's trial on the charge of Murder in the First Degree is barred solely because the armed robbery for which he was previously convicted is a necessary element of the murder conviction, the holding of *Harris* v. *Oklahoma* . . . does not prevent petitioner's trial on a lesser degree of homicide which does not require proof of the armed robbery as a necessary element." Order Denying Relief, No. H–78–322 (July 25, 1978).

The order of the Oklahoma Court of Criminal Appeals would permit petitioner to be tried on charges arising out of the same criminal transaction as that underlying petitioner's conviction for armed robbery. Because I continue to adhere to my view, expressed in *Harris* v. *Oklahoma, supra,* at 683 (concurring opinion), that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction," *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring), I would grant the petition for certiorari and reverse the judgment of the Oklahoma Court of Criminal Appeals in No. H–78–322. See *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

No. 78–5489. HALL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE WHITE would grant certiorari.

No. 78–464. CURTIN MATHESON SCIENTIFIC, INC., ET AL. *v.* RUSSELL ET AL. C. A. 5th Cir. Motion for leave to file petition for writ of certiorari and/or petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 77–1589. OLIVETI *v.* UNITED STATES, *ante,* p. 822;

No. 77–1616. NELSON *v.* DEFENSE LOGISTICS AGENCY, *ante,* p. 824;

No. 77–1816. DIGILIO ET AL. *v.* UNITED STATES, *ante,* p. 836;

No. 77–6691. ALDRIDGE *v.* FLORIDA, *ante,* p. 882;

No. 77–6696. LEWIS *v.* UNITED STATES, *ante,* p. 842; and

No. 77–6712. BRIDGES *v.* UNITED STATES, *ante,* p. 842. Petitions for rehearing denied.

No. 77–6932. COOMES *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 854;

No. 77–6988. BLOCH ET UX. *v.* GENERAL MOTORS ACCEPTANCE CORP., *ante,* p. 807;

No. 78–92. FIRST NATIONAL BANK OF MEMPHIS *v.* SMITH ET AL., *ante,* p. 883;

No. 78–5055. MAZZEFFI *v.* SCHWANKE, DBA ASHLAND & WAVELAND SERVICE STATION, ET AL., *ante,* p. 869;

No. 78–5085. HAMILTON *v.* DEPARTMENT OF SOCIAL SERVICES OF NEW YORK CITY, HUMAN RESOURCES ADMINISTRATION, *ante,* p. 870;

No. 78–5092. ALEXANDER *v.* DELAWARE STATE BAR ASSN., *ante,* p. 808;

No. 78–5147. BALOUN *v.* HELFERTY, *ante,* p. 872;

No. 78–5186. SHADD *v.* UNITED STATES BOARD OF PAROLE ET AL., *ante,* p. 815;

No. 78–5238. KAVANAUGH *v.* GRUNDMAN ET AL., *ante,* p. 897; and

No. 78–5280. GOOD SHIELD *v.* UNITED STATES, *ante,* p. 898. Petitions for rehearing denied.

No. 77–6869. STUART *v.* EMORY UNIVERSITY, INC., ET AL., *ante,* p. 882. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

NOVEMBER 14, 1978

Dismissal Under Rule 60

No. 78–450. UNITED STATES *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 572 F. 2d 1224.

NOVEMBER 27, 1978

Appeals Dismissed

No. 78–553. AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN. Appeal

from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 82 Mich. App. 574, 267 N. W. 2d 698.

No. 78–5486. RIDZON *v.* MOLLENKOPF, DIRECTOR, BOARD OF ELECTIONS OF COLUMBIANA COUNTY. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petiton for writ of certiorari, certiorari denied.

No. 78–5560. BELL *v.* BELL 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.

Certiorari Granted—Vacated and Remanded

No. 78–2. ILLINOIS *v.* VITALE. Sup. Ct. Ill. Certiorari granted, judgment vacated, and case remanded to consider whether judgment based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U. S. 33 (1972). MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 71 Ill. 2d 229, 375 N. E. 2d 87.

No. 78–370. CITY OF WEST HAVEN *v.* TURPIN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Monell* v. *Department of Social Services of New York City,* 436 U. S. 658 (1978). Reported below: 579 F. 2d 152.

Miscellaneous Orders

No. A–437. THIES *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE. Ct. App. N. Y. Application for stay, addressed to MR. JUSTICE POWELL and referred to the Court, denied.

No. A–460 (78–5716). MCCRORY *v.* KIRK. Ct. Crim. App. Tex. Application for stay, addressed to MR. JUSTICE MARSHALL, and referred to the Court, denied.

No. D–135. In re Disbarment of Kutza. Disbarment entered. [For earlier order herein, see 436 U. S. 943.]

No. D–144. In re Disbarment of Hirsch. It is ordered that Burton G. Hirsch of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–145. In re Disbarment of Shaker. It is ordered that Donald J. Shaker, of Pittsfield, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–146. In re Disbarment of Teitelbaum. It is ordered that Myron Teitelbaum, of Dayton, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–147. In re Disbarment of Pence. It is ordered that Richard F. Pence, of Parkersburg, W. Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.*

No. D–148. In re Disbarment of Clem. It is ordered that Maurice Curran Clem, Jr., of Henderson, Ky., 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. 80, Orig. Colorado *v.* New Mexico et al. Motion for leave to file bill of complaint granted and defendants allowed 60 days in which to answer.

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*[Reporter's Note: The rule to show cause was discharged and the order was vacated on December 11, 1978, *post,* p. 1042.]

No. 76–1471. FEDERAL COMMUNICATIONS COMMISSION *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

No. 76–1521. CHANNEL TWO TELEVISION CO. ET AL. *v.* NATIONAL CITIZENS COMMITTEE FOR BROADCASTING ET AL.;

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., 436 U. S. 775. Motion of National Citizens Committee for Broadcasting to waive or retax costs denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 77–926. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 438 U. S. 914.] Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted.

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, 436 U. S. 955.] Motion of petitioners for divided argument granted. Motion of the Solicitor General to permit Kent L. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 77–1680. MICHIGAN *v.* DEFILLIPPO. Ct. App. Mich. [Certiorari granted, *ante,* p. 816.] Motion of respondent for appointment of counsel granted, and it is ordered that James C. Howarth, Esquire, of Detroit, Mich., be appointed to serve as counsel for respondent in this case.

No. 77–1578. BROADCAST MUSIC, INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 77–1583. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 817.] Motion of the Solicitor General for additional time to present oral argument on behalf of the United States as *amicus curiae* denied. Time allotted for oral argument is divided as follows: 30 minutes to petitioners, 15 minutes to the Solicitor General as *amicus curiae,* and 45 minutes to respondents.

No. 77–1654. CONSUMER ENERGY COUNCIL OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. [Certiorari granted, *ante,* p. 817.] Motion of petitioner to substitute Consumer Energy Council of America in place of Consumer Federation of America, Energy Policy Task Force, granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 77–1724. BURKS ET AL. *v.* LASKER ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose.

No. 77–6673. BROWN *v.* TEXAS. County Ct. at Law No. 2, El Paso County, Tex. [Probable jurisdiction noted, *ante,* p. 909.] Motion of Joe B. Dibrell, Jr., Esquire, to permit Renea Hicks, Esquire, to present oral argument *pro hac vice* granted.

No. 78–201. GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. *v.* INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 817.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additonal minutes allotted for that purpose.

No. 78–421. DAHLBERG ELECTRONICS, INC., ET AL. *v.* KIEVLAN ET AL. Appeal from Ct. App. Cal., 1st App. Dist.; and

No. 78–486. COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE *v.* WHDH CORP. ET AL. C. A. 1st Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 78–761. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied.

No. 78–5388. FORD *v.* MUIR, U. S. DISTRICT JUDGE, ET AL.; and

No. 78–5505. PICKING *v.* BALTIMORE COUNTY, MARYLAND, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 78–425. P. C. PFEIFFER CO., INC., ET AL. *v.* FORD ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 575 F. 2d 79.

No. 78–488. UNITED STATES *v.* 564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 576 F. 2d 983.

No. 78–511. LO-JI SALES, INC. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari granted.

No. 78–99. PARKER *v.* RANDOLPH ET AL. C. A. 6th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 575 F. 2d 1178.

No. 78–309. TOUCHE ROSS & Co. *v.* REDINGTON, TRUSTEE, ET AL. C. A. 2d Cir. Motion of American Institute of Certified Public Accountants for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 592 F. 2d 617.

No. 78–5066. DUNAWAY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 61 App. Div. 2d 299, 402 N. Y. S. 2d 490.

Certiorari Denied. (See also Nos. 78–5486 and 77–5560, *supra.*)

No. 77–1765. NEWPORT NEWS SHIPBUILDING & DRY DOCK Co. *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 167.

No. 77–1848. SPRAYREGEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 577 F. 2d 173.

No. 77–1860. RANKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 503.

No. 77–1861. OGDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 501.

No. 77–6768. MAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 77–6819. ROCHON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 191.

No. 78–128. KRANCO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 318.

No. 78–159. CARSELLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 199.

No. 78–178. MAULDING ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 745.

No. 78–194. CHAMPION OIL CO., INC. *v.* HERBERT, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF ALASKA, ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 578 P. 2d 961.

No. 78–209. FRENCH *v.* UNITED STATES;
No. 78–5203. BOEHM *v.* UNITED STATES; and
No. 78–5204. PAYNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–216. UNITED STATES INDEPENDENT TELEPHONE ASSN. *v.* MCI TELECOMMUNICATIONS CORP. ET AL.;
No. 78–217. AMERICAN TELEPHONE & TELEGRAPH CO. *v.* MCI TELECOMMUNICATIONS CORP. ET AL.; and
No. 78–270. FEDERAL COMMUNICATIONS COMMISSION *v.* MCI TELECOMMUNICATIONS CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 327, 580 F. 2d 590.

No. 78–231. HARPER *v.* FELDMAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 200, 578 F. 2d 442.

No. 78–234. NIEDERBERGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 580 F. 2d 63.

No. 78–241. ARPEJA-CALIFORNIA, INC. *v.* COHANE. Ct. App. D. C. Certiorari denied. Reported below: 385 A. 2d 153.

No. 78–242. ANDERSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 2d 455.

No. 78–258. MEHTA *v.* GUILLEMIN. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1315.

No. 78–279. PILUSO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 738.

No. 78–281. WEINER ET AL. *v.* UNITED STATES; and
No. 78–284. LICHTIG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 757.

No. 78–305. COMDEN ET UX. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. (DORIS DAY DISTRIBUTING CO. ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 20 Cal. 3d 906, 576 P. 2d 971.

No. 78–318. DALLAS POWER & LIGHT CO. ET AL. *v.* CENTRAL POWER & LIGHT CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 56, 575 F. 2d 937.

No. 78–324. PIERORAZIO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 48.

No. 78–326. CHAMBER OF COMMERCE OF THE UNITED STATES EX REL. BOISE CASCADE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 574 F. 2d 457.

No. 78–328. CHAMBERS *v.* UNITED STATES; and
No. 78–333. GRIFFIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 2d 1104.

No. 78–336. ALLEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 553.

No. 78–341. MAINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–363. GRASSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–365. CREPS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 94 Nev. 351, 581 P. 2d 842.

No. 78–379. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS, ET AL. *v.* STEWART, ASSISTANT AREA DIRECTOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 734.

No. 78–382. STREETER *v.* UNITED STATES; and
No. 78–390. DYAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1385.

No. 78–402. MEIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–412. LIVINGSTON ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 145 Ga. App. 792, 245 S. E. 2d 11.

No. 78–413. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 78–414. UNITED AIR LINES, INC. *v.* STATE HUMAN RIGHTS APPEAL BOARD ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 1010, 402 N. Y. S. 2d 630.

No. 78–418. ASH GROVE CEMENT CO. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 1368.

No. 78–458. DESOTO PARISH SCHOOL BOARD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 804.

No. 78–466. MODLA *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 351.

No. 78–477. West Side Women's Services, Inc., et al. *v.* City of Cleveland, Ohio, et al. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–500. Brown *v.* Danley, Administrator. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 480, 566 S. W. 2d 385.

No. 78–506. Bower *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 499.

No. 78–513. Tracy, Judge *v.* Dixon et al. Sup. Ct. Ariz. Certiorari denied. Reported below: 119 Ariz. 165, 579 P. 2d 1388.

No. 78–515. Fehr Bros., Inc. *v.* Acciaierie Weissenfels et al. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 2d 833.

No. 78–519. Brainerd *v.* Flannery. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 56 Ill. App. 3d 991, 373 N. E. 2d 26.

No. 78–521. Yiamouyiannis *v.* Chemical Abstracts Service et al. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 164.

No. 78–522. Wentz et al. *v.* International Brotherhood of Electrical Workers et al. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 1271.

No. 78–525. Wilmorite, Inc., et al. *v.* Eagan Real Estate, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 78–527. Courier-Newsom Express, Inc. *v.* Martin Imports. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 2d 240.

No. 78–534. Welsh et al. *v.* Kinchla et al. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 767.

No. 78–539. MIZE ET AL. *v.* DARROW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1333.

No. 78–541. DELTA REFRIGERATION CO. *v.* UPJOHN CO. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 879.

No. 78–545. MOORE *v.* SUPREME COURT OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 735.

No. 78–552. BUILTA *v.* GENERAL ELECTRIC CREDIT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 879.

No. 78–554. NATURAL GAS PIPELINE COMPANY OF AMERICA *v.* ZIMMER, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 106.

No. 78–555. WARREN *v.* KUIPER, STATE ENGINEER, COLORADO GROUND WATER COMMISSION, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 195 Colo. 541, 580 P. 2d 32.

No. 78–556. BLOCH ET AL. *v.* BLOCH. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 724.

No. 78–564. WATKINS ET UX. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 2d 1033, 406 N. Y. S. 2d 343.

No. 78–565. LOCAL UNION No. 513, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO *v.* VANDEVENTER. C. A. 8th Cir. Certiorari denied. Reported below: 579 F. 2d 1373.

No. 78–566. POWELL *v.* SYRACUSE UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1150.

No. 78–568. ARRIAZA ET AL. *v.* CROCKER NATIONAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 750.

No. 78–573. MELTON *v.* Bow. Sup. Ct. Ga. Certiorari denied. Reported below: 241 Ga. 629, 247 S. E. 2d 100.

No. 78–576. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO *v.* WINN-DIXIE STORES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 567 F. 2d 1343 and 575 F. 2d 1107.

No. 78–578. IN RE STEINBERGER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 387 A. 2d 1121.

No. 78–593. SOUTH CAROLINA NATIONAL BANK *v.* NORTH CAROLINA NATIONAL BANK. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1305.

No. 78–595. LONE STAR GAS CO. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 567 S. W. 2d 493.

No. 78–601. SCHULTZE ET UX. *v.* CHEVRON OIL CO. C. A. 3d Cir. Certiorari denied. Reported below: 579 F. 2d 776.

No. 78–626. LONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 574 F. 2d 761.

No. 78–662. IRVIN *v.* UNITED STATES CIVIL SERVICE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 144.

No. 78–667. AMEND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 145.

No. 78–670. HANKS *v.* UNITED STATES ATTORNEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 573 F. 2d 1315.

No. 78–723. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 580 F. 2d 349.

No. 78–5015. BEAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

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No. 78–5063. CHRISTIAN *v.* HOGAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5168. JONES *v.* UNITED STATES; and
No. 78–5200. HOLT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–5180. JOHNSON *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 572 F. 2d 1219.

No. 78–5195. CARVER *v.* UNITED STATES; and
No. 78–5436. CURTIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1284.

No. 78–5208. HEIMERLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 57.

No. 78–5216. LOCKS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–5247. MAYFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5262. HO YIN WONG *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 78–5268. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 707.

No. 78–5277. KNUCKLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 581 F. 2d 305.

No. 78–5293. GAIAS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 2d 1382.

No. 78–5317. MOSLEY *v.* UNITED STATES DEPARTMENT OF LABOR ET AL C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 751.

No. 78–5320. MORRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1048.

No. 78–5328. KORTRIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 832.

No. 78–5343. LANDRUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–5350. HILTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–5356. DRIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 581 F. 2d 80.

No. 78–5370. WISHART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 236.

No. 78–5372. GOODWIN *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 751.

No. 78–5377. PIFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–5382. YATES *v.* UNITED STATES CIVIL SERVICE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 78–5383. ROSENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1046.

No. 78–5387. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–5391. DIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 145.

No. 78–5392. LEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–5412. HAWPETOSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–5417. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1366.

No. 78–5426. JONES *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 217 Ct. Cl. —, 578 F. 2d 1391.

No. 78–5446. MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1373.

No. 78–5447. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1039.

No. 78–5495. TALLEY *v.* FOREST CITY FOUNDRIES CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–5500. MASON *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 573 F. 2d 1305.

No. 78–5501. HOLLIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–5509. LLOYD *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–5512. NICHOLAS *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 575 F. 2d 1338.

No. 78–5514. NORKETT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5516. BRUCE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 180, 375 N. E. 2d 1042.

No. 78–5518. TURPIN *v.* CITY OF WEST HAVEN. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 152.

No. 78–5521. MCMAHON *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE. Pa. Commw. Ct. Certiorari denied.

No. 78–5523. CATANZARO *v.* MASCO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 575 F. 2d 1085.

No. 78–5524. WERN *v.* CITY OF CENTERVILLE, OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 78–5525. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–5530. SALTER *v.* JOHNSTON, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 2d 1007.

No. 78–5534. PETERSON ET AL. *v.* PUERTO RICO. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 78–5536. HARMON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 362 So. 2d 629.

No. 78–5537. GARZA *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 32 Ore. App. 643, 574 P. 2d 1151.

No. 78–5538. IN RE WELFARE OF A. R. W. ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 268 N. W. 2d 414.

No. 78–5539. CLIFTON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 78–5543. HINCHCLIFFE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 479 Pa. 551, 388 A. 2d 1068.

No. 78–5545. HOLSEY *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1048.

No. 78–5547. BRIGHTWELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 479 Pa. 541, 388 A. 2d 1063.

No. 78–5549. SHERRIL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–5565. O'CALAGAN (CEREZO) *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 161.

No. 78–5572. O'BRYANT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 479 Pa. 534, 388 A. 2d 1059.

No. 78–5584. ALEXANDER *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 212.

No. 78–5588. MCCLENDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1287.

No. 78–5595. JIMENEZ (GONZALEZ) *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 897.

No. 78–5596. KRUCKEBERG *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 643, 377 N. E. 2d 1351.

No. 78–5602. KEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 536, 246 S. E. 2d 723.

No. 78–5603. BLOCH ET UX. *v.* SUFFOLK COUNTY FEDERAL SAVINGS & LOAN ASSN. C. A. 2d Cir. Certiorari denied.

No. 78–5607. CLECKLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 1055.

No. 78–5608. BROWN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–5614. VOGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 870.

No. 78–5616. VINES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 850.

No. 78–5622. HAMNETT *v.* MICHIGAN CONFERENCE OF TEAMSTERS WELFARE FUND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 843.

No. 78–5624. SEAWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 583 F. 2d 416.

No. 78–5627. JERNIGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1211.

No. 78–5628. CHASE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 978.

No. 78–5634. MAHLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 730.

No. 78–5637. BEASLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 578.

No. 76–6882. MEEKS *v.* FLORIDA. Sup. Ct. Fla.;
No. 78–5225. DUFFY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 78–5490. ALDERMAN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 78–5544. STEPHENS *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 76–6882, 339 So. 2d 186; No. 78–5225, 567 S. W. 2d 197; No. 78–5490, 241 Ga. 496, 246 S. E. 2d 642; No. 78–5544, 241 Ga. 596, 247 S. E. 2d 92.

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. 77–1556. BERG ET AL. *v.* BERGER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 570 F. 2d 348.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Respondent, a nontenured public school teacher, was dismissed from her job in May 1975, following months of disagreement and dissension with her supervisors. The situation came to a head about six weeks before her dismissal. An informal conference was arranged and respondent, accompanied by her counsel, met with several school administrators to discuss her performance as a teacher. Although the meeting lasted for some time, it was confined primarily to an extensive cross-examination by respondent's counsel of the school administrators. The meeting was terminated inconclusively because respondent's counsel insisted upon a "specific written statement of charges" as a precondition of his client's full participation in the meeting and "never allowed her to speak."*

*Dr. Robinson, one of the defendants, took notes of the meeting. His record of the events leading to the adjournment of the meeting was as follows:

"*Mr. Ditkowsky* [counsel for Miss Berger]: Again, Dr. Robinson, I respectfully submit that since we do not have a specific written statement of charges, and furthermore, since the nature of some of these charges are components of a Court suit we already have against the Board of Education, I do not feel that my client's participation in this meeting is proper. . . .

"*Dr. Robinson:* Mr. Ditkowsky, will you allow your client to respond to *any* of the reported activities [?]

"*Mr. Ditkowsky:* Yes, I will allow her to respond, but only for the sake of accommodation. Further, I would like the record to show that there should be a Court reporter present, and the charges should be made specifically in writing.

"(At this point the matter of impersonating a parent was discussed at great length. It turned into an extensive cross-examination by Mr. Ditkowsky

After conferring among themselves, the administrators, petitioners here, decided that the problems arising from respondent's conduct were sufficiently severe to merit an immediate recommendation of dismissal to the Board of Education. Their report to the Board referred to over 90 memoranda respondent had written to her principals during the past year about urgent problems with her students, emergencies which upon investigation were determined to be nonexistent or exaggerated; over

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of Miss O'Shea and Mrs. Berg [principals under whom Miss Berger served]. Neither Miss O'Shea nor Mrs. Berg were prepared with supportive documentation nor were they prepared to undergo an extensive cross-examination. This cross-examination went on for twenty to thirty minutes, and it appeared that Mr. Ditkowsky was taking advantage of the principals. Occasionally Miss Berger tried to volunteer some information, but Mr. Ditkowsky never allowed her to speak. It took about thirty minutes to cover one reported activity, when Mrs. Whitten [counsel for the school board] intervened.)

"*Mrs. Whitten:* Perhaps we should postpone this meeting to a time when we can supply you with a specific statement of charges and a time when the line administrators could have their supportive documentation available to them.

"*Mr. Ditkowsky:* We would be agreeable to this.

"*Dr. Robinson:* We will have to investigate with our Law Department as to whether or not under the State Statute it would be necessary for us to provide you with a written statement of charges which can be reviewed by you prior to any action by our Board of Education. You will be notified."

The Law Department advised petitioners that another meeting was not necessary. Instead, counsel for respondent was invited to review the documentation of Miss Berger's misconduct which the principals had compiled.

Respondent did not dispute this version of these events, but rather adopted it in her own pleadings. These notes provided substantial support for Dr. Robinson's statement, contained in an answer to one of respondent's interrogatories, that "[t]he entire purpose of the conference, which was to give Miss Berger an opportunity to respond to the allegations, was thwarted by her attorney, who would not allow her to respond." Respondent did not controvert this statement by any counter-affidavit.

60 telephone calls to principals and parents, the majority of which were threatening and harassing; and five incidents in which she had called the police into her classroom without cause and in violation of school policy. The report mentioned one incident where respondent had impersonated a parent and threatened other parents with a lawsuit. Following petitioners' recommendation, the Board discharged respondent for insubordination and conduct unbecoming a teacher.

Respondent filed an action under 42 U. S. C. § 1983 in the United States District Court for the Northern District of Illinois, accusing petitioners of having engaged in a malicious conspiracy to violate her rights under, *inter alia,* the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments. The District Court granted summary judgment for petitioners, ruling that "there is no genuine issue of fact to be submitted to the trier of fact" and concluding that petitioners "are entitled to a judgment as a matter of law." On appeal, the Seventh Circuit reversed. It perceived that the case turned on whether respondent had been deprived of a property or liberty interest without due process of law, and it found disputed issues of fact on this question. Respondent might be able to prove either that she had a property right to serve out the balance of her contract term or that the public dissemination of the charges against her created a stigma that infringed a protected liberty interest. Judge Pell dissented.

I would grant the petition for certiorari and summarily reverse. Even if respondent were able to prove the existence of a constitutionally protected property or liberty interest, it seems clear that the procedural requirements of the Due Process Clause were met on the facts of this case. Judge Pell appears to have been correct in observing:

> "It needs no reading between the lines of the record presented to us to discern that the [petitioners], exercising their functions of operating the school system, terminated a non-tenured teacher who was seriously detrimental to

> the proper accomplishment of the educational aims of the school."

With respect to the procedures followed here, Judge Pell noted:

> "[T]his non-tenured teacher received the due process to which she was entitled by virtue of her status. She was given a meeting with school authorities who were willing to discuss with her and her attorney the difficulties which she was causing in the school where she was purporting to teach. The attorney's tactics on that occasion subverted the effort."

Our decisions in *Board of Curators* v. *Horowitz,* 435 U. S. 78 (1978); *Goss* v. *Lopez,* 419 U. S. 565 (1975); and *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961), have emphasized that the requirements of due process are flexible, varying according to the situation involved and interests implicated. It is abundantly clear that respondent and her supervisory authorities had been in a state of tension and disagreement for a period of months, and that respondent had full notice of the dissatisfaction with her performance. Finally, respondent was afforded a hearing with the appropriate school administrators at which she had the opportunity, with counsel present, to submit her views. It was at the instruction of her counsel that respondent did not speak in her own defense on this occasion. In sum, respondent received all process that she was due. See *Board of Curators* v. *Horowitz, supra,* at 85; *Goss* v. *Lopez, supra,* at 582.

No. 78–173. KING *v.* NORRIS. Ct. App. La., 3d Dist. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 355 So. 8d 21.

No. 78–352. WILLIAMS PIPE LINE CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 189 U. S. App. D. C. 250, 584 F. 2d 408.

No. 78–257. BURNETTE-CARTER CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 575 F. 2d 587.

No. 78–440. COUNTY OF SONOMA ET AL. *v.* ISBELL ET AL. Sup. Ct. Cal. Certiorari denied for failure to file petition within time provided by 28 U. S. C. § 2101 (c). Reported below: 21 Cal. 3d 61, 577 P. 2d 188.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join.

When a petition for certiorari is jurisdictionally untimely, should the Court so indicate in its order denying the writ? I think not, for these reasons: First, since a denial of certiorari has no precedential value in any event, the notation serves no useful purpose. Second, since the question of timeliness is not always easy to answer, compare *Department of Banking* v. *Pink,* 317 U. S. 264, with *Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, and may produce different answers from different Members of the Court, even the decision to include that brief notation may consume valuable time. Third, because there is no consistency in the Court's practice with regard to such notations, their spasmodic use may engender confusion and misunderstanding. Accordingly, I do not join in the Court's statement.

No. 78–455. MITCHELL, WARDEN *v.* GIBSON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 581 F. 2d 75.

No. 78–491. ALTON & SOUTHERN RAILWAY CO. ET AL. *v.* BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 78–579. REUSS, MEMBER OF HOUSE OF REPRESENTATIVES *v.* BALLES ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 189 U. S. App. D. C. 303, 584 F. 2d 461.

No. 78–510. WISCONSIN DEPARTMENT OF REVENUE *v.* MIDWESTERN GAS TRANSMISSION CO. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 84 Wis. 2d 261, 267 N. W. 2d 253.

No. 78–540. NEW YORK TIMES CO. ET AL. *v.* NEW JERSEY ET AL. Sup. Ct. N. J. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion and petition. Reported below: 78 N. J. 259, 394 A. 2d 330.

Rehearing Denied

No. 77–1288. QUAGLINO *v.* CALIFORNIA, *ante*, p. 875;

No. 77–1432. KILRAIN ET AL. *v.* UNITED STATES, *ante*, p. 819;

No. 77–1523. MILLER *v.* UNITED STATES, *ante*, p. 821;

No. 77–1586. KEECH ET AL. *v.* UNITED STATES ET AL., *ante*, p. 822;

No. 77–1600. GILLRING OIL CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION, *ante*, p. 823;

No. 77–1631. RIDGILL ET UX. *v.* RESTON HOMEOWNERS ASSN., *ante*, p. 805;

No. 77–1643. HOULTIN *v.* UNITED STATES, *ante*, p. 826;

No. 77–1655. HOWELL *v.* THOMAS, SHERIFF, *ante*, p. 826;

No. 77–1661. MARCH ET UX. *v.* ALLIS-CHALMERS CORP. ET AL., *ante*, p. 826; and

No. 77–1689. LITTON SYSTEMS, INC. *v.* UNITED STATES, *ante*, p. 828. Petitions for rehearing denied.

No. 77–1725. COLECO INDUSTRIES, INC. *v.* BERMAN ET AL., *ante,* p. 830;

No. 77–1737. ROLOFF EVANGELISTIC ENTERPRISES, INC., ET AL. *v.* TEXAS, *ante,* p. 803;

No. 77–1781. RABCO METAL PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 833;

No. 77–1787. GIACALONE *v.* UNITED STATES, *ante,* p. 834;

No. 77–1796. METRO CLUB, INC. *v.* METRO PASSBOOK, INC., ET AL., *ante,* p. 834;

No. 77–1825. ARTHUR ET AL. *v.* CLAY COMMUNITY SCHOOLS ET AL.; and TOLIN ET AL. *v.* SOUTHWEST PARKE COMMUNITY SCHOOL CORP. ET AL., *ante,* p. 806;

No. 77–1834. LANG *v.* CITY OF PHILADELPHIA ET AL., *ante,* p. 804;

No. 77–1849. CHICAGO SHERATON CORP. *v.* ZABAN ET AL., *ante,* p. 888;

No. 77–6217. STACY *v.* FLORIDA, 436 U. S. 924;

No. 77–6537. SPEARS ET AL. *v.* UNITED STATES, *ante,* p. 839;

No. 77–6604. LITTLE *v.* NEBRASKA, *ante,* p. 809;

No. 77–6728. PHILLIPS *v.* UNITED STATES, *ante,* p. 826;

No. 77–6759. O'LEARY *v.* PALMER ET AL., *ante,* p. 844;

No. 77–6767. PEACOCK *v.* COX ET VIR, *ante,* p. 845;

No. 77–6897. KENNICK *v.* PLAIN DEALER PUBLISHING CO. ET AL., *ante,* p. 852;

No. 77–6900. MACKEY *v.* FLORIDA, *ante,* p. 807;

No. 78–66. ANGELINO ET AL. *v.* DODSON ET AL., *ante,* p. 883;

No. 78–261. INDEPENDENT INVESTOR PROTECTIVE LEAGUE ET AL. *v.* TOUCHE ROSS & CO., *ante,* p. 895;

No. 78–371. BERNSTEIN *v.* UNITED STATES, *ante,* p. 895;

No. 78–5016. SAYLES *v.* SALES, *ante,* p. 868;

No. 78–5098 NOONE *v.* DART DRUG CORP., *ante,* p. 871; and

No. 78–5240. HUGHES *v.* TEXAS, *ante,* p. 903. Petitions for rehearing denied.

No. 78–5296. HORNICK *v.* YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF MADISON, WISCONSIN, INC., *ante,* p. 888;

No. 78–5315. PHILLIPS *v.* SNYDER ET AL., *ante,* p. 898;

No. 78–5353. CAMPBELL *v.* MICHIGAN, *ante,* p. 899; and

No. 78–5380. HEMMERLE ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DESOTO COUNTY, *ante,* p. 921. Petitions for rehearing denied.

NOVEMBER 30, 1978

Dismissal Under Rule 60

No. 78–655. PINKUS, DBA ROSSLYN NEWS CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 579 F. 2d 1174.

DECEMBER 4, 1978

Affirmed on Appeal

No. 78–70. WILKES COUNTY, GEORGIA, ET AL. *v.* UNITED STATES. Affirmed on appeal from D. C. D. C. Reported below: 450 F. Supp. 1171.

No. 78–439. BRIDGEPORT HYDRAULIC CO. ET AL. *v.* COUNCIL ON WATER COMPANY LANDS OF CONNECTICUT ET AL. Affirmed on appeal from D. C. Conn. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST would vacate judgment and remand case for further consideration in light of *Penn Central Transportation Co.* v. *City of New York,* 438 U. S. 104 (1978). Reported below: 453 F. Supp. 942.

Appeals Dismissed

No. 78–5258. PERILLO *v.* DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE STEWART and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 476 Pa. 494, 383 A. 2d 208.

No. 78–574. GIBSON DISTRIBUTING CO., INC., ET AL. *v.* DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Notice of appeal was not filed within the time provided by 28 U. S. C. § 2101 (c). Reported below: 572 S. W. 2d 334.

No. 78–5408. MORPURGO *v.* PROFESSIONAL STAFF CONGRESS/CUNY ET AL. Appeal from C. A. 2d 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: 580 F. 2d 1045.

Certiorari Granted—Reversed. (See No. 78–344, *ante*, p. 89.)

Miscellaneous Orders

No. A–333. WHITE *v.* UNITED STATES. C. A. 7th Cir. Application for reduction of bond, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–404 (78–708). GREENE ET UX. *v.* UNITED STATES. Application for recall and stay of mandate of the United States Court of Appeals for the Eighth Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–472 (78–621). VILLAGE OF CARPENTERSVILLE *v.* LIMPERIS, TRUSTEE IN BANKRUPTCY. Application for stay of judgment of the United States Court of Appeals for the Seventh Circuit, entered July 14, 1978, addressed to MR. JUSTICE WHITE, and referred to the Court, denied.

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 78–330. HUNERWADEL *v.* BAIRD ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 925.] Motion of appellees Planned Parenthood League of Massachusetts et al. for additional time for oral argument denied. Alternative motion for divided argument granted. Motion of appellees Baird et al. to strike appearance of counsel for Planned Parenthood League of Massachusetts et al. denied.

No. 76–1234. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ROSS ET AL. C. A. 4th Cir.; and

No. 76–1261. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ABRAMS ET AL. C. A. 9th Cir. [Certiorari granted, 431 U. S. 928.] Motion of the Solicitor General, with consent of respondents, for reference to the United States District Court for the District of Maryland [in No. 76–1234], and for reference to the United States District Court for the Central District of California [in No. 76–1261], to consider settlement granted.

No. 78–90. BURCH ET AL. *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, *ante,* p. 925.] Motion of petitioners to dispense with printing appendix granted.

No. 78–432. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.;

No. 78–435. KAISER ALUMINUM & CHEMICAL CORP. *v.* WEBER ET AL.; and

No. 78–436. UNITED STATES ET AL. *v.* WEBER ET AL. C. A. 5th Cir. Motion of Government Contract Employers Assn. for leave to file a brief as *amicus curiae* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Certiorari Granted

No. 78–5283. JACKSON *v.* VIRGINIA ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 580 F. 2d 1048.

No. 78–5374. SMITH *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 283 Md. 156, 389 A. 2d 858.

Certiorari denied. (See also No. 78–5408, *supra.*)

No. 77–6979. PIERCE *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 78–166. PLAQUEMINES PARISH SCHOOL BOARD *v.* BROUSSARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1113.

No. 78–271. DINKO *v.* UNITED STATES; and
No. 78–469. DINKO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1297.

No. 78–296. SALVUCCI *v.* REVERE RACING ASSN., INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 721.

No. 78–340. HAMILTON ET AL. *v.* UNITED STATES;
No. 78–396. FITZGERALD *v.* UNITED STATES;
No. 78–398. KOVACH *v.* UNITED STATES; and
No. 78–5313. LEAHU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 579 F. 2d 1014.

No. 78–353. LUIGI GOLDSTEIN, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 78–369. SHANNON ET AL. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 854.

No. 78–408. DUCHARME ET VIR *v.* MERRILL-NATIONAL LABORATORIES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1307.

No. 78–433. GORDON TRANSPORTS, INC., ET AL. *v.* HIGHWAY & CITY FREIGHT DRIVERS, DOCKMEN & HELPERS, LOCAL UNION No. 600. C. A. 8th Cir. Certiorari denied. Reported below: 576 F. 2d 1285.

No. 78–441. ALLIED INTERNATIONAL PRODUCTS, LTD. *v.* TEXTRON INDUSTRIES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 722.

No. 78–442. OTM CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1046.

No. 78–445. ANDERSON, DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS *v.* BARASA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1283.

No. 78–448. WRIGHT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 739.

No. 78–461. NORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 581 F. 2d 390.

No. 78–487. MARQUES-URIA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 751.

No. 78–570. PREMIER CORP. *v.* SHEVIN, SHAPO & SHEVIN, P. A. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 566.

No. 78–583. HERRMANN *v.* MOORE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 453.

No. 78–584. ROBINSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 359 So. 2d 1355.

No. 78–596. RUSS ET AL. *v.* RATLIFF. C. A. 8th Cir. Certiorari denied. Reported below: 578 F. 2d 221.

No. 78–598. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. *v.* HASTY. Sup. Ct. Miss. Certiorari denied. Reported below: 360 So. 2d 925.

No. 78–613. RUTLEDGE ET AL. *v.* LONG, PERSONNEL DIRECTOR, DEPARTMENT OF ADMINISTRATION OF KANSAS, ET AL. Ct. App. Kan. Certiorari denied. Reported below: 2 Kan. App. 2d xxii, 580 P. 2d 437.

No. 78–616. MARKUS *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 78–620. ATKINSON, ADMINISTRATOR *v.* BASS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 579 F. 2d 865.

No. 78–628. HUTTER *v.* LAKE VIEW TRUST & SAVINGS BANK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 54 Ill. App. 3d 653, 370 N. E. 2d 47.

No. 78–631. BUSH *v.* WEBSTER, MAYOR OF GU-WIN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1365.

No. 78–635. ACOUSTI ENGINEERING COMPANY OF FLORIDA *v.* SEA ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 352 So. 2d 1250.

No. 78–636. FAGNAN *v.* GREAT CENTRAL INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 418.

No. 78–643. ROCKWELL INTERNATIONAL CORP. *v.* KIRK. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 814.

No. 78–644. LEE KLINGER VOLKSWAGEN, INC. *v.* CHRYSLER CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 910.

No. 78–648. CITY OF SAN ANTONIO *v.* SAN PEDRO NORTH, LTD., ET AL. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 562 S. W. 2d 260.

No. 78–715. FITZGERALD *v.* STAATS, COMPTROLLER GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 193, 578 F. 2d 435.

No. 78–5166. RUDOLPH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 564 S. W. 2d 1.

No. 78–5212. WRIGHT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 572 F. 2d 1071.

No. 78–5242. DRENNON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 581 P. 2d 901.

No. 78–5273. CONNOR ET UX. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 57 Ill. App. 3d 607, 373 N. E. 2d 684.

No. 78–5275. GORECKI *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 54 Ill. App. 3d 267, 369 N. E. 2d 380.

No. 78–5341. VON REED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–5355. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 84.

No. 78–5360. PARKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 201, 578 F. 2d 443.

No. 78–5375. GALLAGHER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 359 So. 2d 1224.

No. 78–5396. RAYO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1137.

No. 78–5401. HALEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 2d 723.

No. 78–5409. FIERRO-SOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 460.

No. 78–5418. AGUILERA ET AL. *v.* UNITED STATES;
No. 78–5452. AGUIAR ET AL. *v.* UNITED STATES; and
No. 78–5453. MIRANDA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5425. TORRES ET AL. *v.* RAMOS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 578 F. 2d 11.

No. 78–5443. YORK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 1036.

No. 78–5445. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 642.

No. 78–5451. PRINCE ET AL. *v.* UNITED STATES; and
No. 78–5465. FOSTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 190 U. S. App. D. C. 16, 584 F. 2d 997.

No. 78–5475. MARTINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–5513. HOMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5558. HOFFMAN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–5561. BAILEY *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 78–5566. MONROE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 389 A. 2d 811.

No. 78–5567. MACUMBER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 119 Ariz. 516, 582 P. 2d 162.

No. 78–5568. REICH *v.* DOW BADISCHE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 575 F. 2d 363.

No. 78–5642. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 193.

No. 78–5655. MARTIN *v.* COOPER, U. S. PAROLE COMMISSIONER, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5676. WORCHESTER *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 77–1464. HUCH ET AL. *v.* UNITED STATES;

No. 77–1467. SOUTH PARK INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES; and

No. 78–222. BOARD OF EDUCATION FOR THE CITY OF VALDOSTA, GEORGIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: Nos. 77–1464 and 77–1467, 566 F. 2d 1221; No. 78–222, 576 F. 2d 37.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

Efforts to describe the complex of factors that go into a decision by this Court to deny certiorari in any given case date back at least to the opinion of Mr. Justice Frankfurter in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912 (1950), and I shall make no attempt to embroider them here. Some Members of the Court may feel that a case is wrongly decided, but lacking in general importance; others may feel that it is of general importance, but rightly decided; for either reason, a vote to deny certiorari is logically dictated. In these cases it seems to me demonstrable that the Court of Appeals has not properly assessed the relationship between *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976). Obviously we cannot review in this Court every school desegregation case decided by a Court of Appeals, and particularly where, as here, the Court of Appeals merely remands the case to the District Court for further proceedings, there is a very natural tendency to conclude that the decisions of the Court of Appeals are not deserving of plenary review given the almost unmanageable caseload of the Court. But the Court of Appeals from which these cases come historically has had to decide more school desegregation cases than any other Court of Appeals, and the interminable pendency of school desegregation litigation resulting from remand orders such as these is precisely what was condemned in *Pasadena, supra.* I would therefore grant

certiorari to review the orders of the Court of Appeals remanding these cases to their respective District Courts.

I

Nos. 77–1464 and 77–1467. South Park Independent School District

The United States brought this action in 1970, and in that same year the District Court adopted a school desegregation plan submitted by the district, "with certain modifications designed to increase the overall percentage of integration at particular schools." App. to Pet. for Cert. in No. 77–1467, pp. C–1—C–2 (hereinafter cited as Pet.). Since no party sought to appeal, the District Court's order became final. Almost six years later, the United States filed a motion for "supplemental relief," seeking an order requiring the district to "develop, adopt and implement a comprehensive school desegregation plan." The Government's motion, it should be noted, was filed *after* this Court's decision in *Pasadena, supra.* The motion was supported largely by the Government's assertion that during the 1975–1976 school term, 75.1% of all black students in the system attended schools that were 92% or more black, while 77.5% of all white students attended schools that were 86% or more white. The School District filed a reply, a group of parents successfully sought to intervene, and two separate hearings on the Government's motion were held in the District Court. The School District called witnesses in support of its petition; the Government called none.

The court concluded from the evidence before it that the 1970 desegregation order had dissolved all vestiges of a dual system. Noting that in each academic year since entry of the 1970 order total student enrollment in the district had consistently declined, while the percentage of black students enrolled in the district had steadily increased, the District Court found that "[t]he desegregative results differing from those anticipated in 1970 have been the result of shifting residential

patterns, attendance of some district students at private schools, and other factors beyond the control of defendant [school district] . . . ." Pet. B–5. The court also found that the School District had complied with the 1970 order in all respects and had taken no action having a natural and foreseeable segregative effect on schools in the district. Student class assignments in the district had been made without regard to race or color, and no state agency had attempted to alter the residential or demographic patterns affecting the comprehensive neighborhood attendance plan set forth in the 1970 order. Concluding that no further action on its part was constitutionally required, the District Court denied the motion for supplemental relief.[1]

The Court of Appeals believed that this case was governed by a single passage from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 26, removed from its context, describing the duty of district courts to scrutinize initial desegregation plans proposed by school boards for systems with a history of segregation where such plans contemplate the continuance of some schools that "are all or predominantly of one race."[2] I think that the Court of Appeals erred in applying this particular passage from *Swann* to a

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[1] The District Court also based its denial of the motion for supplemental relief on the Government's failure to comply with 20 U. S. C. § 1758, which in essence requires that local school authorities be given notice and a reasonable opportunity to develop a voluntary remedial plan before any existing court-approved desegregation plan may be modified.

[2] " 'Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.' " *United States* v. *South Park Independent School Dist.,* 566 F. 2d 1221, 1225 (CA5 1978), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 26.

school desegregation plan which had been accepted by all parties at the time of its inception, and had been in effect for six years before the Government decided to seek supplemental relief.[3] In *Swann* itself this Court acknowledged the reality that minority groups are often found concentrated in particular parts of metropolitan areas. Recognizing that demographic patterns can be affected by natural human migration as well as by official discrimination, the *Swann* court observed:

> "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. . . . [I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Id.*, at 31–32.

This language was brought into sharper focus in *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976). Petitioner in *Pasadena* sought in 1974 to be relieved of a provision of a 1970 desegregation order requiring that there be no majority of any minority at any Pasadena school. Although the 1970 order had established a racially neutral system of student assignment in Pasadena, a "normal pattern of human migration" over the following four years had caused some Pasadena schools to "sli[p] out of compliance" with the no-majority-of-any-minority requirement. The District Court

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[3] Indeed, the District Court noted that "[t]he Department of Health, Education and Welfare, an agency of [the Government] charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and prospectively, for academic school year 1977–78." Pet. B–5.

denied relief, apparently believing it had authority to impose the requirement upon Pasadena schools regardless of what had caused the post-1971 change in their racial composition. We held that the District Court lacked such authority:

> "[T]he District Court was not entitled to require [Pasadena] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.*, at 436–437.

The thrust of *Swann* and *Pasadena,* when taken together, is that a district court must heed the *Swann* mandate to closely scrutinize predominantly one-race schools when approving an *initial* desegregation plan in a school district with a history of *de jure* segregation, but that the District Court has no obligation, indeed, has no authority, to monitor the plan indefinitely to make sure that the initial *Swann* requirements are maintained year after year in spite of demographic changes which are in no way attributable to the school board. A unanimous Court in *Swann* made clear that the Constitution requires the dismantling of dual school systems, but does not mandate racial balance in schools. This principle was reaffirmed in *Milliken* v. *Bradley,* 418 U. S. 717, 740–741 (1974).

Here the Court of Appeals acknowledged that the District Court had found "no basis for relief since the 1970 plan had desegregated the school district thereby dissolving all vestiges of a dual school system." *United States* v. *South Park Independent School Dist.,* 566 F. 2d 1221, 1224 (CA5 1978). After expressly observing that it did not view the case as "a situation where a district court has refused to rule," the

Court of Appeals nonetheless found the District Court's holding that the School District was unitary "not detailed enough to show us whether or not the school system meets [the] *Swann* requirement." *Id.*, at 1225. Accordingly, the case was remanded to the District Court for "supplemental findings of fact."

I believe the Court of Appeals was wrong in its analysis of Fourteenth Amendment law when it implied that *Swann* rather than *Pasadena* would apply to a situation in which there *had been in effect* for six years a school desegregation plan fully accepted by all of the parties, including the United States. But more importantly, this case has an unsettling precedential potential for similar cases throughout the federal-court system. The Court of Appeals' opinion gives no clue to the District Court as to where it went wrong or how it can correct whatever mistake the Court of Appeals believes that it made. So far as I can tell from the remand order of the Court of Appeals, the District Court appears condemned to a fate akin to that of Sisyphus, the mythical King of Corinth who was sentenced by Zeus to an eternity in Hades trying "to roll a rock uphill which forever rolled back upon him."[4] Such a result, in my view, represents a departure "from the accepted and usual course of judicial proceedings" sufficient to warrant a grant of certiorari pursuant to our Rule 19 (1)(b).

II

No. 78–222. Board of Education for the City of Valdosta v. *United States*

In *Board of Education for the City of Valdosta* v. *United States*, 576 F. 2d 37 (CA5 1978), another panel of the Fifth Circuit relied upon the decision in *South Park* as "the law of school desegregation *as currently understood in this Circuit.*" 576 F. 2d, at 38 (emphasis added). There the United States

[4] E. Hamilton, Mythology 439–440 (1945).

moved in 1976 for supplemental relief to "correct" the racial imbalance that had developed in certain Valdosta elementary schools since entry of the District Court's desegregation plan in 1971. After an evidentiary hearing, the District Court found that the school board had followed the 1971 desegregation order to the letter and that any racial imbalance in Valdosta schools "exists . . . not because of any action or inaction on the part of the Defendant Board of Education, but . . . simply because of a change in housing patterns which has occurred since the date of the Court's original order . . . ." App. to Pet. for Cert. in No. 78–222, p. 5c. Having found the Valdosta school system unitary, the District Court denied the Government's motion for supplemental relief.

On appeal the Court of Appeals rejected the contention that the District Court's holding was compelled by *Pasadena City Board of Education* v. *Spangler*. Relying on *South Park* for the propositon that "the continued existence of a significant number of virtually one-race schools is constitutionally suspect," the court held that the "high incidence of racially identifiable schools belies the school board's contention that Valdosta has achieved a unitary school system. 576 F. 2d, at 38. Accordingly, the case was "remanded to the district court for the development of a plan . . . designed to alleviate the incidence of virtually one-race elementary schools." *Ibid.*

The Court of Appeals, having based its decision solely on statistics indicating that there were five racially identifiable elementary schools in Valdosta in 1976, undoubtedly acknowledged but can hardly be said to have heeded this Court's observation in *Swann,* 402 U. S., at 26, that "the existence of some small number of one-race . . . schools within a district is not in and of itself the mark of a system that still practices segregation by law." Before a district court can move under the Constitution to "correct" racially imbalanced schools, it must be shown that the imbalance was in some

manner "caused by segregative actions chargeable to [school authorities]." *Pasadena City Board of Education* v. *Spangler*, 427 U. S., at 435. There is no indication in the Court of Appeals' opinion that the Government carried its burden of proving that the racial mix of Valdosta's elementary schools was the product of official discrimination, either present or past. Absent such a showing in the record, the District Court's finding that Valdosta had achieved a unitary school system cannot be held to be clearly erroneous. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 417–418 (1977). Accordingly, I dissent from the Court's denial of certiorari in this case.

No. 77–1581. BROWN TRANSPORT CORP. *v.* ATCON, INC. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 301, 241 S. E. 2d 15.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

Respectfully, I dissent from the denial of certiorari.

I

Section 223 of the Motor Carrier Act, 49 Stat. 565, 49 U. S. C. § 323, prohibits a common carrier by motor vehicle from delivering freight transported in interstate commerce until all tariff rates and charges have been paid, except as permitted by rules and regulations of the Interstate Commerce Commission. The Interstate Commerce Commission, pursuant to 49 U. S. C. § 323, has adopted regulations that allow delivery without prior collection of freight charges but limit the credit that may be extended: Freight bills must be presented to the shipper and collected within seven days. 49 CFR § 1322 (1977). A "shipper" is defined as the person who undertakes to pay the tariff charges. *Ibid.* The regulations are silent about what happens if the carrier fails to comply with the time limits established by them. The question raised by this case is whether failure by the carrier to comply with

the time limits prescribed by 49 CFR § 1322 (1977) estops the carrier from collecting the freight charges from the shipper.

The Georgia Court of Appeals in this case held that it did, thereby joining the Seventh Circuit, which had reached a similar result in *Consolidated Freightways Corp. of Delaware* v. *Admiral Corp.*, 442 F. 2d 56 (1971).

Judge Swygert dissented in the *Consolidated Freightways Corp.* case, reasoning that "[n]othing in the Motor Carrier Act provides that a carrier's failure to comply with section 323 or the Interstate Commerce Commission's credit regulation should result in the carrier's forfeiting its right to collect freight charges." *Id.*, at 65. At least two jurisdictions share this view. *AAA Trucking Corp.* v. *Spherex, Inc.*, 110 N. H. 472, 272 A. 2d 594 (1970); *East Texas Motor Freight Lines* v. *Franklin County Distilling Co.*, 184 S. W. 2d 505 (Tex. Civ. App. 1944).

This conflict among jurisdictions over an issue which "imperatively demand[s] a single uniform rule," *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852), commands the Court's immediate attention. There is further justification for review in *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577 (1919). There the Court held that a shipper remains liable for the full legal tariff even though the carrier mistakenly billed him for less, rejecting an argument that estoppel prevented collection on the ground that "[e]stoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute." *Id.*, at 583. The *Fink* case, although concerning Interstate Commerce Act provisions regulating railroads and not motor carriers, is directly analogous to this case, suggesting that the decision below may be at variance with our prior case law.

Because of the substantiality of the federal issue raised, I would grant certiorari and set this case for argument.

II

Although I dissent from denial of certiorari, it must be acknowledged that this case is no more deserving of plenary consideration than many other cases in which certiorari has been denied so far this Term.

A

During the week of September 25, the Court met in Conference to deal with the petitions for certiorari, jurisdictional statements in appeals, petitions for rehearing, and miscellaneous motions that had accumulated and had been studied during the summer.* There was a total of 992 items on the Conference List, of which 865 were petitions for writs of certiorari and 59 were appeals. As the Order Lists for this Term prior to today indicate, of these the Court has so far granted 24 petitions for certiorari, 23 paid and 1 unpaid, and has set for plenary consideration 6 appeals. In addition, summary action on the merits was taken on 15 petitions for certiorari, 8 paid and 7 unpaid, and on 30 statements of jurisdiction. Seven hundred and ninety-four petitions for certiorari were denied, 365 paid and 429 unpaid. Twenty-one appeals were dismissed and denied. There were thus 396 paid petitions for certiorari acted on and 437 unpaid, for a total of 833. Fifty-seven of the 59 appeals were also disposed of. For one reason or other, the remaining 32 petitions and 2 appeals have been held over for later action.

The 23 paid petitions granted amount to 5.81% of the 396 paid petitions acted upon. Summary action was taken on an additional 2.02%, making a total of 7.83% of the paid peti-

*The analysis following in the text pertains only to this Term's first Conference List. I have little doubt, however, that study of our dispositions of cases on subsequent Conference Lists would yield similar results. New filings accumulate at the rate of about 80 per week. As of the close of business on November 29, 869 paid petitions and statements of jurisdiction had been filed so far this Term, together with 808 unpaid petitions and statements of jurisdiction.

tions that were either granted or disposed of on the merits. The single unpaid petition granted amounted to 0.23% of the unpaid petitions acted on. Summary action was taken on an additional 1.60% of unpaid petitions, making a total of 1.83% of the unpaid petitions which were granted or on which summary action was taken.

B

Our Rule 19 provides that one of the principal factors in determining whether certiorari should be granted is whether the decision below conflicts with another decision: Is the federal law, statutory or constitutional, being interpreted and enforced differently in different sections of the country? This has been an important criterion for the exercise of the Court's powers since most of the Court's jurisdiction was made discretionary in 1925.

When one examines the petitions for certiorari on the September 25 Conference List that have so far been denied, it is not difficult to find a good many cases in which the Court refused to review lower court decisions that conflicted with decisions of other federal or state appellate courts. The following are examples of such cases.

Mansfield v. *Estelle,* No. 77–6709, order reported below (opinion unpublished), 568 F. 2d 1366 (CA5 1978): "farce or mockery" standard for judging the effectiveness of retained counsel; a more stringent standard for appointed counsel. Cf. *United States* v. *DeCoster,* 159 U. S. App. D. C. 326, 487 F. 2d 1197 (1973) (diligent, conscientious, and reasonably competent assistance); *Moore* v. *United States,* 432 F. 2d 730, 736 (CA3 1970) ("the exercise of the customary skill and knowledge which normally prevails at the time and place"); *United States ex rel. Williams* v. *Twomey,* 510 F. 2d 634, 641 (CA7 1975) ("assistance which meets a minimum standard of professional representation"); *United States* v. *Easter,* 539 F. 2d 663, 666 (CA8 1976) ("reasonably competent" assistance). Also cf. *United States* v. *McCord,* 166 U. S. App.

D. C. 1, 509 F. 2d 334 (1974), cert. denied, 421 U. S. 930 (1975); *Goodwin* v. *Cardwell,* 432 F. 2d 521 (CA6 1970); *United States ex rel. Williams* v. *Twomey, supra,* at 640; *Blanchard* v. *Brewer,* 429 F. 2d 89 (CA8 1970), cert. denied, 401 U. S. 1002 (1971); *Ellis* v. *Oklahoma,* 430 F. 2d 1352 (CA10 1970), cert. denied, 401 U. S. 1010 (1971), all rejecting the distinction between paid and appointed counsel.

United States v. *Kelley,* No. 77–1729, opinion below, 568 F. 2d 259 (CA2 1978): timely administrative claim is not a jurisdictional prerequisite to recovery in suits in which the United States is substituted as defendant pursuant to the Federal Drivers' Act, 28 U. S. C. §§ 2679 (b)–(e). Contra, *Meeker* v. *United States,* 435 F. 2d 1219 (CA8 1970).

Pennsylvania v. *United States Tobacco Co.,* No. 77–1780, opinion below, 478 Pa. 125, 386 A. 2d 471 (1978): broad interpretation of "solicitation" in 15 U. S. C. § 381 (a), which prohibits a State from taxing the income of persons whose only contact with the State is solicitation of orders. Contra, *Clairol, Inc.* v. *Kingsley,* 109 N. J. Super. 22, 262 A. 2d 213. aff'd, 57 N. J. 199, 270 A. 2d 702 (1970), dismissed for want of a substantial federal question, 402 U. S. 902 (1971).

Lacey v. *United States,* No. 77–1751, order reported below (opinion unpublished), 578 F. 2d 1371 (CA2 1978): not impermissibly coercive *per se* to give a second *Allen* (*Allen* v. *United States,* 164 U. S. 492 (1896)) charge to a jury that has twice reported inability to reach a verdict and has not requested repetition of the charge. Accord, *United States* v. *Robinson,* 560 F. 2d 507 (CA2 1977) (en banc). Contra, *United States* v. *Seawell,* 550 F. 2d 1159 (CA9 1977).

Guiffre v. *United States,* No. 77–1778, opinion below 576 F. 2d 126 (CA7 1978): coverage of federal bank robbery statute, 18 U. S. C. § 2113 (b), is not limited to conduct that would fall within the common-law definition of larceny. Accord, *United States* v. *Fistell,* 460 F. 2d 157 (CA2 1972); *Thaggard* v. *United States,* 354 F. 2d 735 (CA5 1965), cert. denied, 383

U. S. 958 (1966). Contra, *LeMasters* v. *United States,* 378 F. 2d 262 (CA9 1967); *United States* v. *Rogers,* 289 F. 2d 433 (CA4 1961) (dictum).

Holcomb v. *United States,* No. 77–6857, order reported below, 578 F. 2d 1381 (CA6 1978): a person accused of violating 18 U. S. C. § 922 (a)(6) by falsely denying that he has ever been convicted of a crime is not entitled to litigate the constitutionality of that conviction. Accord, *United States* v. *Edwards,* 568 F. 2d 68 (CA8 1977); *United States* v. *Allen,* 556 F. 2d 720 (CA4 1977); *United States* v. *Graves,* 554 F. 2d 65 (CA3 1977) (en banc); *United States* v. *Ransom,* 545 F. 2d 481 (CA5), cert. denied, 434 U. S. 908 (1977). Contra, *United States* v. *Pricepaul,* 540 F. 2d 417 (CA9 1976).

Burke v. *New Jersey Education Assn.,* No. 78–177, opinion below, 579 F. 2d 764 (CA3 1978): litigation of federal constitutional issues in a 42 U. S. C. § 1983 action is not precluded by a prior state adjudication of the same cause of action in which the federal issues could have been but were not raised. Other Circuits have taken different approaches to this issue. Cf. *Kurek* v. *Pleasure Driveway and Park District of Peoria,* 557 F. 2d 580 (CA7 1977); *Graves* v. *Olgiati,* 550 F. 2d 1327 (CA2 1977); *Scoggin* v. *Schrunk,* 522 F. 436 (CA9 1975); *Spence* v. *Latting,* 512 F. 2d 93 (CA10), cert. denied, 423 U. S. 896 (1975); *Lovely* v. *Laliberte,* 498 F. 2d 1261 (CA1 1974).

Johnson v. *Georgia,* No. 77–6607, opinion below, 240 Ga. 526, 242 S. E. 2d 53 (1978): Double Jeopardy Clause does not bar a State from revoking an individual's probation for an offense of which he was previously acquitted. Contra, *People* v. *Grayson,* 58 Ill. 2d 260, 319 N. E. 2d 43 (1974).

McKethan v. *United States,* No. 77–1545, and *Garner* v. *United States,* No. 77–1557, opinion below, 574 F. 2d 1141 (CA4 1978): admission into evidence of grand jury testimony of unavailable witness proper under Confrontation Clause and Federal Rules of Evidence. But see *United States* v. *Gonzalez,* 559 F. 2d 1271 (CA5 1977); *United States* v. *Fiore,* 443 F. 2d 112 (CA2 1971).

C

Also among the petitions for certiorari that were denied were those appearing to conflict with a decision of this Court. Under our Rules, this is a substantial reason for granting certiorari. Examples of such cases follow.

Sears, Roebuck & Co. v. *Roberts,* No. 78–26, opinion below, 573 F. 2d 976 (CA7 1978): assignor of exclusive license may recover in action for fraud against assignee despite invalidity of the patent. Arguably inconsistent with *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969).

First Nat. Bank of Memphis v. *Smith,* No. 78–92, opinion below *sub nom. Torian Estate* v. *Smith,* 564 S. W. 2d 521 (Ark. 1978): State need not give full faith and credit to judgment of court of sister State with *in personam* jurisdiction over property claimants but affecting personal property with no connection to that State. Arguably inconsistent with *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394 (1917).

Arnold v. *Hogan,* No. 77–6621, order below unpublished, D. C. Ct. App., No. 12347 (1978): neither the Due Process Clause nor the Ex Post Facto Clause infringed by the abolition of the corroboration requirement in a criminal trial for rape, where the requirement was judge made but longstanding, and is abolished in the course of the instant trial. Arguably inconsistent with *Weiler* v. *United States,* 323 U. S. 606 (1945), and *Calder* v. *Bull,* 3 Dall. 386, 390 (1798).

Mellon Bank v. *Southland Mobile Homes of S. C., Inc.,* No. 78–188, opinion below *sub nom. Southland Mobile Homes* v. *Associates Financial Services Co.,* 270 S. C. 527, 244 S. E. 2d 212 (1978): venue in suits against national banks under the National Bank Act, 12 U. S. C. § 94. Arguably inconsistent with *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591 (1963).

Smith v. *Collin,* No. 77–1736, opinion below, 578 F. 2d 1197 (CA7 1978): local ordinance prohibiting the dissemination of materials that would promote hatred toward persons on the

basis of their heritage held unconstitutional. Arguably inconsistent with *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952).

D

Rule 19 also indicates that likely candidates for certiorari are those cases in which a state or federal court has decided an important question of federal law not heretofore determined by this Court. Some of the cases from our initial Conference List which involved issues of this kind and which the Court declined to review are the following.

Lowe v. *United States,* No. 78–5044, and *Dixon* v. *United States,* No. 78–5052, opinion below, 575 F. 2d 1193 (CA6 1978): whether 19 U. S. C. § 482 subjects mail entering the United States to customs inspection at a place other than the point of entry into this country, an issue reserved in *United States* v. *Ramsey,* 431 U. S. 606 (1977).

Beatty v. *Lycoming County Children's Services,* No. 77–1703, opinion below *sub nom. In re William L.,* 477 Pa. 322, 383 A. 2d 1228 (1978): rejecting equal protection and due process challenges to a Pennsylvania statute permitting termination of parental rights (so that the child may be adopted) on a showing of incapacity, without any evidence of abuse or misconduct.

Warden of West Virginia Penitentiary v. *Jones,* No. 77–1734, opinion below, —— W. Va. ——, 241 S. E. 2d 914 (1978): *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975) is to be applied retroactively to collateral proceedings, an issue not expressly decided in *Hankerson* v. *North Carolina,* 432 U. S. 233 (1977).

Eastern Scientific Co. v. *Wild Heerbrugg Instruments, Inc.,* No. 77–1769, opinion below, 572 F. 2d 883 (CA1 1978): under *Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36 (1977), territorial restrictions enforced by resale price maintenance are not *per se* illegal.

Indiana v. *Martin,* No. 77–1822, order reported below, 577 F. 2d 749 (CA7 1978): the prosecution bears the burden of

showing reliability of in-court identification subsequent to impermissibly suggestive lineup identification.

Frazier v. *Weatherholtz,* No. 77–6460, opinion below, 572 F. 2d 994 (CA4 1978): burden of proving self-defense may be placed on the accused in a criminal prosecution.

International Business Machines Corp. v. *FCC,* No. 77–1540, opinion below *sub nom. American Tel. & Tel. Co.* v. *FCC,* 572 F. 2d 17 (CA2 1978): whether the Commission possesses and has consciously exercised discretion to consider whether to refrain from rate regulation of resellers of telephone transmission services.

Marshall v. *Daniel Construction Co.,* No. 77–1697, opinion below, 563 F. 2d 707 (CA5 1977): worker has no right under Occupational Safety and Health Act to refuse to perform tasks that he reasonably believes present an immediate risk of death or serious injury, and employee who does so may be properly discharged; the Secretary of Labor's regulation to the contrary held invalid.

Kerr-McGee Chemical Corp. v. *Andrus,* No. 77–1785, order reported below, 187 U. S. App. D. C. 426, 574 F. 2d 637 (1978): regulations promulgated by the Secretary of the Interior may be applied retroactively to deny mining leases that were assertedly granted under formerly prevailing standards.

University of Texas Medical Branch at Galveston v. *United States,* No. 77–1520, opinion below, 557 F. 2d 438 (CA5 1977): the impact of *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191 (1967), implying a right of action under § 15 of the Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1152, 33 U. S. C. § 409, upon the availability of a defense under the Limitation of Shipowners' Liability Act.

Early v. *Palm Beach Newspapers, Inc.,* No. 77–1649, opinion below, 334 So. 2d 60 (Fla. App. 1976), appeal and cert. dismissed, 354 So. 2d 351 (Fla. 1977): statements labeled as opinions or editorials and containing no misstatements of fact may not be the subject of a constitutionally valid libel action.

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I do not suggest that the Court should have granted certiorari in *all* of these cases or that it should review *all* cases of this kind in the future. The reason is that we are performing at our full capacity, *i. e.*, we are now extending plenary review to as many cases as we can adequately consider, decide and explain by full opinion.

In 1937, in a letter to Senator Wheeler, Mr. Chief Justice Hughes stated that the Court was fully abreast of its work and was granting plenary consideration to all cases that deserved decision by an institution such as the Supreme Court. The Chief Justice said:

> "Granting certiorari is not a matter of favor but of sound judicial discretion. It is not the importance of the parties or the amount of money involved that is in any sense controlling. The action of the Court is governed by its rules.
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> . . . . . .
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> "I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality."

In 1937, there were fewer than 1,000 new filings on the Supreme Court docket. In 1962, there were about 2,800 and today about 4,000. No longer is it possible to review 20% or even 10% of the cases in which petitions are filed.

For the 24 years ending with the 1970 Term, in cases granted plenary consideration, the Court issued an average

of 101 full opinions plus 10 to 15 *per curiam* opinions. Since 1970, we have averaged 132 full opinions plus 15 *per curiams*—these opinions deciding an average of 170 cases—and we cannot hope substantially to exceed this average or to increase the percentage of all cases docketed to which we give plenary review. Indeed, if the certiorari docket resumes the remarkable growth that it exhibited prior to 1972, which it may well do when the output of the courts of appeals begins to reflect the many new judgeships created by the Omnibus Judgeship Act just passed by Congress, the percentage of petitions filed that can be reviewed here will inevitably decline ever further.

There is no doubt that those concerned with the coherence of the federal law must carefully consider the various alternatives available to assure that the appellate system has the capacity to function in the manner contemplated by the Constitution. As others have already noted, there is grave doubt that this function is being adequately performed.

In 1972, a study group chaired by Paul Freund of the Harvard Law School examined the problem. Its stark conclusion was:

> "The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions." Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 5 (1972), reprinted in 57 F. R. D. 573, 581 (1973).

Likewise, the Commission on Revision of the Federal Court Appellate System, which was established by Congress, concluded in 1975 that the present appellate arrangements leave

unsettled too many conflicting decisions and important questions of federal law. The point has been reached at which "the percentage of cases accorded review [has] dipped below the minimum necessary for effective monitoring of the nation's courts on issues of federal statutory and constitutional law." Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 29 (1975), reprinted in 67 F. R. D. 195, 217 (1976).

The Commission recommended the creation of a National Court of Appeals, which would not be interposed between the lower courts and this Court but whose mission in the main would be to decide cases that this Court referred to it. Legislation was proposed to implement the Commission's recommendations. Under the proposal, cases from lower courts would first be filed here, as under the present system. This Court would then not only select and dispose of its own argument docket, but would also refer additional cases to the new court for its decision. The bill did not proceed beyond the hearing stage.

MR. CHIEF JUSTICE BURGER.

Reasonable men can, and do, have differing views on the specific cases recited by MR. JUSTICE WHITE, but his analysis of the broad workload problem confronting this Court is sound and constitutes an important service. It is not a healthy situation when cases deserving authoritative resolution must remain unresolved because we are currently accepting more cases for plenary review than we can cope with in the manner they deserve.

It is now six years since a committee of distinguished practitioners and scholars, all of them intimately familiar with the work of the Court, concluded that the growth in the volume and changing complexion of that work called for a remedy. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972), 57 F. R. D. 573

(1973).[1] That committee, chaired by Professor Paul A. Freund,[2] after tracing the rise in the Court's filings and opinions, proposed the creation of a new national, intermediate appellate court to afford review of cases which it was not possible for this Court to review. The Study Group on the Caseload of the Supreme Court saw a twofold function for the proposed court:

> "(1) screening all petitions for certiorari and appeals that would at present be filed in the Supreme Court, referring the most review-worthy . . . to the Supreme Court . . . , and denying the rest; and
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> "(2) retaining for decision on the merits cases of genuine conflict between circuits (except those of special moment, which would be certified to the Supreme Court)." *Id.*, at 611.

Responding to urgings from the Judicial Branch and the tremendous increase in the workload of the federal courts, the Congress in 1972 established a commission representing all three branches of Government to study the problems and make recommendations.[3] The commission requested the

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[1] In the first Term of Chief Justice Warren's tenure (O. T., 1953), for example, this Court announced 65 signed opinions; his final (1968) Term, 99; with an average of 96, 1953 to 1968 inclusive. The average, 1969 through 1977, was 125.

[2] Other members of the committee were: Alexander M. Bickel, Peter D. Ehrenhaft, Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Charles A. Wright.

[3] The Chairman and Vice Chairman of the commission were Senator Roman L. Hruska and Judge J. Edward Lumbard, respectively; Professor A. Leo Levin was Executive Director. Members appointed from the Senate and House, and by the President and Chief Justice, were Senators Quentin N. Burdick, Hiram L. Fong, and John L. McClellan; Congressmen Jack Brooks, Walter Flowers, Edward Hutchinson, and Charles E. Wiggins; Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Judge Roger Robb, Bernard G. Segal, and Professor Herbert Wechsler.

views of each Member of this Court. My response in part stated:

> "[I]f no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative. The notion that nine Justices of the Supreme Court can deal as effectively and correctly with four times as many docketed cases as were dealt with only four decades ago may seem flattering to the incumbent Justices, but Congress must become aware of the enormous change in the burdens on the Justices in that short period of time. Indeed, it can be documented that as far back as 40 years ago, 10 years after the Judiciary Act of 1925, many of the Justices were even then apprehensive about the capacity of the Supreme Court to perform the functions performed in its first 150 years. The changes brought on in the 20th century and the new social, political and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have vastly increased the volume of important questions which can have an impact of great significance on the country." Report of the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F. R. D. 195, 398–399 (1976).

In June 1975, the Commission on Revision of the Federal Court Appellate System issued its report, recommending

> "the creation of a new national court of appeals, designed to increase the capacity of the federal judicial system for definitive adjudication of issues of national law, subject always to Supreme Court review." *Id.*, at 208.

That Commission found four significant consequences resulting from the inability of the federal judicial system to provide

adequate capacity for the declaration of national law: (a) unresolved intercircuit conflict; (b) delay; (c) a burden on the Supreme Court to hear cases arising from intercircuit conflict otherwise less worthy than many cases denied review; and (d) resulting uncertainty in the law. *Id.*, at 217–219.

The Commission proposed a National Court of Appeals consisting of seven judges with reference jurisdiction and transfer jurisdiction. Under the proposed reference jurisdiction, the Supreme Court would be empowered to refer any case within its appellate jurisdiction to the National Court of Appeals either for a decision on the merits or, alternatively, for a decision as to whether the National Court of Appeals should review the case. Under the proposed transfer jurisdiction, any court of appeals could, in appropriate and specified circumstances, transfer any case to the National Court of Appeals for a nationally binding decision, subject to this Court's consideration. *Id.*, at 238–247.

The recommendations of the Study Group on the Caseload of the Supreme Court, commonly called the "Freund Committee," have been available to the Congress and the Bar since 1972. The recommendations of the Commission on the Federal Court Appellate System have been available since 1975.

The dilemma now confronting this Court—and the country—is not new. Under the Judiciary Act of 1789, Congress created only 13 federal district judgeships and six Justices of the Supreme Court. It did not provide for an intermediate appellate court staffed, as today, with United States circuit judges. Supreme Court Justices were required to "ride circuit" and to sit with district judges to form circuit courts, sometimes reviewing district court appeals, sometimes sitting as trial judges. Later these circuit-riding judges, acting as Supreme Court Justices, sat in review of the very cases in which they had participated on Circuit.

Chief Justice John Jay and the Associate Justices urged relief and circuit courts of appeal were authorized in the

Judiciary Act of 1801; however, after the election of Thomas Jefferson, that statute was repealed the following year. Subsequently, Chief Justice Marshall unavailingly urged the creation of an intermediate tier of courts of appeals. Thus, nearly a century passed before such courts were finally created in 1891; they exist today as the United States Courts of Appeals for the 11 Circuits.[4]

In my response of May 29, 1975, to the Commission, 67 F. R. D., at 396, I strongly urged that if an intermediate court was created it should not be a permanent tier of new judges at the outset. Rather, I suggested that Congress seriously consider the creation of a temporary court so that for five years, more or less, an experimental program could be carried out.[5] The experience could then serve as a valuable guide to the Congress, without the burden of the irreversible step of establishing a permanent intermediate court.[6] MR. JUSTICE WHITE, too, favored an additional appellate court, "at least on a trial basis." He said in his letter to the Commission:

> "I should also emphasize that the proposed new court would not only permit the decision of a good many cases that are not now being decided at all by this Court, but

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[4] Under the recent Omnibus Judgeship Act of 1978, Pub. L. 95–486, 92 Stat. 1629 (Oct. 20, 1978), the total number of circuit judgeships was increased from 97 to 132.

[5] The mode of selection of members of such an ad hoc court can be worked out either along the lines recommended by the Freund Committee or through some other neutral mechanism.

[6] There is, of course, precedent for this suggestion, for Congress has created temporary courts in the past. *E. g.*, Special Regional Rail Reorganization Court, created by the Regional Rail Reorganization Act of 1973, § 209 (b), 87 Stat. 999; Temporary Emergency Court of Appeals, created by the Act of Dec. 22, 1971, § 211 (b), 85 Stat. 749; Emergency Court of Appeals, created by the Emergency Price Control Act of 1942, § 204, 56 Stat. 31.

would also (1) permit plenary consideration in selected cases which are within our compulsory appellate jurisdiction but which are presently being summarily disposed of here; (2) permit this Court to decline full consideration of and refer to the new court a substantial number of cases the issues in which are not unusually important or complex but which are now reviewed here because of existing conflicts among the circuits or among the federal and state courts; (3) enable this Court, if it was so minded, to reduce the total number of cases in which it now hears oral arguments and writes full opinions, perhaps to the yearly average of approximately 100 that obtained for 15 years prior to the 1970 Term; and (4) present the opportunity for this Court to review some cases that it would not now otherwise hear because of docket pressures." Report of the Commission on Revision of the Federal Court Appellate System, 67 F. R. D., at 402.[7]

After nearly nine years' delay, the 95th Congress recently created 117 additional district and 35 additional circuit judgeships—all of them long desperately needed to meet rising caseloads at both levels. This rise in caseload[8] is thought by many observers to result from multiple sources: (a) the enactment of more than 50 statutes by Congress since 1969

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[7] Letters to the Commission from JUSTICES BLACKMUN, POWELL, and REHNQUIST reflect general agreement with these views of MR. JUSTICE WHITE on the need for some relief if this Court is to achieve and maintain the optimum level of quality in its work. 67 F. R. D., at 404, 406, 407, respectively. MR. JUSTICE STEWART expressed the view that it is "likely that the day would come when a new court would be needed." *Id.*, at 400.

[8] For the year ending June 30, 1970, district court filings were 125,423, and for the year ending June 30, 1978, they were 166,539. Courts of appeals filings rose from 11,662 during the same period in 1970 to 18,918 for the year ending June 30, 1978.

increasing the jurisdiction of federal courts; (b) the increasing tendency to bypass available state and municipal remedies in favor of assumed swifter remedies in federal courts; (c) the increasing perceived need for courts to become "problem solvers" on great social and economic problems rather than the traditional resolvers of discrete, manageable disputes; [9] (d) the default, perceived or real, of executive and legislative solutions; and (e) the increasing complexity of much of the litigation arising from a modern society.[10]

We cannot assume any lessening in the expansion of federal jurisdiction or in congressional response to new demands.[11] When the 152 newly created federal judgeships are filled and operational, decisions of those judges will likely generate a significant increase in cases subject to review on appeal or on certiorari in this Court.

The additional judgeships may solve short-term problems, but the long-term problems of the Supreme Court analyzed by the Freund Committee and the Commission on Revision of the Federal Court Appellate System remain as they were a decade ago. If the improvement in the expeditious dispensation of justice intended by the Congress and the President

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[9] See S. Rifkind, Are We Asking too Much of our Courts?, address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F. R. D. 96, 101–104 (1976).

[10] Provocative and thoughtful analyses of these subjects are not wanting. See, *e. g.*, Hellman, The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's, 91 Harv. L. Rev. 1711 (1978); S. Rifkind, *supra*, n. 9; Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

[11] These, obviously, are policy matters for the political branches; but it is equally true that the Judiciary has an obligation to help focus attention on its needs as they are perceived by judges who must give effect to legislation relating to the administration of justice. It is for Congress to develop appropriate measures to accommodate the tension arising from contending demands on judicial resources.

when they authorized 152 new federal judges is to be realized, these problems should be faced without waiting for a crisis.

MR. JUSTICE BRENNAN.

It seems appropriate, in light of footnote 7 of the memorandum of THE CHIEF JUSTICE, to note my statement to the Commission, 67 F. R. D., at 400, that MR. JUSTICE BRENNAN "remains completely unpersuaded, as he has repeatedly said, that there is any need for a new national court." See also my article, The National Court of Appeals: Another Dissent. 40 U. Chi. L. Rev. 473 (1973).

No. 77–1794. NEW JERSEY *v.* O'HERRON ET UX. Super. Ct. N. J. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 153 N. J. Super. 570, 380 A. 2d 728.

No. 77–1831. DUNCANTELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 563 S. W. 2d 252.

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

Petitioner is a black political activist who was stopped by Houston police for a traffic offense. Police pulled petitioner from his car, handcuffed him, and searched his automobile. Upon the dashboard police found a matchbox containing marihuana. Petitioner was convicted of possession of marihuana and sentenced to seven years.

Petitioner challenges the search of the matchbox on Fourth Amendment grounds. The Texas Court of Criminal Appeals rejected this claim. 563 S. W. 2d 252 (1978) (en banc). The court credited police testimony that petitioner had appeared intoxicated at the time of the arrest, reasoned that the intoxication could have resulted from drug use, and concluded that police thus had probable cause to search petitioner's car for drugs.

This jerry-built justification surely requires review by a federal forum. Police smelled alcohol on petitioner's breath

at the time of the arrest. They had no basis, therefore, for supposing that petitioner's alleged intoxication was the result of drug rather than alcohol use. Hence, the police claim of probable cause to inspect the contents of petitioner's matchbox is patently suspect.

Were it not for the Court's decision in *Stone* v. *Powell*, 428 U. S. 465 (1976), I would not dissent. But for that decision petitioner could have sought federal forum review in federal habeas corpus. The limitation that *Stone* has placed upon federal habeas jurisdiction to redress Fourth Amendment violations denies petitioner that remedy. Thus, this Court may well be the only federal forum with jurisdiction to review petitioner's Fourth Amendment claim. Because the Court declines to exercise jurisdiction, the denial of petitioner's Fourth Amendment rights may well stand forever uncorrected.

I would grant certiorari in this case so that the constitutional error of the Texas Court of Criminal Appeals can be corrected. More generally, I believe that, so long as *Stone* v. *Powell* remains the law, this Court is obliged to take a more active role in reviewing the denial of Fourth Amendment claims by state courts. We can no longer content ourselves with the articulation of general principles. Rather, if federal law in this area is to remain uniform and supreme, we must undertake the task of error correction previously performed by the district courts. In other words, I see no escape from plenary review whenever state courts deny criminal defendants rights guaranteed by the Fourth Amendment of the United States Constitution.

The Court's denial of certiorari in the present case reinforces, for me, "the notorious fact that our certiorari jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds" and underscores Congress' wisdom, rejected by this Court in *Stone* v. *Powell*, "in mandating a broad federal habeas jurisdiction for the district courts." *Id.*, at 534 (BRENNAN, J., dissenting).

No. 78–451. NELSON ET AL. *v.* BUTLER ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 571 F. 2d 588.

No. 78–268. GILLESPIE ET AL. *v.* SCHWARTZ ET AL.; and

No. 78–361. BOSTON HOSPITAL FOR WOMEN *v.* SCHWARTZ ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari. Reported below: 579 F. 2d 194.

No. 78–410. LEE–HY PAVING CORP. ET AL. *v.* O'CONNOR, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 194.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

This case presents the question whether the Due Process Clause permits a tort plaintiff to obtain jurisdiction in New York over a defendant whose sole contact with the State arises from the defendant's contract for indemnity with a company that does business in New York.[1] The case presents an issue of considerable importance, with troublesome ramifications in the spacious arena of personal injury litigation. Moreover, it seems to me that the rationale of our recent decision in *Shaffer* v. *Heitner,* 433 U. S. 186 (1977), is at odds with the decision of the Court of Appeals here. I therefore would grant certiorari and set the case for argument.

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[1] Along with this case, the Court of Appeals decided two other cases with respect to which certiorari is sought: *Gillespie* v. *Schwartz,* No. 78–268, and *Boston Hospital for Women* v. *Schwartz,* No. 78–361. In each of these cases, residents of other States were sued in New York for torts occurring outside of New York. The sole basis for jurisdiction in each is the insurance policy of the defendant, issued by a company doing business in New York. Although I write only with respect to this case, the reasons stated in my opinion here would support the granting of certiorari in all three cases.

The petitioners are residents of Virginia. While working for petitioner Lee-Hy Paving Corp. (Lee-Hy) in Virginia, the respondent's decedent (a New York resident) was killed when Lee-Hy's grader, operated by petitioner Clem, struck him near Richmond, Va. The respondent instituted this suit in the District Court for the Eastern District of New York as executrix for her husband's estate, claiming damages for the wrongful death of her husband. In order to obtain jurisdiction over the petitioners, who are conceded to have no other connection with New York, the respondent sought and obtained under New York law an order attaching the contractual obligations of two insurance companies doing business in New York to defend and indemnify Lee-Hy. The District Court denied petitioners' motion to vacate the attachment and dismiss the suit. Acknowledging that there was a "substantial ground for difference of opinion" on the question of law, and that the issue was an important one, the District Court certified an appeal to the Court of Appeals under 28 U. S. C. § 1292 (b).

The Second Circuit affirmed. 579 F. 2d 194 (1978). The court based its ruling on the theory of *quasi in rem* jurisdiction adopted by the New York Court of Appeals in *Seider* v. *Roth,* 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). In *Seider,* personal jurisdiction was predicated on the fiction that the insurance company's obligation to indemnify the policyholder was a "debt" that the plaintiff in a negligence suit could attach as a *"res."* In *Minichiello v. Rosenberg,* 410 F. 2d 106 (1968), the Second Circuit affirmed the constitutionality of *Seider* jurisdiction, reasoning that the New York Court of Appeals had created judicially a direct-action law similar to the Louisiana statute held constitutional in *Watson* v. *Employers Liability Assurance Corp.,* 348 U. S. 66 (1954). The *Minichiello* court recognized that the *Seider* doctrine differed in one important respect from the Louisiana direct-action statute of *Watson:* Under *Seider,* there was no requirement that the tort for

which redress was sought occur in the State asserting jurisdiction. Despite the Court's emphasis in *Watson* on the location of the tort, the Second Circuit in *Minichiello* ruled that New York's interest in protecting its residents and providing them with a ready means of suing foreign tortfeasors was sufficient to justify *Seider* jurisdiction under the Due Process Clause.[2]

In the case at bar, the petitioners unsuccessfully urged reconsideration of *Minichiello* on the ground that the *Seider* doctrine had been undermined by *Shaffer* v. *Heitner, supra.* The Court of Appeals viewed the "overriding teaching of *Shaffer*" as requiring courts to look to the "realities" of the asserted grounds for jurisdiction. As far as the insurance companies were concerned, the court found no unfairness in their being subject to the jurisdiction of New York courts, as they do business in New York. The court thought that this was true even though often it is more expensive (and therefore more costly to insurers) to defend a lawsuit brought several hundred miles from the site of the accident, the residence of the defendants, and the location of the witnesses. The court reached a similar conclusion concerning the fairness of a suit brought in New York against "the nominal defendants" (the petitioners here). The court thought it ironical that they should complain even though they "will not pay the judgment, nor manage the defense." 579 F. 2d, at 201.[3]

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[2] In his persuasive dissent in *Minichiello,* Judge Anderson argued that *Watson* was based primarily on a State's strong interest in having jurisdiction with respect to tortious activity within the State's borders. See *Minichiello,* 410 F. 2d, at 113–117. Thus, Judge Anderson concluded that "statutes asserting jurisdiction of the state where the accident occurred qualify as due process, whereas the assertion of jurisdiction by the state of the plaintiff's residence does not." *Id.,* at 116 (footnote omitted).

[3] The court did note that no "other state could constitutionally give collateral estoppel effect to a *Seider* judgment." Although I agree that no such effect should be allowed, the court's opinion in this regard is dictum that may or may not be followed in other jurisdictions.

I find the Court of Appeals' decision disturbing. Although the insurance companies' contact with New York is important in determining whether it is fair for the New York courts to assert their jurisdiction, our decision in *Watson* indicated that the difficulties of defending a negligence case far from the place of the injury should be taken into account under the Due Process Clause. See *Watson* v. *Employers Liability Assurance Corp., supra,* at 72. Often these difficulties are substantial. It is routine procedure for the judge and jury [4] to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography. In short, many of the factors traditionally considered under the doctrine of *forum non conveniens*—itself a doctrine based on fairness—may also pertain to the fairness of a court hundreds of miles from the location of an accident exercising its jurisdiction over the parties to the resulting tort suit.[5]

Moreover, the Court of Appeals' reference to the petitioners as "nominal defendants" disregards many of the "realities" that bear upon whether an alleged tortfeasor, sued in a jurisdiction remote from his home and the location of the accident, is denied the fairness required by the Due Process Clause. It is novel doctrine, at least for me, to refer to the interest of defendants in negligence actions as "nominal" merely because they have insurance. In this case, for example, petitioners will be summoned to appear in a court in New York, and will be required to participate in the defense of the suit in essentially the same manner as if it had been brought in Virginia. They are required to do this 300 miles from their residences and place of business, confronted with all of the uncertainties caused by delays that often stretch a trial over several days or even weeks.

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[4] See E. Cleary, McCormick on Evidence § 216 (2d ed. 1972).

[5] See *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 507–509 (1947).

In addition to the problems posed for both the insurer and the insured by litigation located hundreds of miles from the scene of the tort, there is the ever-present possibility of a second suit in the jurisdiction where the accident occurred. The opinion of the Court of Appeals seems to assume, by its reference to petitioners as nominal defendants, that the only real parties in interest are the insurance companies. To be sure, a judgment against the petitioners in the New York courts cannot exceed the amount of indemnification provided under the insurance policies. But judgments for civil damages, especially in recent years, often have exceeded insured limits. In this case, for example, if respondent wins a judgment that exhausts the obligation of the insurers, the respondent will be free to sue petitioners in Virginia where they would be forced to go through a second trial—possibly without the benefit of lawyers supplied by the insurance companies. Moreover, as every litigation lawyer knows, the hazards of a second trial may exceed those of the first; witnesses seldom tell their story precisely the same way twice, and often new evidence is introduced. To say that the legal rights of insured defendants are not being adjudicated, despite their substantial role in the defense of the suit and despite the potential loss of their right to the insurance company's legal representation, begs the question: To what extent must an individual be involved in the litigation before the fundamental-fairness requirements of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), are applicable?

In sum, the judicially created *Seider* doctrine raises serious questions of due process. To me it does not appear consonant with the standards of fairness enunciated in *International Shoe Co.* v. *Washington,* and strongly reiterated in *Shaffer* v. *Heitner.* The issues presented are of concern to insurers and insureds in every State, as well as to state legislators responsible for the fairness of long-arm statutes. The case merits plenary consideration by this Court.

No. 78–411. INTERSTATE COMMERCE COMMISSION *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 582 F. 2d 1043.

No. 78–560. BLYTH, EASTMAN DILLON & CO., INC., ET AL. *v.* ROLF. C. A. 2d Cir. Motions of Merrill Lynch, Pierce, Fenner & Smith, Inc., et al., and New York Stock Exchange, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 570 F. 2d 38.

No. 78–611. MIRABAL ET AL. *v.* GENERAL MOTORS ACCCEPTANCE CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 576 F. 2d 729.

No. 78–5410. PROCA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 578 F. 2d 1386.

No. 78–5460. SPIVEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 241 Ga. 477, 246 S. E. 2d 288.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 77–1684. BROADUS *v.* LOTT, ADMINISTRATRIX, *ante,* p. 828. Petition for rehearing denied.

No. 78–428. GAETANO ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (SILBERT, U. S. ATTORNEY, REAL PARTY IN INTEREST), *ante*, p. 924;

No. 78–5051. CARTER *v.* TEXAS, *ante*, p. 956; and

No. 78–5213. RODRIGUEZ *v.* UNITED STATES, *ante*, p. 920. Petitions for rehearing denied.

DECEMBER 5, 1978

Dismissal Under Rule 60

No. 78–157. UNITED STATES *v.* EDWARDS. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 574 F. 2d 937.

DECEMBER 11, 1978

Dismissal Under Rule 60

No. 78–634. CLARENCE LABELLE POST NO. 217, VETERANS OF FOREIGN WARS OF THE UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 580 F. 2d 270.

Appeals Dismissed

No. 78–602. TUSCAN DAIRY FARMS, INC. *v.* BARBER, COMMISSIONER OF AGRICULTURE AND MARKETS OF NEW YORK. Appeal from Ct. App. N. Y. Motion of The Great Atlantic & Pacific Tea Co., Inc., for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE POWELL and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 45 N. Y. 2d 215, 380 N. E. 2d 179.

No. 78–608. LUMPKIN *v.* DEPARTMENT OF SOCIAL SERVICES OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 45 N. Y. 2d 351, 380 N. E. 2d 249.

No. 78–657. KIMBLE ET AL. *v.* SWACKHAMER, SECRETARY OF STATE OF NEVADA, ET AL. Appeal from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 94 Nev. 600, 584 P. 2d 161.

No. 78–646. SOUTHERN CALIFORNIA EDISON CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument.

No. 78–663. BOROUGH OF FOX CHAPEL ET AL. *v.* FRIDAY. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5587. BALLENTINE *v.* FOGG, CORRECTIONAL SUPERINTENDENT. Appeal from C. A. 2d 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: 582 F. 2d 1271.

Certiorari Granted—Vacated and Remanded

No. 77–477. HOPPER, WARDEN *v.* BARNETT. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded with directions to dismiss cause as moot. Reported below: 548 F. 2d 550.

Miscellaneous Orders

No. D–149. IN RE DISBARMENT OF GENUA. It is ordered that Albert J. Genua, Jr., of Rocky Hill, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–147. IN RE DISBARMENT OF PENCE. The rule to show cause is discharged and the order entered November 27, 1978 [*ante*, p. 975], is vacated.

No. D–150. IN RE DISBARMENT OF GILLARD. It is ordered that Jack F. C. Gillard, of Albert Lea, Minn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–151. IN RE DISBARMENT OF HOPFL. It is ordered that Charles E. Hopfl, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–152. IN RE DISBARMENT OF WATERS. It is ordered that Michael F. Waters, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–153. IN RE DISBARMENT OF OLITT. It is ordered that J. Jerome Olitt, of White Plains, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–154. IN RE DISBARMENT OF BRICKEL. It is ordered that Bernard Michael Brickel, of Croton-on-Hudson, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 77–926. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 438 U. S. 914.] Motion of the Solicitor General for additional time for oral argument denied. Alternative request for divided argument granted.

No. 77–983. WASHINGTON ET AL. *v.* WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN. ET AL.; and WASHINGTON ET AL. *v.* PUGET SOUND GILLNETTERS ASSN. ET AL. Sup. Ct. Wash.;

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir.; and

No. 78–139. PUGET SOUND GILLNETTERS ASSN. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. [Certiorari granted, *ante*, p. 909.] Motions of Washington State Commercial Passenger Fishing Vessel Assn. and Puget Sound Gillnetters Assn. et al. for additional time for oral argument denied.

No. 77–1571. DELAWARE *v.* PROUSE. Sup. Ct. Del. [Certiorari granted, *ante*, p. 816.] Motion of Americans for Effective Law Enforcement et al. for leave to file a brief as *amici curiae* granted.

No. 77–1583. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motion of Authors League of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 78–642. SHAPP, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* CASEY, TREASURER OF PENNSYLVANIA, ET AL. Appeal from Sup. Ct. Pa. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–852. LIBRACH *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 8th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 77–1652. FEDERAL ENERGY REGULATORY COMMISSION *v.* SHELL OIL CO. ET AL.; and

No. 77–1654. CONSUMER ENERGY COUNCIL OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. [Certiorari granted, *ante*, p. 817.] Motions of Action Alliance of Senior Citizens of Greater Philadelphia and United States Conference of Mayors et al. for leave to file briefs as *amici curiae* granted. MR. JUSTICE STEWART took no part in the consideration or decision of these motions.

No. 78–5321. ADAMS *v.* FLORIDA, *ante*, p. 947. Respondent invited to file a response to petition for rehearing within 30 days.

No. 78–5742. BONIFACE *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 78–5550. WELCH *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 78–647. MARCHIORO ET AL. *v.* CHANEY ET AL. Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Reported below: 90 Wash. 2d 298, 582 P. 2d 487.

No. 78–437. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WESTCOTT ET AL.; and

No. 78–689. SHARP, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS *v.* WESTCOTT ET AL. Appeals from D. C. Mass. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 460 F. Supp. 737.

No. 78–5420. PAYTON *v.* NEW YORK; and

No. 78–5421. RIDDICK *v.* NEW YORK. Appeals from Ct. App. N. Y. Motions of appellants for leave to proceed *in*

forma pauperis granted. In No. 78–5420, probable jurisdiction is noted limited to Question 1 presented by the jurisdictional statement. In No. 78–5421, probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 45 N. Y. 2d 300, 380 N. E. 2d 224.

Certiorari Granted

No. 78–561. UNITED STATES *v.* NAFTALIN. C. A. 8th Cir. Certiorari granted. Reported below: 579 F. 2d 444.

No. 77–6949. DUNN *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 577 F. 2d 119.

No. 77–1665. BONANNO *v.* UNITED STATES. C. A. 9th Cir.; and

No. 78–156. UNITED STATES *v.* ADDONIZIO ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 77–1665, 571 F. 2d 588; No. 78–156, 573 F. 2d 147.

No. 78–349. UNITED STATES *v.* HELSTOSKI; and

No. 78–546. HELSTOSKI *v.* MEANOR, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 576 F. 2d 511.

No. 78–432. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.;

No. 78–435. KAISER ALUMINUM & CHEMICAL CORP. *v.* WEBER ET AL.; and

No. 78–436. UNITED STATES ET AL. *v.* WEBER ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 563 F. 2d 216.

No. 78–354. NORTH CAROLINA *v.* BUTLER. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 295 N. C. 250, 244 S. E. 2d 410.

Certiorari Denied. (See also Nos. 78–663 and 78–5587, *supra.*)

No. 78–244. FISHER *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 832.

No. 78–321. PARKER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 773, 573 F. 2d 42.

No. 78–391. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1274.

No. 78–401. MILLAR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 212.

No. 78–403. SCOTT, ATTORNEY GENERAL OF ILLINOIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 589.

No. 78–406. MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 941.

No. 78–454. PAVLECKA ET AL. *v.* BANNER, COMMISSIONER OF PATENTS AND TRADEMARKS. C. C. P. A. Certiorari denied. Reported below: 582 F. 2d 43.

No. 78–468. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 77.

No. 78–478. MAPES ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 217 Ct. Cl. 115, 576 F. 2d 896.

No. 78–490. HOUSTON DISTRIBUTION SERVICES, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 260.

No. 78–494. TEXTRON, INC., BELL HELICOPTER TEXTRON, A DIVISION OF TEXTRON, INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 1163.

No. 78–507. FAIRFAX COUNTY WIDE CITIZENS ASSN. ET AL. *v.* COUNTY OF FAIRFAX, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 1299.

No. 78–533. LOUISIANA *v.* DINO. Sup. Ct. La. Certiorari denied. Reported below: 359 So. 2d 586.

No. 78–589. POE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 752.

No. 78–617. CULHANE ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 757, 380 N. E. 2d 315.

No. 78–650. CORBETT *v.* THOR ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 267 N. W. 2d 412.

No. 78–651. CACHUR *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 747.

No. 78–654. DELUCA *v.* ROBERTSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 78–656. MACHIPONGO CLUB, INC. *v.* NATURE CONSERVANCY. C. A. 4th Cir. Certiorari denied. Reported below: 579 F. 2d 873.

No. 78–661. PORRO ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: 158 N. J. Super. 269, 385 A. 2d 1258.

No. 78–665. MOLINA *v.* RICHARDSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 846.

No. 78–674. MAYER *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 54 Ohio St. 2d 431, 377 N. E. 2d 770.

No. 78–676. HICKOK ELECTRICAL INSTRUMENT CO. *v.* TEKTRONIX, INC., ET AL. Ct. Cl. Certiorari denied. Reported below: 216 Ct. Cl. 144, 575 F. 2d 832.

No. 78–679. KUGEL *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 351 So. 2d 429.

No. 78–681. NOLTE *v.* BUDD CO. C. A. 6th Cir. Certiorari denied.

No. 78–712. ARA SERVICES, INC. *v.* SOUTH CAROLINA TAX COMMISSION. Sup. Ct. S. C. Certiorari denied. Reported below: 271 S. C. 146, 246 S. E. 2d 171.

No. 78–745. FAVREAU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–747. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 2d 1173.

No. 78–794. WASHINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 389 A. 2d 1356.

No. 78–798. GLIATTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 156.

No. 78–801. KIRK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 773.

No. 78–5289. BRETZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 569 F. 2d 951.

No. 78–5302. JOHNSON *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 78–5324. HOWARD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 589, 377 N. E. 2d 628.

No. 78–5358. DULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 737.

No. 78–5389. JONES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 359 So. 2d 95.

No. 78–5415. GUZMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 1269.

No. 78–5440. KENNEDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 578 F. 2d 196.

No. 78–5483. MCMILLIAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 2d 1061.

No. 78–5488. OROZCO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 789.

No. 78–5494. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–5498. GUILFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5529. STONE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 78–5542. FERNANDO *v.* CLELAND, ADMINISTRATOR, VETERANS' AFFAIRS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 78–5563. SMITH *v.* WARDEN, ILLINOIS STATE PENITENTIARY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1283.

No. 78–5574. YORE *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–5577. HARTBARGER *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–5578. FULTZ *v.* FINKBEINER. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1285.

No. 78–5580. SHAFFER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 18 Wash. App. 2d 652, 571 P. 2d 220.

No. 78–5592. SUBILOSKY *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 374 N. E. 2d 334.

No. 78–5594. MIRON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 78–5609. ROSS *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–5611. HINDMAN *v.* KELLY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1288.

No. 78–5618. BEASON *v.* LOUISIANA CASING CREW & RENTAL SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1132.

No. 78–5621. WALKER *v.* INTERNAL REVENUE SERVICE. C. A. 2d Cir. Certiorari denied.

No. 78–5625. CLARK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 90, 378 N. E. 2d 850.

No. 78–5638. CHAPLINSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 373.

No. 78–5671. PELLEGRINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 836.

No. 78–5678. TOBIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 687.

No. 78–5679. WALLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 2d 585.

No. 78–5680. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 827.

No. 78–5686. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 836.

No. 78–5694. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 335.

No. 78–5697. FRISON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–5698. SWIGER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5708. RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 177.

No. 77–1694. BENJAMIN FRANKLIN FEDERAL SAVINGS & LOAN ASSN. *v.* DERENCO, INC. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 281 Ore. 533, 577 P. 2d 477.

No. 78–140. APELBY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 78–5326. TROTTI ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 144 Ga. App. 648, 242 S. E. 2d 270.

No. 78–512. KONIAG, INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Motion of petitioners to defer consideration of petition for writ of certiorari and certiorari denied. Reported below: 188 U. S. App. D. C. 338, 580 F. 2d 601.

No. 78–606. PACIFIC TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and

No. 78–607. GENERAL TELEPHONE COMPANY OF CALIFORNIA *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Motions for leave to file briefs as *amici curiae*, in both cases, filed by Southern Co., Communications Workers of America, Sierra Pacific Power Co. et al., and California Independent Telephone Assn., granted. Motions for leave to file briefs as *amici curiae* in No. 78–606, filed by Edison Electric Institute and Dallas Power & Light Co. et al., granted. Certiorari denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN would grant certiorari.

No. 78–5519. HOLLENBAUGH ET AL. *v.* CARNEGIE FREE LIBRARY ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 578 F. 2d 1374.

MR. JUSTICE MARSHALL, dissenting.

The Court today lets stand a decision that upholds, after the most minimal scrutiny, an unwarranted governmental intrusion into the privacy of public employees. The ruling below permits a public employer to dictate the sexual conduct and family living arrangements of its employees, without a meaningful showing that these private choices have any relation to job performance. Because I believe this decision departs from our precedents and conflicts with the rulings of other courts, I would grant certiorari and set the case for argument.

I

Petitioner Rebecca Hollenbaugh served as a librarian and petitioner Fred Philburn as a custodian at the state-maintained Carnegie Free Library in Connellsville, Pa. The two began seeing each other socially, although Mr. Philburn was married at the time. In 1972, Ms. Hollenbaugh learned that she was pregnant with Mr. Philburn's child, and within a month, Mr. Philburn left his wife and moved in with Ms. Hollenbaugh. Due to her pregnancy, Ms. Hollenbaugh sought and was granted a leave of absence by the respondent Board of Trustees from March to September 1973. While petitioners did not conceal their arrangement, neither did they advertise it.

Responding to some complaints from members of the community, the Board of Trustees attempted to dissuade petitioners from continuing to live together. When petitioners refused to alter their arrangement, they were discharged. They subsequently brought this action under 42 U. S. C. § 1983 seeking declaratory and injunctive relief and monetary damages.

After a nonjury trial, the District Court found that under the minimum rationality test, petitioners' discharge did not violate the Equal Protection Clause. The court further concluded that petitioners' behavior was not encompassed within the constitutional right to privacy. 436 F. Supp. 1328 (WD Pa. 1977). The Court of Appeals for the Third Circuit affirmed on the basis of the District Court's opinion. 578 F. 2d 1374 (1978).

II

I have frequently reiterated my objections to the perpetuation of "the rigid two-tier model [that] still holds sway as the Court's articulated description of the equal protection test." *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 318 (1976) (MARSHALL, J., dissenting); see, *e. g.*, *Marshall* v. *United States*, 414 U. S. 417, 432–433 (1974) (MARSHALL, J., dissenting); *San Antonio Independent School Dist.* v. *Rodri-*

guez, 411 U. S. 1, 98–110 (1973) (MARSHALL, J., dissenting). The test that this Court has in fact applied has often, I believe, been much more sophisticated. The substantiality of the interests we have required a State to demonstrate in support of a challenged classification has varied with the character of the classification and the importance of the individual interests at stake. See, *e. g., Trimble* v. *Gordon,* 430 U. S. 762, 767 (1977); *Craig* v. *Boren,* 429 U. S. 190 (1976); *Bullock* v. *Carter,* 405 U. S. 134, 144 (1972); *Reed* v. *Reed,* 404 U. S. 71 (1971); see also Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Had the courts below undertaken this inquiry, rather than unreflectively applying the minimum rationality test, the outcome here might well have been different.

Respondents do not claim to have relied on a legislative proscription of particular sexual conduct. The Commonwealth of Pennsylvania repealed its law prohibiting adultery and fornication in 1972. 1972 Pa. Laws, Act No. 334, § 5. Rather, in the exercise of ad hoc and, it seems, unreviewable discretion, respondents determined to deprive petitioners of their jobs unless "they 'normalized' their relationship through marriage or [unless] Philburn moved out." 436 F. Supp., at 1331. The District Court found that "the motivating factor behind the discharges of [petitioners] was that they were living together in a state of 'open adultery.'" *Id.,* at 1332. Respondents were unwilling to appear as if they "condoned [petitioners'] extramarital 'affair' and . . . the child's birth out of wedlock." *Ibid.* Thus, respondents apparently did not object to furtive adultery, but only to petitioners' refusal to hide their relationship. In essence, respondents sought to force a standard of hyprocrisy on their employees and fired those who declined to abide by it. In my view, this form of discrimination is particularly invidious.

Such administrative intermeddling with important personal

rights merits more than minimal scrutiny. One such right, clearly implicated by petitioners' discharge, is that "'of the individual . . . to engage in any of the common occupations of life,'" *Board of Regents* v. *Roth,* 408 U. S. 564, 572 (1972), quoting *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923); see *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972); *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968). Perhaps even more vital is "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969). Although we have never demarcated the precise boundaries of this right, we have held that it broadly encompasses "freedom of personal choice in matters of marriage and family life." *Cleveland Board of Education* v. *LeFleur,* 414 U. S. 632, 639–640 (1974) (pregnancy). See, *e. g., Loving* v. *Virginia,* 388 U. S. 1, 12 (1967), and *Zablocki* v. *Redhail,* 434 U. S. 374, 383–385 (1978) (marriage); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541–542 (1942) (procreation); *Eisenstadt* v. *Baird,* 405 U. S. 438, 453–454 (1972); *id.,* at 460, 463–465 (WHITE, J., concurring in result), and *Carey* v. *Population Services International,* 431 U. S. 678, 684–685 (1977) (contraception); *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944) (family relationships); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), and *Meyer* v. *Nebraska, supra,* at 399 (child rearing and education); *Roe* v. *Wade,* 410 U. S. 113, 152–153 (1973) (abortion); *Moore* v. *East Cleveland,* 431 U. S. 494, 499 (1977) (plurality opinion) (right to determine family living arrangements).

Petitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection. That petitioners' arrangement was unconventional or socially disapproved does not negate the resemblance, cf. *Carey* v. *Population Services International, supra,* at

698, 699 (plurality opinion); *Eisenstadt* v. *Baird, supra,* at 452–453; *Wisconsin* v. *Yoder,* 406 U. S. 205, 223–224 (1972), particularly in the absence of a judgment that the arrangement so offends social norms as to evoke criminal sanctions. And certainly, no distinction can be drawn between this case and those cited above in terms of the importance to petitioners of this personal decision. In addition, to impose separate living arrangements as a condition of employment impinges not only on petitioners' associational interests, but also on the interests of their child in having a two-parent home. See *Trimble* v. *Gordon, supra,* at 769–770; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 175 (1972).

Petitioners' choice of living arrangements for themselves and their child is thus sufficiently close to the interests we have previously recognized as fundamental and sufficiently related to the constitutional guarantee of freedom of association that it should not be relegated to the minimum rationality tier of equal protection analysis, a disposition that seems invariably fatal to the assertion of a constitutional right. See *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S., at 319–320 (MARSHALL, J., dissenting). Rather, respondents should at least be required to show that petitioners' discharge serves a substantial state interest. See *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S., at 124–126 (MARSHALL, J., dissenting); *Massachusetts Board of Retirement* v. *Murgia, supra,* at 325 (MARSHALL, J., dissenting); *Reed* v. *Reed, supra,* at 76–77. As the plurality held in *Moore* v. *East Cleveland, supra,* at 499, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."

Moreover, respondents' actions here may not withstand even the minimal scrutiny of the rational-basis test. In the District Court's view, the test was satisfied because respondents

could have legitimately concluded that petitioners' relationship impaired their effectiveness on the job and that failure to discharge them would constitute tacit approval of an illicit relationship.

The court acknowledged, however, that petitioners were "competent employees who had had no significant problems with their employers until the circumstances that gave rise to their discharges." 436 F. Supp., at 1330–1331. In suggesting that respondents could rationally find petitioner Hollenbaugh unfit to perform her duties, the court observed merely that her job "involved direct and frequent contacts with the community" and that the "community was well aware of [petitioners'] living arrangement." *Id.*, at 1332, 1333. This reasoning reduces to the conclusion that Hollenbaugh was incompetent as a librarian because some members of the community disapproved of her lifestyle. But the District Court never intimated that this disapproval affected the community members' use of the library or that Hollenbaugh's marital status in any way diminished her ability to discharge her duties as a librarian. And the court gave no indication that Philburn's custodial job called for similar contacts with the community or that his performance was affected in any way by his extramarital relationship.

Nor does the District Court's opinion make clear how respondents' interest in avoiding the appearance of "tacit approval" of petitioners' relationship provided a rational basis for petitioners' discharge. The court adverted to no evidence suggesting that petitioners' status impaired the library's performance of its public function. Moreover, the State has given some indication of the prevailing moral sensibilities of the community by the repeal in 1972 of the criminal sanctions against fornication and adultery.

III

On a record so devoid of evidence in support of petitioners' discharge, the Court of Appeals' holding appears to conflict

with decisions of other courts striking down similar attempts by governmental bodies to regulate the private lives of their employees. In *Andrews* v. *Drew Municipal Separate School Dist.*, 507 F. 2d 611 (CA5 1975), cert. dismissed as improvidently granted, 425 U. S. 559 (1976), the Court of Appeals found that a school district rule barring employment of unwed parents was insufficiently related to any legitimate objective to satisfy the requirements of the Equal Protection Clause. Similarly, in *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974, 979 (MD Ala. 1974), a three-judge District Court declared unconstitutional the dismissal of an unmarried, pregnant teacher, finding no compelling interest "which would justify the invasion of [the teacher's] constitutional right of privacy." See also *Mindel* v. *United States Civil Service Commission*, 312 F. Supp. 485 (ND Cal. 1970) (discharge of postal clerk for living with a woman not his wife held unconstitutional). These decisions reflect a considerably greater degree of solicitude for the privacy interests of public employees than was evident in the rulings of the courts below.

I believe that individuals' choices concerning their private lives deserve more than token protection from this Court, regardless of whether we approve of those choices. Accordingly, I dissent from the denial of certiorari.

No. 78–5582. ROGERS *v.* DOUGLAS ET UX. Ct. App. D. C. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari Reported below: 390 A. 2d 1.

Rehearing Denied

No. 78–5110. CRISAFI *v.* UNITED STATES, *ante*, p. 931; and

No. 78–5322. LINGHAM *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 933. Petitions for rehearing denied.

DECEMBER 26, 1978

Dismissal Under Rule 60

No. 78–688. SAMMONS, DBA SAMMONS TRUCKING, ET AL. *v.* SCHINDELE ET AL. Appeal from Sup. Ct. Minn. dismissed under this Court's Rule 60. Reported below: 268 N. W. 2d 547.

JANUARY 8, 1979

Affirmed on Appeal

No. 78–580. GARCIA ET AL. *v.* UVALDE COUNTY ET AL.; and No. 78–731. UNITED STATES *v.* UVALDE COUNTY ET AL. Affirmed on appeal from D. C. W. D. Tex. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set cases for oral argument. Reported below: 455 F. Supp. 101.

Appeals Dismissed

No. 77–1567. BUCK *v.* HUNTER ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 44 N. Y. 2d 137, 375 N. E. 2d 735.

No. 78–343. GRADY ET AL. *v.* MCLEAN. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied Reported below: 44 N. Y. 2d 949.

No. 78–5508. DREW *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 360 So. 2d 500.

No. 78–5660. BELL *v.* CHURCH 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.

No. 78–621. VILLAGE OF CARPENTERSVILLE *v.* LIMPERIS, TRUSTEE IN BANKRUPTCY. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 583 F. 2d 290.

No. 78–741. FUTCH *v.* O'LEARY; and FUTCH *v.* SIEBEN-MORGEN. 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. 78–5662. CROSS *v.* ALZOFON 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. 78–360. RANDOLPH ET AL. *v.* MUNICIPAL COURT, SOUTHERN JUDICIAL DISTRICT, COUNTY OF SAN MATEO, ET AL. (CALIFORNIA, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would reverse the convictions.

No. 78–649. CITY OF BOSTON ET AL. *v.* ANDERSON ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: —— Mass. ——, 380 N. E. 2d 628.

No. 78–816. BELL *v.* NEW YORK STATE LIQUOR AUTHORITY. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Reported below: 62 App. Div. 2d 1066, 403 N. Y. S. 2d 804.

No. 78–5290. EZZELL *v.* LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 21 Cal. 3d 349, 579 P. 2d 495.

No. 78–5357. CALDWELL *v.* KAQUATOSH ET AL. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 84 Wis. 2d 545, 267 N. W. 2d. 870.

Certiorari Granted—Vacated and Remanded

No. 78–571. BLUCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the District of Wyoming with directions to vacate its judgment and dismiss the indictment. MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST dissent. Reported below: 581 F. 2d 244.

Miscellaneous Orders

No. 77, Orig. TENNESSEE *v.* ARKANSAS. It is ordered that the Honorable Earl R. Larson, Senior Judge of the United States District Court for the District of Minnesota, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see *ante,* p. 812.]

No. A–452 (78–951). MORTON *v.* MORTON. Ct. App. Cal., 2d App. Dist. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–580 (78–437). CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WESTCOTT ET AL.; and

No. A–374 (78–689). SHARP, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS *v.* WESTCOTT ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 1044.] Application of the Solicitor General for stay of judgment of the United States District Court for the District of Massachusetts, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pending this Court's final disposition of the cases. MR. JUSTICE BRENNAN would deny the application. Application of the Attorney General of Massachusetts for partial stay of judgment of the United States District Court for the District of Massachusetts, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–601. LYNCH ET AL. *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the District of Columbia Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–70. IN RE DISBARMENT OF WEBER. Disbarment entered. [For earlier order herein, see 429 U. S. 936.]

No. D–124. IN RE DISBARMENT OF LINDSAY. Disbarment entered. [For earlier order herein, see 434 U. S. 979.]

No. 77–1497. ARKANSAS *v.* SANDERS. Sup. Ct. Ark. [Certiorari granted, *ante*, p. 891.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Jack T. Lassiter, Esquire, of Little Rock, Ark., be appointed to serve as counsel for respondent in this case.

No. 77–922. CHRYSLER CORP. *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. [Certiorari granted, 435 U. S. 914.] Motion of petitioner for leave to file supplemental brief after argument granted.

No. 77–1575. FEDERAL COMMUNICATIONS COMMISSION *v.* MIDWEST VIDEO CORP. ET AL.;

No. 77–1648. AMERICAN CIVIL LIBERTIES UNION *v.* FEDERAL COMMUNICATIONS COMMISSION; and

No. 77–1662. NATIONAL BLACK MEDIA COALITION ET AL. *v.* MIDWEST VIDEO CORP. ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General to dispense with printing appendix granted.

No. 77–1578. BROADCAST MUSIC, INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 77–1583. AMERICAN SOCIETY OF COMPOSERS, AUTHORS, & PUBLISHERS ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motions of National Broadcasting Co., Inc., American Broadcasting Companies, Inc., and National Religious Broadcasters, Inc., for leave to file briefs as *amici curiae* granted. Motion of All-Industry Television Music License Committee for leave to participate in oral argument as *amicus curiae* denied.

No. 77–1652. FEDERAL ENERGY REGULATORY COMMISSION *v.* SHELL OIL CO. ET AL.; and

No. 77–1654. CONSUMER ENERGY COUNCIL OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. [Certiorari granted, *ante*, p. 817.] Motion of the Solicitor General for additional time for oral argument denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 78–5914. SCHREIBMAN *v.* WALTER E. HELLER & COMPANY OF PUERTO RICO ET AL. C. A. 1st Cir. Motion of Las Colinas Development Corp. for leave to proceed *in forma pauperis* denied. MR. JUSTICE STEWART would grant the motion.

No. 77–1806. FORD MOTOR CO. (CHICAGO STAMPING PLANT) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 891.] Motion of respondent UAW Local 588 for additional time for oral argument denied. Alternative request for divided argument granted.

No. 77–6949. DUNN *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, *ante,* p. 1045.] Motion for appointment of counsel granted, and it is ordered that Daniel J. Sears, Esquire, of Denver, Colo., be appointed to serve as counsel for petitioner in this case.

No. 78–99. PARKER *v.* RANDOLPH ET AL. C. A. 6th Cir. [Certiorari granted, *ante,* p. 978.] Motion for appointment of counsel granted, and it is ordered that Walter Lee Evans, Esquire, of Memphis, Tenn., be appointed to serve as counsel for respondent in this case.

No. 78–201. GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. *v.* INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 817.] Motion of Jerome N. Frank Legal Services Organizations of Yale Law School et al. for leave to participate in oral argument as *amici curiae* denied.

No. 78–225. BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL. D. C. Ariz. [Probable jurisdiction postponed, *ante,* p. 891.] Motion of appellee United Farm Workers National Union for additional time for oral argument granted and 10 additional minutes allotted for that purpose. Appellants also allotted an additional 10 minutes for oral argument.

No. 78–5283. JACKSON *v.* VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, *ante,* p. 1001.] Motion for appointment of counsel granted, and it is ordered that Carolyn J. Colville of Richmond, Va., be appointed to serve as counsel for petitioner in this case.

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 78–330. HUNERWADEL *v.* BAIRD ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 925.] Motion for appointment of Alan Ernest as counsel or guardian *ad litem* for unborn children denied.

No. 78–5633. CARTER *v.* BUE, U. S. DISTRICT JUDGE;

No. 78–5747. CARBINO ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT; and

No. 78–5799. GREEN *v.* RALSTON, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 78–5717. GREEN *v.* CLERK, U. S. DISTRICT COURT, WESTERN DISTRICT OF MISSOURI. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 78–759. LEROY, ATTORNEY GENERAL OF IDAHO, ET AL. *v.* GREAT WESTERN UNITED CORP. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 577 F. 2d 1256.

Certiorari Granted

No. 78–223. NATIONAL LABOR RELATIONS BOARD *v.* BAPTIST HOSPITAL, INC. C. A. 6th Cir. Certiorari granted. Reported below: 576 F. 2d 107.

No. 78–625. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. v. SIERRA CLUB ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 189 U. S. App. D. C. 117, 581 F. 2d 895.

No. 78–690. REITER *v.* SONOTONE CORP. ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 579 F. 2d 1077.

No. 78–711. SOUTHEASTERN COMMUNITY COLLEGE *v.* DAVIS. C. A. 4th Cir. Certiorari granted. Reported below: 574 F. 2d 1158.

No. 78–744. UNITED STATES *v.* TIMMRECK. C. A. 6th Cir. Certiorari granted. Reported below: 577 F. 2d 372.

No. 78–753. GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* NOVOTNY. C. A. 3d Cir. Certiorari granted. Reported below: 584 F. 2d 1235.

No. 78–776. UNITED STATES *v.* BATCHELDER. C. A. 7th Cir. Certiorari granted. Reported below: 581 F. 2d 626.

No. 78–575. SOUTHERN RAILWAY CO. *v.* SEABOARD ALLIED MILLING CORP. ET AL.;

No. 78–597. INTERSTATE COMMERCE COMMISSION *v.* SEABOARD ALLIED MILLING CORP. ET AL.; and

No. 78–604. SEABOARD COAST LINE RAILROAD CO. ET AL. *v.* SEABOARD ALLIED MILLING CORP. ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 570 F. 2d 1349.

No. 78–610. COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument with No. 78–627, immediately *infra*. Reported below: 583 F. 2d 787.

No. 78–627. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument with No. 78–610, immediately *supra*. Reported below: 583 F. 2d 243.

No. 78–680. HUTCHINSON *v.* PROXMIRE, U. S. SENATOR, ET AL. C. A. 7th Cir. Certiorari granted and case set for oral argument with No. 78–5414, immediately *infra*. Reported below: 579 F. 2d 1027.

No. 78–5414. WOLSTON v. READER'S DIGEST ASSN., INC., ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 78–680, immediately *supra*. Reported below: 188 U. S. App. D. C. 185, 578 F. 2d 427.

No. 78–749. KENTUCKY *v.* WHORTON. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 570 S. W. 2d 627.

No. 78–5384. SANDSTROM *v.* MONTANA. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 176 Mont. 492, 580 P. 2d 106.

Certiorari Denied. (See also Nos. 78–343, 78–621, 78–741, 78–5508, 78–5660, and 78–5662, *supra.*)

No. 77–6300. BHILLIPS, AKA GERGEL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 475 Pa. 427, 380 A. 2d 1210.

No. 78–342. JARA *v.* MUNICIPAL COURT FOR THE SAN ANTONIO JUDICIAL DISTRICT OF LOS ANGELES COUNTY (COUNTY OF LOS ANGELES ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 3d 181, 578 P. 2d 94.

No. 78–373. TOOMER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 595, 566 S. W. 2d 393.

No. 78–388. TEX-LA ELECTRIC COOPERATIVE, INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 201, 578 F. 2d 443.

No. 78–393. PIERCEALL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 218 Va. 1016, 243 S. E. 2d 222.

No. 78–394. COSTANZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 581 F. 2d 28.

No. 78–399. NABORS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 409, 565 S. W. 2d 598.

No. 78–417. CALIFORNIA ET AL. *v.* CIVIL AERONAUTICS BOARD; and

No. 78–447. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* CIVIL AERONAUTICS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 176, 581 F. 2d 954.

No. 78–423. CHEIMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 160.

No. 78–430. TODD ET UX. *v.* ASSOCIATED CREDIT BUREAU SERVICES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–462. OSBORNE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 216 Ct. Cl. 469, 578 F. 2d 1390.

No. 78–484. O'CALLAGHAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 216 Ct. Cl. 481, 578 F. 2d 1390.

No. 78–489. MITCHELL ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 1356.

No. 78–495. COLE HOSPITAL, INC., ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1284.

No. 78–496. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 946.

No. 78–497. RAMSEY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 215 Ct. Cl. 1042, 578 F. 2d 1388.

No. 78–505. BRAESCH ET AL. *v.* DEPASQUALE ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 200 Neb. 726, 265 N. W. 2d 842.

No. 78–514. ABNEY *v.* ABNEY. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 374 N. E. 2d 264.

No. 78–518. NACIREMA OPERATING CO. ET AL. *v.* LYNN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 852.

No. 78–532. CONSOLIDATION COAL CO. v. UNITED STATES;
No. 78–537. ZITKO *v.* UNITED STATES; and
No. 78–697. MARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 2d 1011.

No. 78–538. CRIPPEN v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 535.

No. 78–542. TAMA MEAT PACKING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 661.

No. 78–547. BURTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 327, 584 F. 2d 485.

No. 78–548. ARROYO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 649.

No. 78–562. MADONNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 704.

No. 78–569. PATTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–577. VALAND *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 78–581. CAHN *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE. Ct. App. N. Y. Certiorari denied. Reported below: 44 N. Y. 2d 641, 376 N. E. 2d 934.

No. 78–585. JACKSON SAWMILL CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 580 F. 2d 302.

No. 78–592. ST. VINCENT'S MEDICAL CENTER OF RICHMOND *v.* STATE HUMAN RIGHTS APPEAL BOARD ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 778, 398 N. Y. S. 2d 735.

No. 78–594. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 571 F. 2d 583.

No. 78–614. CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, AFFILIATED WITH INTERNATIONAL LABORERS' UNION OF NORTH AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 16.

No. 78–615. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 279, 595 F. 2d 664.

No. 78–619. GETTY OIL CO. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 581 F. 2d 838.

No. 78–633. LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 832.

No. 78–639. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 367 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1375.

No. 78–652. PEAT *v.* NATIONAL TRANSPORTATION SAFETY BOARD. C. A. D. C. Cir. Certiorari denied.

No. 78–658. UTAH POWER & LIGHT CO. *v.* ENVIRONMENTAL DEFENSE FUND, INC., ET AL.; and

No. 78–678. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* ENVIRONMENTAL DEFENSE FUND, INC., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 78–659. FORSTNER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 579 F. 2d 506.

No. 78–660. PLEASANTON GRAVEL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 827.

No. 78–664. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1275.

No. 78–668. DIPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 1323.

No. 78–677. ARTHUR YOUNG & CO. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 190 U. S. App. D. C. 37, 584 F. 2d 1018.

No. 78–682. T. G. MOTORS, INC., OF HOUSTON, DBA TOM GRAY DATSUN *v.* JACKSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1133.

No. 78–684. AMERICAN SERVICE CORP. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 823.

No. 78–686. FLEMING *v.* CITIZENS FOR ALBEMARLE, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 236.

No. 78–691. FOSTER ET AL. *v.* MARYLAND FEDERAL SAVINGS & LOAN ASSN. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 226, 590 F. 2d 928.

No. 78–695. FOWLER *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 268 N. W. 2d 220.

No. 78–700. MCKINNEY ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1240.

No. 78–702. ZARCONE *v.* PERRY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 581 F. 2d 1039.

No. 78–704. GARCIA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 78–705. P. D. Q., INC., OF MIAMI *v.* NISSAN MOTOR CORPORATION IN U. S. A. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 910.

No. 78–706. SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. *v.* BURNS. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 403.

No. 78–710. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 186.

No. 78–713. UNITED STATES *v.* SEA-LAND SERVICE, INC. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730.

No. 78–716. NATIONAL AUTO BROKERS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 953.

No. 78–717. GARONZIK *v.* SHEARSON HAYDEN STONE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1220.

No. 78–725. SOVEREIGN CONSTRUCTION CO., LTD. *v.* CITY OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1276.

No. 78–726. BENNETT ET AL. *v.* KIGGINS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 391 A. 2d 236.

No. 78–727. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA) *v.* KENNY. C. A. 3d Cir. Certiorari denied. Reported below: 581 F. 2d 351.

No. 78–729. ARROW FOOD DISTRIBUTORS, INC. *v.* LOVE, CONSERVATOR. Sup. Ct. Miss. Certiorari denied. Reported below: 361 So. 2d 324.

No. 78–754. UNIT, INC., ET AL. *v.* HICKMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–758. WESTINGHOUSE ELECTRIC CORP. *v.* HUMAN RIGHTS APPEAL BOARD OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 60 App. Div. 2d 943, 401 N. Y. S. 2d 597.

No. 78–760. TASSOP, DBA ST. ANDREW ACADEMY ON THE SOUND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–767. GLASGOW ET UX. *v.* BARTLESON. Ct. App. Wash. Certiorari denied.

No. 78–768. GASPER ET AL. *v.* LOUISIANA STADIUM AND EXPOSITION DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 897.

No. 78–770. CURTIS *v.* FRANK S. PHILLIPS, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 78–773. UNITED STATES LINES, INC. *v.* SUN SHIPBUILDING & DRY DOCK CO. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1276.

No. 78–804. LAROCCO *v.* UNITED STATES; and

No. 78–805. SMALDONE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 583 F. 2d 1129.

No. 78–836. LEE PHARMACEUTICALS *v.* KREPS, SECRETARY OF COMMERCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 610.

No. 78–851. FAYER *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 2d 709, 406 N. Y. S. 2d 493.

No. 78–869. JEZARIAN ET AL. *v.* RAICHLE, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 206.

No. 78–870. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–5232. CARTER *v.* TELECTRON, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5271. MALLETT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 357 So. 2d 1105.

No. 78–5279. HEFLIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 71 Ill. 2d 525, 376 N. E. 2d 1367.

No. 78–5292. BROWN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5294. TRAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 108.

No. 78–5330. GILLESPIE *v.* JEFFES, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–5371. BRADY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 579 F. 2d 1121.

No. 78–5386. ORDUNO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 80 Cal. App. 3d 738, 80 Cal. Reptr. 806.

No. 78–5393. SEDGWICK *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 190 U. S. App. D. C. 63, 584 F. 2d 1044.

No. 78–5416. RIVERA *v.* HEFNER ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 254 Pa. Super. 627, 387 A. 2d 123.

No. 78–5431. GAVIN ET VIR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–5433. HOLLINGSWORTH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–5435. SAENZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 643.

No. 78–5457. GLOVER *v.* DOLAN, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 78–5464. DUFFY *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 581 F. 2d 1059.

No. 78–5491. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 582 F. 2d 514.

No. 78–5506. BABB ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 2d 1011.

No. 78–5510. KIRKLAND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–5515. COX ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 580 F. 2d 317.

No. 78–5520. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1287.

No. 78–5522. DATTALO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–5548. VANDER LINDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1133.

No. 78–5554. RELIFORD *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 195 Colo. 549, 579 P. 2d 1145.

No. 78–5555. AKERBLOM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5559. MCMAHON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 256 Pa. Super. 532, 389 A. 2d 173.

No. 78–5562. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1054.

No. 78–5564. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 581 F. 2d 1374.

No. 78–5570. CRESTA *v.* MEACHUM, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 78–5573. CARRIER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5583. ALVARADO-COLON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–5599. MEADOWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5605. PARKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–5613. VANEK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5626. MAHDI *v.* DUKAKIS, GOVERNOR OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 1269.

No. 78–5630. GREAR *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 568 S. W. 2d 285.

No. 78–5636. RANDALL *v.* FITZMORRIS. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5644. RICHARDSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–5646. WARNER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 78–5647. MCCLURE *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 938.

No. 78–5652. WRIGHT *v.* WILLIAMS. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 979.

No. 78–5653. MAGANN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5654. WILLIAMS *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–5656. MANNING *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 480 Pa. 484, 391 A. 2d 989.

No. 78–5657. SPYCHALA *v.* GUNN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1054.

No. 78–5663. HUNTER *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 78–5665. PROCK *v.* DERRYBERRY, ATTORNEY GENERAL OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 78–5668. RIGGS *v.* GIANNETTA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–5669. COOK *v.* CROFTS, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 78–5670. DAVIS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5672. JOHNSON *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–5677. CLEVELAND *v.* WARDEN, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–5681. GAINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 1381.

No. 78–5682. REVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 978.

No. 78–5683. OLVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–5687. KAPLAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 598.

No. 78–5690. FLOYD *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 832.

No. 78–5691. STOKES *v.* FAIR, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 581 F. 2d 287.

No. 78–5695. MUDD ET AL. *v.* BUSSE. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1283.

No. 78–5699. GREEN *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 78–5700. PATTERSON *v.* THOMPSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 78–5701. RHEUARK *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 265.

No. 78–5702. FEARON *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–5703. BATES *v.* BRIERTON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 834.

No. 78–5704. VAN CRANEBROCK *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 832.

No. 78–5707. HARDWICK *v.* BROOKS ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5710. JIMENEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–5711. LEWIS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 78–5713. GARCIA *v.* UNITED STATES; and
No. 78–5773. COWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 827.

No. 78–5714. NELSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 582 F. 2d 1246.

No. 78–5716. MCCRORY *v.* KIRK, JUDGE. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5719. TURNER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–5722. KALITA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 978.

No. 78–5729. AKERBLOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5731. MARCONI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 836.

No. 78–5735. HARTWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 266.

No. 78–5736. ROBERTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 583 F. 2d 1173.

No. 78–5738. HINES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5740. ROSS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 471, 376 N. E. 2d 1117.

No. 78–5741. BECKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 2d 703.

No. 78–5743. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5754. DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 570 F. 2d 352.

No. 78–5756. BECKWITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 737.

No. 78–5766. ACEVEDO DE CAMPOS, SUBSECRETARY OF DEPARTMENT OF NATURAL RESOURCES OF PUERTO RICO, ET AL. *v.* CORDECO DEVELOPMENT CORP. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 1270.

No. 78–5768. ARMSTRONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 800.

No. 78–5769. MALONE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 361 So. 2d 674.

No. 78–5781. LINDEN *v.* UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–5772. HENNEMEYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5782. PERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 388.

No. 78–5787. ROLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5794. GREENE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 78–5805. FREEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 1051.

No. 78–5807. LOSING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 2d 289.

No. 78–5813. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 576 F. 2d 253.

No. 78–5815. SALDANA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–364. CUPP, PENITENTIARY SUPERINTENDENT *v.* DOUGLAS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 578 F. 2d 266.

No. 78–453. ACF INDUSTRIES, INC., CARTER CARBURETOR DIVISION *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 43.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The decision of the Court of Appeals in this case appears to be inconsistent with recent decisions of this Court on principles vital to the proper functioning of the federal courts. I therefore dissent from the denial of certiorari.

I

In 1970, a civil rights organization and several individuals filed a charge against petitioner with respondent Equal Employment Opportunity Commission (EEOC). It was claimed that in discharging an employee and in failing to promote another, petitioner had discriminated on the basis of race. In 1972, an additional complaint was lodged on behalf of a female employee who asserted that petitioner's pregnancy-leave policies discriminated against her on the basis of sex. Upon the unsuccessful conclusion of conciliation efforts concerning these charges, the EEOC commenced this action against petitioner in the District Court. The complaint alleged broadly that petitioner had discriminated on the basis of race in its hiring, promotion, apprenticeship, and other practices, and on the basis of sex with respect to its maternity-leave and disability benefits.

Each party served interrogatories on the other. The dispute leading to this petition arose from the EEOC's refusal adequately to answer interrogatories seeking the names of the individuals, other than those named in the initial administrative charges, against whom the EEOC believed petitioner had discriminated. Rather than supply this information, the EEOC moved the District Court to stay the filing of its answers while it completed its discovery against petitioner. This motion was denied. The EEOC thereafter submitted the following answer to the interrogatories: "The Commission is unable at this time to identify other individuals until it has completed its discovery."

Petitioner moved for sanctions against the EEOC under Fed. Rule Civ. Proc. 37. At a hearing on this motion, the District Judge reserved decision and directed the parties to confer. He stated that if they could not agree on the matter, he would consider the motion for sanctions. Further negotiations failed to produce an agreement.

The District Court then granted, in part, petitioner's mo-

tion for sanctions. It concluded that the answers filed by the EEOC were merely an attempt to postpone an adequate response until after the EEOC's own discovery was completed. It further found that "the EEOC has not in fact answered the interrogatories and has wilfully ignored the Court's order . . . denying the requested stay." 76 F. R. D. 143, 144 (1977). The court thought it obvious that the EEOC had made "broad-based allegations, without any basis for a belief in those allegations, and then . . . invade[d] the defendant's records in an attempt to determine whether or not a cause of action exists." *Ibid.* Rather than dismissing the complaint outright, as requested by petitioner, the court ordered (1) that at the trial on the merits it should be taken as established that petitioner had not discriminated against anyone, with the possible exception of the individuals named in the administrative charges before the EEOC; (2) that the EEOC would not be permitted to introduce evidence of discrimination against anyone other than those named individuals; and (3) that the EEOC should pay attorney's fees of $500. Sanctions of this kind are expressly authorized by Rule 37 (d).

The EEOC filed a notice of appeal from the District Court's order. It argued to the Court of Appeals for the Eighth Circuit that the sanctions order was appealable either as a collateral order under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), or as a denial of an injunction under 28 U. S. C. § 1292 (a)(1). Petitioner responded that the Court of Appeals lacked jurisdiction because the sanctions order was not appealable before final judgment.

The Court of Appeals declined to decide the jurisdictional issue as presented by the parties. Instead, it stated, "we find this an appropriate case for the issuance of a writ of mandamus." 577 F. 2d 43, 45 (1978). The court offered little by way of justification for its issuance of the writ, a remedy not requested by the EEOC. It merely noted its belief that petitioner, as well as the EEOC, had "displayed dilatory tactics

during the discovery period," *id.*, at 48, and that the procedures leading to the sanctions had been irregular.[1] It also disagreed with the District Court's finding that the EEOC's conduct amounted to willful disobedience.

II

The opinion of the Court of Appeals appears to be seriously at odds with the decisions of this Court in two respects, both of which are important to federal judicial policy.

A

The court below seems to have committed the compound error of using the mandamus power to mask a questionable jurisdictional decision. Our cases have emphasized the practical importance of the final-judgment rule of 28 U. S. C. § 1291, which goes to the jurisdiction of the courts of appeals. As recently as last Term we unanimously agreed that " '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal disposition of what is, in practical consequence, but a single controversy.' " *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 471 (1978), quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 170 (1974). Whether the District Court's sanctions order comes within either of the exceptions to the final-judgment rule suggested by the EEOC appears to be highly questionable. Rather than dealing with the merits of

[1] The Court of Appeals thought the procedures had been irregular because, in its opinion, the EEOC had not been given a sufficient opportunity to present its side of the story before sanctions were imposed. The District Court's action, however, was premised on the conclusion that the EEOC had simply persisted in doing what it had been forbidden to do when the motion to stay was denied. Thus, even if the Court of Appeals were correct that the adversary proceedings that preceded the sanctions order may have been unduly truncated, a district court should not be required to prolong argument over a matter within its discretion and already decided.

this important and dispositive issue, the Court of Appeals simply sidestepped it by treating the appeal as a petition for a writ of mandamus. This action is difficult to square with the well-established rule that mandamus "is not to be used as a substitute for appeal." *Schlagenhauf* v. *Holder,* 379 U. S. 104, 110 (1964).

It also seems evident that this was not an appropriate case for mandamus. "'[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.'" *Kerr* v. *United States District Court,* 426 U. S. 394, 402 (1976), quoting *Will* v. *United States,* 389 U. S. 90, 95 (1967). The petitioning party must show, among other things, that his right to the issuance of the writ is "'clear and indisputable.'" *Kerr* v. *United States District Court, supra,* at 403, quoting *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379, 384 (1953). A litigant does not have a clear and indisputable right to a particular result in matters committed to the discretion of the District Court. *Will* v. *Calvert Fire Ins. Co.,* 437 U. S. 655, 665–666 (1978) (plurality opinion). As the decision to impose sanctions under Rule 37 is discretionary with the District Judge, see *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U. S. 639, 642 (1976), and the sanctions ordered in this case are among those expressly authorized by Rule 37, the Court of Appeals' resort to mandamus to review what appears to have been an otherwise unappealable order is highly suspect.

B

The decision below is difficult to reconcile with our recent decision in *National Hockey League* v. *Metropolitan Hockey Club, Inc., supra.* In that case an antitrust action was dismissed under Rule 37 because of the plaintiff's failure to comply with discovery orders. The Court of Appeals reversed, apparently finding this sanction too harsh. We summarily reversed the Court of Appeals. We stressed that "the most

severe in the spectrum of sanctions . . . must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 427 U. S., at 643. The sanctions order in this case is less severe than that approved in *National Hockey League,* and it was imposed for a virtually identical reason: a willful failure to answer interrogatories. Although the Court of Appeals rejected the District Court's finding that the EEOC had willfully disregarded the court's order, "[t]he question . . . is not whether this Court, or whether the Court of Appeals, would as an original matter have [imposed the sanctions]; it is whether the District Court abused its discretion in so doing." *Id.,* at 642. Neither the EEOC nor the Court of Appeals has convincingly demonstrated that an abuse of discretion occurred here.

III

The decision of the Court of Appeals in this case not only appears to be inconsistent with our recent decisions, but also could discourage efforts to curb the widespread abuse of discovery that is a prime cause of delay and expense in civil litigation. The extent of this abuse has been of increasing concern. It was the subject of close attention at the Pound Conference held in St. Paul, Minn., in April 1976, and it was scrutinized further by the Pound Conference Follow-Up Task Force.[2] The Task Force, chaired by then Judge Griffin B. Bell, recommended that the appropriate organizations of the bench and bar should "accord a high priority to the problem of abuses in the use of pretrial procedures . . . with a view to appropriate action by state and federal courts."[3] Fol-

[2] See Report of Pound Conference Follow-Up Task Force, 74 F. R. D. 159, 191–192 (1976).

[3] *Id.,* at 192. See also Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-first Century, 76

lowing the studies that ensued, the Section of Litigation of the American Bar Association submitted recommendations for substantial changes in the provisions of the Rules of Civil Procedure respecting pretrial discovery.[4] The Committee on Rules of Practice and Procedure of the Judicial Conference, after considering these and other recommendations, has circulated for comment a number of proposed amendments to the Rules.[5] In a letter to the Committee, Attorney General Bell stated:

> "It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity and high cost of civil litigation in the federal courts." [6]

I have referred briefly to the concern that exists with respect to abuse of discovery to emphasize that, at least until rule changes can be made, there is a pressing need for judicial supervision in this area. The district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose

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F. R. D. 277, 288–290 (1978); Bell, The Pound Conference Follow-Up: A Response from the United States Department of Justice, 76 F. R. D. 320, 328 (1978).

[4] See ABA Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation (1977). Comments on these proposals were offered by the Justice Department's Office for Improvements in the Administration of Justice, see United States Department of Justice, The Annual Report of the Attorney General of the United States 1977, pp. 13–15 (1978), and by the Board of Regents of the American College of Trial Lawyers.

[5] See Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1978).

[6] Letter to Hon. Roszel C. Thomsen, Chairman, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, June 27, 1978, from Hon. Griffin B. Bell.

sanctions for its abuse. Here, the District Court found that the EEOC had "in fact [failed to] answe[r] . . . interrogatories" and also had "willfully ignored the Court's order." 76 F. R. D., at 144. It is a serious matter for a court of appeals to undercut a district court's authority on questions of this kind, which are peculiarly within its discretion and competency.[7]

IV

Accordingly, because it appears that the decision below misapplied the relevant decisions of this Court with respect to interlocutory appeals and the use of mandamus, and also because its decision may deter district courts from imposing appropriate sanctions promptly where abuses of discovery occur, I would grant the petition.

No. 78–528. PIERCE *v.* GEORGIA;
No. 78–529. CALLAHAN *v.* GEORGIA;
No. 78–530. WICKMAN *v.* GEORGIA; and
No. 78–531. RITCHIE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 145 Ga. App. 680, 244 S. E. 2d 589.

No. 78–549. HENDERSON, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* MAJORS ET AL. Ct. App. N. Y. Motion of respondent Majors for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 44 N. Y. 2d 982, 380 N. E. 2d 164.

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[7] One need not disagree with the Court of Appeals that petitioner also was at fault in the apparently acrimonious discovery disputes in this case. The District Court supervising the trial concluded that the EEOC's abuse was flagrant enough to warrant sanctions. That petitioner's hands may not have been entirely clean would not seem to justify the drastic action of overturning this decision by mandamus.

No. 78–557. SWOROB ET AL. *v.* HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 3d Cir. Motion of respondent Nellie Reynolds for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 578 F. 2d. 1376.

No. 78–666. NATIONWIDE LIFE INSURANCE CO. *v.* COLLISTER. Sup. Ct. Pa. Motion of petitioner to defer consideration of petition for writ of certiorari and certiorari denied. Reported below: 479 Pa. 579, 388 A. 2d 1346.

No. 78–696. LEWIS ET AL. *v.* PHILIP MORRIS, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 577 F. 2d 1135.

No. 78–751. YOUNG *v.* ETHYL CORP. C. A. 8th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 581 F. 2d 715.

No. 78–701. MELTZER ET AL. *v.* BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 577 F. 2d 311.

No. 78–703. ACKERMAN-CHILLINGWORTH, DIVISION OF MARSH & MCLENNAN, INC., ET AL. *v.* PACIFIC ELECTRICAL CONTRACTORS ASSN. ET AL. C. A. 9th Cir. Motion of Independent Insurance Agents of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 579 F. 2d 484.

No. 78–720. BANK OF HENDERSONVILLE *v.* RED BARON FLYING CLUB, INC. Ct. App. Tenn. Motion of Aircraft Finance Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 571 S. W. 2d 152.

No. 78–734. KANSAS CITY AREA TRANSPORTATION AUTHORITY *v.* DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL–CIO. C. A. 8th Cir. Motion of American Public Transit Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 582 F. 2d 444.

No. 78–755. HOGAN, CORRECTIONS COMMISSIONER, ET AL. *v.* DUNKERLEY. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 579 F. 2d 141.

No. 78–761. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion to defer consideration of petition for writ of certiorari and certiorari denied.

No. 78–764. NORTHERN CALIFORNIA SUPERMARKETS, INC. *v.* CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 580 F. 2d 369.

No. 78–807. PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, ET AL. *v.* KUREK ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 583 F. 2d 378.

No. 78–5333. SHANNON *v.* ASSOCIATES FINANCIAL SERVICES COMPANY, WESTERN, ET AL. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 282 Ore. 449, 579 P. 2d 1288.

No. 78–5359. JONES *v.* MORRIS, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE POWELL would grant certiorari. Reported below: 577 F. 2d 747.

No. 78–5381. TENNON *v.* RICKETTS, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 574 F. 2d 1243.

No. 78–5482. WIGGINS *v.* MURPHY ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 576 F. 2d 572.

No. 78–5531. CARMONA ET AL. *v.* WARD, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 405.

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

In 1973, New York enacted a comprehensive drug law which prescribes mandatory maximum life sentences and varying minimum terms of imprisonment for all class A narcotics felonies. N. Y. Penal Law §§ 70.00 (2)(a), 70.00 (3)(a) (McKinney 1975).[1] The Court today declines to consider whether two mandatory life sentences imposed under this statute, one for possession of an ounce of a substance containing cocaine, and the other for sale of 0.00455 of an ounce of a substance containing cocaine, constitute cruel and unusual punishment.

I

In 1975, petitioner Martha Carmona pleaded guilty to possession of an ounce of a substance containing cocaine in viola-

[1] Section 70.00 (2)(a) provides in part: "For a class A felony the [maximum] term shall be life imprisonment." The minimum terms that a court may impose vary depending on whether the felony is specified as A–I, A–II, or A–III. Section 70.00 (3)(a) provides:

"(i) For a class A–I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years.

"(ii) For a class A–II felony, such minimum period shall not be less than six years nor more than eight years four months.

"(iii) For a class A–III felony such minimum period shall not be less than one year nor more than eight years four months."

tion of N. Y. Penal Law § 220.18 (McKinney Supp. 1978).[2] The Appellate Division affirmed her conviction, and the New York Court of Appeals denied leave to appeal. *People* v. *Carmona,* 40 N. Y. 2d 1081, 360 N. E. 2d 965 (1976). She is currently serving a sentence of six years to life, the minimum possible for a § 220.18 violation under the 1973 statute. N. Y. Penal Law §§ 70.00 (2)(a), (3)(a)(ii) (McKinney 1975).[3] Prior to a series of events giving rise to the instant charges, petitioner Carmona had no criminal record except for one non-drug-related arrest 19 years earlier.[4]

Petitioner Roberta Fowler was convicted in February 1974, of selling 0.00455 of an ounce of a substance containing cocaine to an undercover agent for $20, in violation of N. Y. Penal Law § 220.39 (McKinney Supp. 1978).[5] The state trial court sentenced her to four years to life under §§ 70.00 (2)(a)

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[2] Section 220.18 provides in part:

"A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possesses:

"1. one or more preparations, compounds, mixtures or substances of an aggregate weight of one ounce or more containing a narcotic drug . . . ."

Cocaine is classified as a narcotic drug. § 220.00 (7). N. Y. Pub. Health Law § 3306, Schedule II (a)(4) (McKinney Supp. 1978).

[3] Section 220.18 classifies criminal possession of a controlled substance in the second degree as an A–II felony. See n. 1, *supra.*

[4] Several months before her indictment in state court for the instant offense, Carmona was arrested on federal charges of conspiracy and possession of cocaine with intent to distribute and on state charges of selling heroin. In satisfaction of the federal charges, she pleaded guilty to one substantive count of possession and received a sentence of imprisonment for one year and special parole for three years, both to run concurrently with the state sentence. The other state charges were dismissed in return for Carmona's guilty plea to one count of possession of cocaine.

[5] Section 220.39 provides in part:

"A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:

"1. a narcotic drug . . . ."

and 70.00 (3)(a)(iii),[6] and the New York Court of Appeals sustained that penalty over her Eighth Amendment challenge, *sub nom. People* v. *Broadie,* 37 N. Y. 2d 100, 332 N. E. 2d 338, cert. denied, 423 U. S. 950 (1975). At the time of sentencing, Fowler, then age 20, had no prior record of possession or sale of narcotics, or of any violent criminal conduct, although she previously had been convicted of possession and use of drug paraphernalia, prostitution, and petit larceny.[7]

In 1975, Carmona petitioned the District Court for the Southern District of New York for a writ of habeas corpus under 28 U. S. C. § 2254, on the ground that the sentencing provision of the 1973 statute was unconstitutional as applied. A month later, Fowler intervened as a petitioner. After a hearing, the District Court held that petitioners' mandatory maximum life sentences were so "grossly out of proportion to the severity of [their] crime[s]" as to constitute cruel and unusual punishment. 436 F. Supp. 1153, 1164 (1977). Accordingly, the court ordered petitioners discharged at the end of their minimum terms unless the State imposed constitutionally appropriate maximum sentences within 90 days. *Id.,* at 1175.

A divided panel of the Court of Appeals for the Second Circuit reversed. Although agreeing in principle with the District Court that a sanction grossly disproportionate to the gravity of an offense would violate the Eighth Amendment, the majority concluded that petitioners' sentences were constitutional. 576 F. 2d 405 (1978).

II

Few legal principles are more firmly rooted in the Bill of Rights and its common-law antecedents than the requirement

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[6] Section 220.39 specifies criminal sale of a controlled substance in the third degree as a class A–III felony. See n. 1, *supra.*

[7] Fowler's criminal record is set out in full in the District Court's opinion, 436 F. Supp. 1153, 1159 n. 13 (SDNY 1977).

of proportionality between a crime and its punishment. The precept that sanctions should be commensurate with the seriousness of a crime found expression in both the Magna Carta and the English Bill of Rights.[8] And this Court has long recognized that the Eighth Amendment embodies a similar prohibition against disproportionate punishment.

In *Weems* v. *United States,* 217 U. S. 349 (1910), the Court struck down as cruel and unusual punishment a sentence under the Philippine Code for falsification of a Government document. Although the sentence was excessive not merely in its length but in its conditions—15 years of hard labor in chains, with lifetime surveillance after release—the duration of the imprisonment and subsequent supervision plainly contributed to the Court's conclusion that "[s]uch penalties for such offenses amaze those who . . . believe that . . . punishment for crime should be graduated and proportioned to offense." *Id.,* at 366–367. In so ruling, the Court quoted with approval the Massachusetts Supreme Court's observation that imprisonment "for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment." *Id.,* at 368, quoting *McDonald* v. *Commonwealth,* 173 Mass. 322, 328 (1899).

Applying the analysis set forth in *Weems,* this Court has invalidated punishments that were disproportionate to the nature of the offense charged, *Robinson* v. *California,* 370 U. S. 660 (1962) (imprisonment for the status of drug addiction), and to the penalties imposed in other jurisdictions, *Trop* v.

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[8] Chapter 20, renumbered Chapter 14, of the Magna Carta states: "A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood . . . ." J. Holt, Magna Carta 323 (1965). For a discussion of the evolution of the Cruel and Unusual Punishments Clause in the English Bill of Rights, see Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 855–860 (1969).

Dulles, 356 U. S. 86 (1958) (plurality opinion) (denationalization for wartime desertion). Thus, while recognizing that the power to prescribe punishments rests in the first instance with the legislature, we have not abdicated our constitutional function to draw a meaning from the Eighth Amendment consonant with "the evolving standards of decency that mark the progress of a maturing society." *Id.,* at 101.

Most recently, in *Coker* v. *Georgia,* 433 U. S. 584 (1977), the Court refined the test for assessing Eighth Amendment challenges, concluding that

> "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.,* at 592.

In holding the Georgia death penalty for rape invalid on the latter ground, the Court followed the approach of *Weems,* focusing on the character of the crime, the punishment for the same offense in other jurisdictions, and the penalty for similar crimes in the same jurisdiction.

The Court of Appeals here purported to apply the principles enunciated in *Coker* and *Weems.* Whether it did so in fact is, in my judgment, open to serious question.

III

Under *Coker,* the threshold inquiry concerns the character of the offense. In assessing the severity of petitioners' crimes, the Court of Appeals made the following observations:

> "The crime [drug abuse] spawns is well recognized. Addicts turn to prostitution, larceny, robbery, burglary and assault to support their habits. . . .
>
> "The entire system depends upon ultimate disposition by sellers such as [petitioners] here who . . . are, 'the crucial

> link' in the pernicious cycle spawning the addiction which creates other sellers. We conclude that the legislature could only properly judge the severity of the crime involved by considering the well understood and undisputed operating procedures of the dirty business involved and its disastrous consequences." 576 F. 2d., at 412 (footnote and citation omitted).

This analysis is problematic for several reasons. Petitioners were convicted of selling a single dose of cocaine and of possessing one ounce of a substance containing cocaine. They were not, as the dissent pointed out, "wholesalers, importers, dealers or distributors of that drug or of heroin." *Id.*, at 423 (Oakes, J., dissenting).[9] Yet New York's 1973 statute precluded the judges who sentenced Carmona and Fowler from taking into account any gradations of culpability when imposing the maximum punishment.

To rationalize petitioners' sentences by invoking all evils attendant on or attributable to widespread drug trafficking is simply not compatible with a fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts. Nor is it consistent with the proportionality principle implicit in the Eighth Amendment. As *Coker* suggests, a crime that is sometimes accompanied by

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[9] The Court of Appeals suggested that petitioners were "not aided by the fact that their convictions were based on cocaine and not heroin. Cocaine is a dangerous drug that causes damaging psychological and physiological effects in its users." 576 F. 2d, at 412 n. 11. In support of that proposition, the court cited no findings by the District Court. Rather, the Court of Appeals relied on a law review article which notes that cocaine use "does not produce tolerance or physical dependence," McLaughlin, Cocaine: The History and Regulation of a Dangerous Drug, 58 Cornell L. Rev. 537, 553 (1973), and on an opinion of the Alaska Supreme Court which acknowledges that, "[w]hile cocaine has been anecdotally related to aggressive or criminal conduct, adequate evidence to assess its possible impact in these areas is absent." *State* v. *Erickson*, 574 P. 2d 1, 9 (1978).

collateral offenses cannot constitutionally be punished as if it were always so linked. That the rape in *Coker* occurred while the defendant was committing armed robbery did not alter the plurality's analysis for, "[a]lthough [rape] may be accompanied by another crime, rape by definition does not include the death of, or even the serious injury to another person." 433 U. S., at 598.[10]

Moreover, none of the collateral crimes to which the Court of Appeals adverted carry as severe a punishment as those currently at issue. In New York, the maximum prison term for first-degree robbery and burglary is 25 years, for first-degree assault it is 4½ to 15 years, and for prostitution, 3 months.[11] To justify a stringent penalty for an act on the assumption that the act may engender other crimes makes little sense when those other crimes carry less severe sanctions than the act itself. See 576 F. 2d, at 423 (Oakes, J., dissenting). In sum, by focusing on the corrosive social impact of drug trafficking in general, rather than on petitioners' actual—and clearly marginal—involvement in that enterprise, the Court of Appeals substantially overstated the gravity of the instant charges.

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[10] Here there was no evidence causally linking petitioners' drug offenses to any violent collateral crimes. And it is questionable whether such linkage can be presumed. Even if the Court of Appeals could appropriately rely on a New Yorker Magazine article to establish that a substantial percentage of New York's prison inmates use drugs and that many of them turn to robbery or burglary to support their habits, see 576 F. 2d., at 412 n. 12, it cannot be presumed either that: (1) but for drugs, those defendants would not have committed crimes; or (2) cocaine sales have a significant causal relationship to robbery or burglary. See n. 9, *supra*. Indeed, one of the Court of Appeals' own sources noted that there is "no reliable scientific evidence linking cocaine usage to criminal conduct . . . ." *State* v. *Erickson, supra,* at 9.

[11] N. Y. Penal Law §§ 160.15, 70.00 (2)(b) (McKinney 1975); §§ 140.30, 70.00 (2)(b) (McKinney 1975); §§ 230.00 (McKinney Supp. 1978), 70.15 (2) (McKinney 1975).

IV

When comparing petitioners' sentences with those prescribed for other crimes by New York, and for the same crime in other States, it is first necessary to clarify the precise nature of the penalty imposed. Although the Court of Appeals professed to acknowledge that the "major question on appeal is whether the mandatory maximum sentence of life imprisonment imposed on [petitioners] is unconstitutional," 576 F. 2d, at 408, it declined to analyze the sentences in terms of their maximum potential. Rather, the court discounted petitioners' penalties by the "probability of parole," *id.*, at 413, and considered the constitutionality of those lesser undefined sentences. This approach is analytically unsatisfying and inconsistent with the position taken by other courts that have considered the constitutionality of maximum life sentences.

Under New York law, the determination to grant parole and absolute discharge from parole is committed to the discretion of the Parole Board. Unless the parolee receives an absolute discharge, he remains in the legal custody of the State for the maximum term of his sentence and may be reincarcerated for violating any of the conditions which normally attach to the grant of parole. N. Y. Exec. Law § 259–i (2)(b) (McKinney Supp. 1978). Since the standard governing absolute discharge from parole, whether such termination would serve the "best interests of society," § 259–j, affords nearly limitless discretion to the Parole Board, petitioners could not claim any realistic expectation of release from legal custody prior to the termination of their maximum sentences. On similar reasoning, the New York Court of Appeals and the California Supreme Court have both evaluated Eighth Amendment claims by reference to the maximum terms the defendants might serve, notwithstanding the possibility of parole. *People* v. *Broadie,* 37 N. Y. 2d, at 110, 332 N. E. 2d, at 341; *In*

re Lynch, 8 Cal. 3d 410, 415–418, 503 P. 2d 921, 924–926 (1972) (en banc).[12]

Had the Court of Appeals evaluated petitioners' sentences in terms of their maximum potential, it might well have reached a different result. In New York, the only other crimes with mandatory life sentences are first- and second-degree murder, first-degree arson (intentional damage to an inhabited building by explosion) and first-degree kidnaping (abduction if the victim dies or the purpose is extortion).[13] Among those crimes carrying a substantially lighter maximum penalty than the $20 sale and possession of an ounce of cocaine involved here are:

(1) first-degree rape (sexual intercourse by force or with a female physically helpless or less than 11 years old) (6–25 years);

(2) first-degree manslaughter (homicide with intent to cause serious physical injury) (6–25 years);

(3) second-degree kidnaping (abduction) (6–25 years);

(4) second-degree arson (intentional damage to an inhabited building) (6–25 years);

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[12] In *In re Lynch,* the California Supreme Court held that an indeterminate sentence must be evaluated as a maximum sentence of life imprisonment and that, as such, it was cruel and unusual punishment for a second offense of indecent exposure.

The Court of Appeals for the Fifth Circuit adopted a contrary approach in *Rummel* v. *Estelle,* 587 F. 2d 651 (1978) (en banc). At issue there was the constitutionality of a sentence imposed under the Texas Habitual Criminal Statute, which mandates life imprisonment upon a third felony conviction. Relying in part on the analysis of the Court of Appeals in this case, the en banc majority upheld the sentence, after taking into consideration the possibility of parole. *Id.,* at 659. The dissent, in which six judges joined, refused to discount the defendant's sentence by "a statistical possibility of clemency, an unenforceable hope that he may someday benefit from the grace of a parole board." *Id.,* at 668. (Clark, J., dissenting) (footnote omitted). That another Circuit has narrowly divided over a question of critical significance for this case is, in my judgment, further reason for granting review.

[13] N. Y. Penal Law §§ 125.27, 125.25, 150.20, 135.25 (McKinney 1975).

(5) first-degree robbery or burglary (armed) (6–25 years); and

(6) first-degree assault (injury with intent to cause disfigurement or serious physical injury) (4½–15 years).[14]

Just as the plurality in *Coker* found it "difficult to accept the notion . . . that the rapist . . . should be punished more heavily than the deliberate killer," 433 U. S., at 600, so, too, I find it difficult to accept the concept that the sale or possession of a small amount of cocaine should be penalized more severely than manslaughter or forcible rape.

Compared with the punishment for similar offenses in other jurisdictions, New York's drug law is unique in its severity. As both the District Court and the dissent in the Court of Appeals painstakingly demonstrated, no other State prescribes life sentences for the crimes involved here:

> "Indeed, only six states have statutes permitting a court to consider imposition of a life sentence on a first felony offender. The most common maximum permitted is between ten and twenty years and not one of the thirty-four states in this range *requires* imposition of the maximum term. Neither Fowler nor Carmona would have faced a mandatory sentence of life imprisonment under the law of any other state. As for Carmona, in thirty-one states the *maximum* penalty provided by law is less than the *minimum* sentence which she is serving." 576 F. 2d, at 424 (footnotes omitted).

Under federal drug laws, Carmona, if charged as a first offender with simple possession, could have received no more than one year of imprisonment and/or a $5,000 fine, 21 U. S. C. § 844 (a).[15] Fowler's sale of narcotics, as a first offense, would have

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[14] The crimes are defined in N. Y. Penal Law §§ 130.35, 125.20, 135.20, 150.15, 160.15, 140.30, 120.10 (McKinney 1975). The penalties are set forth in §§ 70.02 (3)(a), (b) (McKinney Supp. 1978).

[15] If convicted of possession as a second offender, Carmona would have been subject to no more than two years' imprisonment and a $10,000

been punishable by probation or incarceration for up to 15 years and/or a fine of up to $25,000, coupled with a mandatory special parole term of at least 3 years. 21 U. S. C. § 841 (b)(1)(A).

Although acknowledging that the penalties under the 1973 New York law are harsher than those in any other jurisdiction, the Court of Appeals justified the disparity on the ground that New York City "houses more than half of all the addicts in the entire United States." 576 F. 2d, at 415. There was no finding to that effect by the District Court. Rather, the majority relied on *People* v. *Broadie,* 37 N. Y. 2d, at 116, 332 N. E. 2d, at 345, which in turn drew upon an estimate in E. Brecher and the Editors of Consumer Reports, Licit and Illicit Drugs 72 (1972). Current evidence, however, indicates that New York City has no more "epidemic" a drug problem than a number of other major metropolitan areas. A study by the National Institute on Drug Abuse reveals that in 1973, the year the statute was passed, Los Angeles, Miami, Detroit, Phoenix, San Diego, and San Francisco all had more heroin addicts per capita than New York City. Person, Retka, & Woodward, A Method for Estimating Heroin Use Prevalence, NIDA Technical Paper 8 (1977).[16]

Moreover, even granting that New York has a greater concentration of drug abuse than other States, this does not of itself justify the punishments at issue here. Due to a variety

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fine. 21 U. S. C. § 844 (a). Had she been convicted of possession with intent to sell, the maximum penalty for a first offense would have been 15 years' imprisonment, a $25,000 fine, and a special parole term of at least 3 years; for a second offense, it would have been 30 years, $50,000, and at least 6 years' special parole. 21 U. S. C. § 841 (b)(1)(A). Only if she were found guilty of engaging in a "continuing criminal enterprise" in concert with at least five others could she have received a life sentence. 21 U. S. C. § 848.

[16] The report's latest annual figures, those for 1975, reflect that San Francisco, Los Angeles, Phoenix, Detroit, Chicago, San Diego, and San Antonio have a higher heroin addict per capita ranking than New York City. Person, Retka, & Woodward, at 8.

of geographic, demographic, and socio-economic factors, New York has more than its fair share of motor vehicle theft and larceny,[17] but this misfortune could not insulate Draconian penalties for such offenses from constitutional challenge. However serious its narcotics problem, New York cannot constitutionally treat those with peripheral involvement in drug trafficking as if they were responsible for the problem in its entirety.

Throughout its opinion, the Court of Appeals emphasized the need for broad deference to the legislature's judgment of how best to deal with a social phenomenon alarming in its current proportions. I do not disagree. It is axiomatic that this Court should approach Eighth Amendment challenges with caution, lest it become "under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." *Powell* v. *Texas*, 392 U. S. 514, 533 (1968) (plurality opinion). But neither should the Court abdicate the function conferred by the Eighth Amendment, to determine whether application of a given legislative judgment results in punishment grossly out of proportion to specific offenses. I decline to join the Court in its abdication here.

Accordingly, I would grant the petition for certiorari and set the case for argument.

No. 78–5533. JACKSON *v.* FLORIDA. Sup. Ct. Fla.; and No. 78–5763. WESTBROOK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 78–5533, 359 So. 2d 1190; No. 78–5763, 242 Ga. 151, 249 S. E. 2d 524.

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

[17] See U. S. Dept. of Justice, FBI Uniform Crime Reports, Crime in the United States 1977, Table 4 (1978).

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. 78–5619. REZIN *v.* WOLFF, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1053.

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

The Nevada Supreme Court affirmed petitioner's conviction after rejecting his claim that a plea bargain had been breached in violation of *Santobello* v. *New York,* 404 U. S. 257 (1971). *Rezin* v. *State,* 93 Nev. 55, 559 P. 2d 822 (1977). Petitioner then unsuccessfully sought federal habeas corpus, the District Court denying his petition on the grounds that he had failed to raise the *Santobello* claim until his appeal to the Nevada Supreme Court. Affirming, the Court of Appeals held that petitioner's failure to object in the state trial court was not within the "cause and prejudice" exception of *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). Affirmance order, 580 F. 2d 1053 (CA9 1978).

Wainwright v. *Sykes,* however, did not impose its own contemporaneous-objection rule independent of state rules governing the time for raising objections in state criminal proceedings. The only issue addressed in *Sykes* was: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?" 433 U. S., at 78–79, 81. In this case, the Nevada Supreme Court reached and decided the *Santobello* issue, and there would have been no adequate and independent state ground of decision barring review by this Court on a petition for certiorari from the judgment of the Nevada Supreme Court. *Jenkins* v. *Georgia,* 418 U. S. 153, 154–157 (1974). If Nevada has a rule requiring the *Santobello* issues to be presented to the trial court, the Nevada Supreme Court

did not enforce the rule in this case. *Wainwright* v. *Sykes* is therefore beside the point, and I would grant certiorari.

Rehearing Denied

No. 78–134. SEXTON *v.* UNITED STATES, *ante,* p. 911;

No. 78–315. NEAVEILL *v.* ANDOLSEK ET AL., *ante,* p. 965;

No. 78–347. ORECK CORP. *v.* WHIRLPOOL CORP. ET AL., *ante,* p. 946;

No. 78–381. HOLDING *v.* BVA CREDIT CORP., *ante,* p. 949;

No. 78–501. KOROS ET UX. *v.* CREDIT BUREAU, INC., OF GEORGIA ET AL., *ante,* p. 966;

No. 78–5342. JENKINS *v.* EVENING STAR NEWSPAPER CO., ET AL., *ante,* p. 921;

No. 78–5382. YATES *v.* UNITED STATES CIVIL SERVICE COMMISSION, *ante,* p. 987;

No. 78–5417. COLLINS *v.* UNITED STATES, *ante,* p. 988;

No. 78–5448. RESTREPO-GRANDA *v.* UNITED STATES, *ante,* p. 935;

No. 78–5458. WAYLAND *v.* TOWN OF TOPSFIELD, *ante,* p. 961;

No. 78–5602. KEY *v.* GEORGIA, *ante,* p. 990;

No. 78–5603. BLOCH ET UX. *v.* SUFFOLK COUNTY FEDERAL SAVINGS & LOAN ASSN., *ante,* p. 990; and

No. 78–5634. MAHLER *v.* UNITED STATES, *ante,* p. 991. Petitions for rehearing denied.

No. 75–1219. SEXTON *v.* SIMON, SECRETARY OF THE TREASURY, ET AL., 425 U. S. 973, and 429 U. S. 873. Motion for leave to file second petition for rehearing denied.

No. 78–397. GARFINKLE ET VIR *v.* SUPERIOR COURT OF CONTRA COSTA COUNTY (WELLS FARGO BANK ET AL., REAL PARTIES IN INTEREST), *ante,* p. 949. Motion of Richard B. Spohn, Director of Consumer Affairs of California, for leave to file a brief as *amicus curiae* denied. Petition for rehearing denied.

JANUARY 15, 1979

Affirmed on Appeal

No. 77–1688. SYMM, TAX ASSESSOR-COLLECTOR OF WALLER COUNTY, TEXAS *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. Tex. MR. JUSTICE BLACKMUN would note probable jurisdiction. MR. JUSTICE POWELL would dismiss appeal for want of a properly presented federal question. Reported below: 445 F. Supp. 1245.

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

Today the Court summarily affirms the judgment of a three-judge District Court enjoining appellant Symm, the Tax Assessor-Collector and ex officio voting registrar of Waller County, Tex., from using a certain questionnaire designed to aid Symm in determining whether persons registering to vote in Waller County are bona fide residents. Because I believe the three-judge District Court mistakenly exercised jurisdiction over Symm, I dissent.

Waller County, a small rural county west of Houston, has a population of approximately 15,000, a slight majority of which is Negro. Prairie View A & M University is a state-supported, predominately black university located in Waller County. Appellant Symm is responsible for registering voters in the county. Persons personally known to Symm or his deputies as county residents, as well as persons who are listed on the tax rolls as owning property in Waller County, are routinely registered upon filling out the state registration form. Those who fall within neither of these categories are required to complete a residency questionnaire, which asks whether the applicant is a college student and, if so, inquires into the student's home address, property ownership, employment status, future plans, and so forth.[1]

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[1] "The undersigned, at the request of the Registrar of Waller County, answers the following questions in support of the application of the under-

On October 14, 1976, the Attorney General of the United States filed this action against Symm, Waller County, the State of Texas, and its Secretary of State and Attorney General, alleging that use of the questionnaire denied Prairie View students the right to vote in violation of 42 U. S. C. §§ 1971 (a), 1971 (c), 1973, 1973j (d), 1973bb, and the Fourteenth, Fifteenth, and Twenty-sixth Amendments. Pursuant to 42 U. S. C. § 1973bb (a)(2),[2] the United States moved to convene a three-judge District Court. The request for a three-judge court was predicated on the United States' claim for injunctive relief to remedy alleged violations of the Twenty-sixth Amendment. The motion was granted, and a

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signed for a voter registration certificate or for appointment as a Deputy Registrary, as the case may be:

"Please print or type your name and address:.....
.....
Are you a college student?..... If so, where do you attend school?....
..... How long have you been a student at such school?
..... Where do you live while in college?.....
..... How long have you lived in Texas?..... In Waller County?..... Do you intend to reside in Waller County indefinitely?..... How long have you considered yourself to be a bona fide resident of Waller County?..... What do you plan to do when you finish your college education?..... Do you have a job or position in Waller County?..... Own any home or other property in Waller County?..... Have an automobile registered in Waller County?..... Have a telephone listing in Waller County?..... Belong to a Church, Club or some Waller County Organization other than college related?..... If so, please name them: .....
Where do you live when the college is not in session?.....
..... What address is listed as your home address with the college?..... Give any other information which might be helpful."

[2] "The district courts of the United States shall have jurisdiction of proceedings instituted under [§ 1973bb], which shall be heard and determined by a court of three judges in accordance with section 2284 of title 28, and any appeal shall lie to the Supreme Court." 42 U. S. C. § 1973bb (a)(2).

three-judge District Court was convened. The District Court found that Symm's registration practices violated the Twenty-sixth Amendment and permanently enjoined him from, among other things, using the questionnaire. Symm appeals from that judgment.

The effect of an injunction against allegedly discriminatory voting practices in one small county in Texas is of no earth-shaking importance, and the District Court may have been justified in concluding that the appellant registrar violated rights guaranteed to Prairie View students under the Twenty-sixth Amendment to the United States Constitution. If the case were here, therefore, on a petition for certiorari and fell within our discretionary jurisdiction, I would have no hesitation in voting to deny certiorari.

But this case is here on direct appeal from the decision of a three-judge District Court. And since we are obligated to decide the merits of cases which Congress allows a party to bring here by appeal, regardless of their importance, I think we are bound to examine on our own motion the jurisdiction of the federal court from which the appeal comes. See *Liberty Mutual Ins. Co.* v. *Wetzel,* 424 U. S. 737, 740 (1976).

Section 1937bb directs the Attorney General "to institute, in the name of the United States, such actions *against States or political subdivisions,* including actions for injunctive relief, as he may determine to be necessary to implement the twenty-sixth article of amendment to the Constitution of the United States." 42 U. S. C. § 1973bb (a)(1) (emphasis added). Suits brought under the statute "shall be heard and determined by a court of three judges . . . ." § 1973bb (a)(2). The section unambiguously limits the Attorney General's authority to bringing actions against States and political subdivisions. Although the United States brought this suit against the State of Texas and Waller County as well as named individual officials, the District Court's injunction runs only against Symm personally. Indeed, the District Court

specifically refused to grant relief "with respect to . . . the State of Texas, and Waller County."

In *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 278–279 (1977), this Court distinguished between jurisdiction asserted under 28 U. S. C. § 1331, "the catchall federal-question provision requiring in excess of $10,000 in controversy," 429 U. S., at 279, and jurisdiction under 28 U. S. C. § 1343, which requires not only that the technical requirements of jurisdiction be met but that suit against the parties named as defendants be authorized under the cognate provisions of 42 U. S. C. § 1983. The language of the jurisdictional provision here, being part of the very statute which creates the substantive cause of action, would seem to require a conclusion that § 1973bb is more akin to 28 U. S. C. § 1343 than it is to 28 U. S. C. § 1331. The jurisdiction of three-judge courts convened under § 1973bb is thus limited to Twenty-sixth Amendment claims brought by the Attorney General against the parties defendant named in the statute—States and political subdivisions. Since Symm falls within neither category, the District Court's jurisdiction to enjoin him from using the questionnaire cannot be based on § 1973bb (a)(2). Nor did the other statutes invoked by the United States furnish an independent basis for three-judge-court jurisdiction over the Government's action against Symm. See 28 U. S. C. §§ 1345, 2201; 42 U. S. C. §§ 1971 (d), 1973j (d).

The absence of a statutory basis of three-judge-court jurisdiction over Symm does not end the matter, however, for it is conceivable that the District Court based its injunction against Symm on some unarticulated, hybrid concept of pendent-party jurisdiction.[3] Resolution of this issue also

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[3] This possibility is suggested by the District Court's exercise, despite the objection of appellee United States, of "pendent jurisdiction" over appellant Symm's cross-claim against the Texas Secretary of State, in which Symm charged that the Secretary lacked authority under Texas law to prohibit use of the residency questionnaire.

requires reference to § 1973bb since under cases such as *Aldinger* v. *Howard,* 427 U. S. 1, 14 (1976), and *Owen Equipment & Erection Co.* v. *Kroger,* 437 U. S. 365 (1978), we must carefully inquire not only into the existence of a case or controversy under Art. III of the United States Constitution but also into the statutory grant of jurisdiction to the District Court.

In *Aldinger* this Court observed that "as against a plaintiff's claim of *additional* power over a 'pendent party,' the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress." 427 U. S., at 17 (emphasis in original). Petitioner, who was discharged from her job as a county employee, brought a § 1983 civil rights claim against county officials and a state-law claim against the county itself. Because Congress had excluded municipal corporations such as counties from the class of "person[s]" suable under § 1983,[4] and therefore from the corresponding grant of jurisdiction in § 1343 (3), we held that "where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction." 427 U. S., at 17–18, n. 12.

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[4] *Aldinger* was decided before *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), which overruled prior cases holding that municipal corporations are not "person[s]" within the meaning of 42 U. S. C. § 1983. *Monell* did not disturb, however, the jurisdictional analysis applied in *Aldinger,* which was recently reaffirmed in *Owen:*

"*Monell* in no way qualifies the holding of *Aldinger* that the jurisdictional questions presented in a case such as this one are statutory as well as constitutional . . . ." 437 U. S., at 373 n. 12.

In this case I think an exercise of pendent-party jurisdiction over Symm would be demonstrably wrong under *Aldinger, supra,* and *Owen, supra.* The civil action created by § 1973bb is plainly limited to suits brought against States and political subdivisions. Accordingly, the special grant of three-judge-court jurisdiction contained in the statute is similarly limited. The other jurisdictional statutes invoked by the United States provide no independent basis of three-judge-court jurisdiction over Symm. Since the District Court could, in my opinion, have quite readily attributed Symm's actions as voting registrar to Waller County, a party statutorily authorized to be named and in fact named as a defendant, I would reverse the judgment against Symm and remand the case to the District Court for further proceedings against the county. While the injunctive relief ordered against Symm is contrary to *Aldinger, supra,* and *Owen, supra,* injunctive relief against Waller County, if the District Court decides such relief is appropriate, would be fully authorized and equally efficacious in vindicating the right of Prairie View students. In the absence of such relief, I would think that any student could bring an action against Symm under 28 U. S. C. §1343. This analysis may all seem very "legalistic" and "technical," but since the case is here on direct appeal, we have no choice but to examine the question of federal jurisdiction. Upon such examination, I believe *Aldinger, supra,* and *Owen, supra,* require reversal of the judgment entered by the District Court.

No. 78–523. BAILEY ET AL. *v.* HARGROVE, JUDGE, ET AL. Affirmed on appeal from D. C. M. D. Ga. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissent.

No. 78–821. HOLLOWAY ET AL. *v.* WISE, JUDGE, ET AL. Affirmed on appeal from D. C. M. D. Ga.

Appeals Dismissed

No. 78–609. CARDWELL *v.* VILLAGE OF WAITE HILL. Appeal from Ct. App. Ohio, Lake County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5804. GENCO *v.* DISTRICT OF COLUMBIA NATIONAL BANK. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5631. AHMAD *v.* RODAK, CLERK, SUPREME COURT OF THE UNITED STATES. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 78–5689. AHMAD ET AL. *v.* AYTCH ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction.

Certiorari Granted—Reversed and Remanded. (See No. 77–1618, *ante,* p. 438.)

Certiorari Granted—Vacated and Remanded. (See Nos. 77–6062, 77–6066, 77–6068, 77–6701, and 77–7012, *ante,* p. 461.)

Miscellaneous Orders

No. D–141. IN RE DISBARMENT OF GASQUE. Disbarment entered. [For earlier order herein, see *ante,* p. 906.]

No. D–142. IN RE DISBARMENT OF FOSTER. Disbarment entered. [For earlier order herein, see *ante,* p. 906.]

No. 78–17. UNITED GAS PIPE LINE CO. *v.* MCCOMBS ET AL.; and

No. 78–249. FEDERAL ENERGY REGULATORY COMMISSION *v.* MCCOMBS ET AL. C. A. 10th Cir. [Certiorari granted, *ante,* p. 892.] Motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 77–983. WASHINGTON ET AL. *v.* WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN. ET AL.; and WASHINGTON ET AL. *v.* PUGET SOUND GILLNETTERS ASSN. ET AL. Sup. Ct. Wash.;

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL.; C. A. 9th Cir.; and

No. 78–139. PUGET SOUND GILLNETTERS ASSN. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. [Certiorari granted, 439 U. S. 909.] Motions of Pacific Legal Foundation, American Institute of Fishery Research Biologists, and Northwest Steelhead & Salmon Council of Trout Unlimited, for leave to file briefs as *amici curiae* granted.

No. 78–309. TOUCHE ROSS & CO. *v.* REDINGTON, TRUSTEE, ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 979.] Motions of petitioner and respondents for additional time for oral argument denied. Alternative motion for divided argument granted.

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 78–330. HUNERWADEL *v.* BAIRD ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 925.] Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motions of Americans United for Life, Inc., et al., Catholic League for Religious and Civil Rights et al., and United States Catholic Conference for leave to file briefs as *amici curiae* granted.

No. 78–479. EDMONDS *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. C. A. 4th Cir. [Certiorari granted, *ante*, p. 952.] Motion of National Association of Stevedores for leave to file a brief as *amicus curiae* granted. Joint motion of respondent and American Export Lines, Inc., et al. as *amici curiae* for additional time for oral argument denied.

No. 78–349. UNITED STATES *v.* HELSTOSKI; and

No. 78–546. HELSTOSKI *v.* MEANOR, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. [Certiorari granted, *ante,* p. 1045.] Motion to dispense with printing appendix granted.

No. 78–354. NORTH CAROLINA *v.* BUTLER. Sup. Ct. N. C. [Certiorari granted, *ante,* p. 1046.] Motion of respondent for appointment of counsel granted, and it is ordered that R. Gene Braswell, Esquire, of Goldsboro, N. C., be appointed to serve as counsel for respondent in this case.

No. 78–5072. DAVIS *v.* PASSMAN. C. A. 5th Cir. [Certiorari granted, *ante,* p. 925.] Motion of petitioner for divided argument denied. Motion of Peter Barton Hutt, Esquire, to permit Sana F. Shtasel to present oral argument *pro hac vice* granted.

No. 78–5420. PAYTON *v.* NEW YORK; and

No. 78–5421. RIDDICK *v.* NEW YORK. Ct. App. N. Y. [Probable jurisdiction noted, *ante,* p. 1044.] Motion of appellants for divided argument denied.

No. 78–5732. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE, ET AL.; and

No. 78–5752. CHRISTIANSEN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 77–1546. STAFFORD, U. S. ATTORNEY, ET AL. *v.* BRIGGS ET AL. C. A. D. C. Cir. Certiorari granted and case set for argument with No. 78–303, immediately *infra.* Reported below: 186 U. S. App. D. C. 170, 569 F. 2d 1.

No. 78–303. COLBY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. *v.* DRIVER ET AL. C. A. 1st Cir. Certiorari granted and case set for argument with No. 77–1546, immediately *supra.* Reported below: 577 F. 2d 147.

No. 78–752. BAKER *v.* MCCOLLAN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 575 F. 2d 509.

Certiorari Denied. (See also Nos. 78–609 and 78–5804, *supra.*)

No. 77–1615. CANTWELL ET AL. *v.* HUDNUT, MAYOR OF INDIANAPOLIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 566 F. 2d 30.

No. 77–6092. HUDSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 240 Ga. 70, 239 S. E. 2d 330.

No. 78–129. BRITISH EUROPEAN AIRWAYS *v.* BENJAMINS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 572 F. 2d 913.

No. 78–302. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1260.

No. 78–310. HELMS ET AL. *v.* DRIVER ET AL.; and

No. 78–311. DRIVER ET AL. *v.* HELMS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 147.

No. 78–498. BOULET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1165.

No. 78–504. MARRA *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 78–535. SHELL OIL CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 78–536. CINCINNATI GAS & ELECTRIC CO. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 578 F. 2d 660.

No. 78–563. AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 1367.

No. 78–586. OSTRER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 577 F. 2d 782.

No. 78–587. MCLENNAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 753.

No. 78–618. PINNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 145.

No. 78–653. BRENNAN ET VIR, DBA P. H. BRENNAN HAND DELIVERY *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 574 F. 2d 712.

No. 78–675. MAHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 582 F. 2d 842.

No. 78–694. BARONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 118.

No. 78–698. SHIMBERG ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 283.

No. 78–722. STARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 2d 235.

No. 78–732. SWISHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 979.

No. 78–766. AMERICAN CAST IRON CO. *v.* PETTWAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 1157.

No. 78–772. GARRETT FREIGHTLINES, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–782. PIPELINE CONSTRUCTION CO., INC. *v.* JAFFEE ET AL. Ct. App. Mass. Certiorari denied.

No. 78–796. SPERL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 78–810. SCHOLL, INC. *v.* S. S. KRESGE CO. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 2d 244.

No. 78–797. K. G. Moore, Inc. *v.* Anderson. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 376 N. E. 2d 1238.

No. 78–799. Board of Supervisors of Buckingham Township *v.* Barness et al. Commw. Ct. Pa. Certiorari denied. Reported below: 33 Pa. Commw. 364, 382 A. 2d 140.

No. 78–814. Thompson *v.* Covington Housing Development Corp. et al. C. A. 6th Cir. Certiorari denied.

No. 78–815. Northwest Power Products, Inc. *v.* Omark Industries, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 83.

No. 78–827. Ball *v.* County of Los Angeles. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 82 Cal. App. 3d 312, 147 Cal. Rptr. 252.

No. 78–834. McAx Sign Co., Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 62.

No. 78–848. R. G. Barry Corp. *v.* Mushroom Makers, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 44.

No. 78–879. Rabbitt *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 2d 1014.

No. 78–887. Colonial Bank & Trust Co. *v.* Department of Financial Institutions of Indiana. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 375 N. E. 2d 285.

No. 78–888. Grosvenor et al. *v.* Equitable Life Assurance Society of the United States. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1279.

No. 78–928. Lopp *v.* Lopp. Sup. Ct. Ind. Certiorari denied. Reported below: 268 Ind. 690, 378 N. E. 2d 414.

No. 78–891. BOMENGO, AKA RUSSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 173.

No. 78–934. DOMINGUEZ, ADMINISTRATRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 583 F. 2d 615

No. 78–938. ROSATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 833.

No. 78–940. GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–979. STOBAUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–5427. GOULDEN, AKA HART *v.* DAVIS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5429. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 581 F. 2d 704.

No. 78–5526. CAVANESS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 581 P. 2d 475.

No. 78–5541. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 188 U. S. App. D. C. 438, 580 F. 2d 701.

No. 78–5586. SAND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 81 Cal. App. 3d 448, 146 Cal. Rptr. 448.

No. 78–5591. WALLACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1387.

No. 78–5597. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 583 F. 2d 1194.

No. 78–5600. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1050.

No. 78–5612. KELLY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 362 So. 2d 1071.

No. 78–5632. CALHOUN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1243.

No. 78–5649. SINCLAIR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 388 A. 2d 1201.

No. 78–5659. PALMERE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 105.

No. 78–5666. BURMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 1354.

No. 78–5667. PETERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 836.

No. 78–5673. SPRATT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 78–5684. HUBBARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5720. WILKINS *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1050.

No. 78–5721. MORROW *v.* IGLEBURGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 767.

No. 78–5726. SOMMERVILLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 361 So. 2d 386.

No. 78–5728. BOLER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5730. WALKER *v.* WAINWRIGHT, DIRECTOR, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 642.

No. 78–5734. FLOYD *v.* JAGO, CORRECTIONAL SUPRINTENDENT. Sup. Ct. Ohio. Certiorari denied.

No. 78–5737. McDaniel *v.* Arizona. Ct. App. Ariz. Certiorari denied. Reported below: 119 Ariz. 373, 580 P. 2d 1227.

No. 78–5748. McDonald *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 569 S. W. 2d 134.

No. 78–5749. Crawley *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 568 S. W. 2d 927.

No. 78–5751. Gibson *v.* Jackson, Judge, et al. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 1045.

No. 78–5770. Wilkins *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 839.

No. 78–5780. Coleman et ux. *v.* Wallace, Governor of Alabama, et al. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5786. Cobb *v.* New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 872, 406 N. Y. S. 2d 943.

No. 78–5788. Porter *v.* Continental Bank et al. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 838.

No. 78–5790. Sayers *v.* Brierton, Prison Superintendent, et al. C. A. 5th Cir. Certiorari denied.

No. 78–5797. Foderaro *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 583 F. 2d 1129.

No. 78–5800. Martell *v.* CBS, Inc., WCBS AM Radio Station, New York, New York. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1292.

No. 78–5802. McGhee *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 78–5816. Sullivan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 979.

No. 78–5821. McGuirk *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 380 N. E. 2d 662.

No. 78–5822. Wilson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5827. Howard *v.* Califano, Secretary of Health, Education, and Welfare. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1368.

No. 78–5830. Jeter *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5839. Ellis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–5840. Jordan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 843.

No. 78–5852. Johnson *v.* Department of Public Health Air Management Services of Philadelphia. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1274.

No. 78–5853. Hutter *v.* Faber et al. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 832.

No. 78–5861. Walker *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 577 F. 2d 744.

No. 78–5865. Wallace *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1278.

No. 78–5879. Morello *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 77–7004. Kerpen *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Brennan would grant certiorari. Reported below: 578 F. 2d 1371.

No. 78–267. MICHIGAN *v.* JAMES ET AL. Ct. App. Mich. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 78–840. ROWE ET AL. *v.* DURSO. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 579 F. 2d 1365.

No. 78–748. CULLERTON ET AL. *v.* FULTON MARKET COLD STORAGE CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 582 F. 2d 1071.

No. 78–811. CITY OF EL PASO *v.* DARBYSHIRE STEEL CO. INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 575 F. 2d 521.

No. 78–824. BRAUER *v.* SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA & NEVADA. Ct. App. Cal., 2d App. Dist. Motion of Motion Picture Industry Pension Plan for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would grant certiorari. Reported below: 82 Cal. App. 3d 159, 146 Cal. Rptr. 844.

No. 78–5532. THOMPSON *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

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

In this proceeding pursuant to 28 U. S. C. § 2254, petitioner presents the same questions presented by him in No. 76–5283, cert. denied, 429 U. S. 1053 (1977). For the reasons expressed in my dissent from the denial of certiorari in that case, I would grant the petition for certiorari and reverse the judgment of

the Court of Appeals affirming the dismissal of the petition for a writ of habeas corpus.

No. 78–5696. JACOBS v. ALABAMA. Sup. Ct. Ala.; and

No. 78–5759. WOODARD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 78–5696, 361 So. 2d 640; No. 78–5759, 261 Ark. 895, 553 S. W. 2d 259.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied.

No. 76–1660. HUTTO ET AL. *v.* FINNEY ET AL., 437 U. S. 678;

No. 77–5781. RAKAS ET AL. *v.* ILLINOIS, *ante,* p. 128;

No. 78–173. KING *v.* NORRIS, *ante,* p. 995;

No. 78–513. TRACY, JUDGE *v.* DIXON ET AL., *ante,* p. 983;

No. 78–5317. MOSLEY *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante,* p. 986;

No. 78–5388. FORD *v.* MUIR, U. S. DISTRICT JUDGE, ET AL., *ante,* p. 978;

No. 78–5490. ALDERMAN *v.* GEORGIA, *ante,* p. 991; and

No. 78–5582. ROGERS *v.* DOUGLAS ET UX., *ante,* p. 1058. Petitions for rehearing denied.

JANUARY 19, 1979

Dismissal Under Rule 60

No. 78–224. CITY OF CLEVELAND *v.* ALBAUGH. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 577 F. 2d 740.

JANUARY 22, 1979

Appeals Dismissed

No. 78–339. WILCOX, SHERIFF *v.* STRUVE. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 99 Idaho 205, 579 P. 2d 1188.

No. 78–5814. WAYLAND *v.* ESSEX COUNTY BANK & TRUST CO. ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–866. VORNADO, INC., ET AL. *v.* DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 77 N. J. 347, 390 A. 2d 606.

Certiorari Granted—Vacated and Remanded

No. 78–5606. HARDY *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Duren* v. *Missouri, ante,* p. 357, and *Harlin* v. *Missouri, ante,* p. 459. Reported below: 568 S. W. 2d 86.

Miscellaneous Orders

No. A–642 (78–961). GAMBINO *v.* LOUISIANA. Sup. Ct. La. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant the application.

No. 27, Orig. OHIO *v.* KENTUCKY. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs, to report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier orders herein, see, *e. g.,* 410 U. S. 641.]

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. It is ordered that the Honorable William H. Becker, Senior Judge of the United States District Court for the Western District of Missouri, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have same effect as if originally made by the Court.

[For earlier order herein, see *ante*, p. 812.]

No. D–140. IN RE DISBARMENT OF RAY. Disbarment entered. [For earlier order herein, see *ante*, p. 906.]

No. D–156. IN RE DISBARMENT OF FALK. It is ordered that Eugene A. Falk, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 77–983. WASHINGTON ET AL. *v.* WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSN. ET AL.; and WASHINGTON ET AL. *v.* PUGET SOUND GILLNETTERS ASSN. ET AL. Sup. Ct. Wash.;

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir.; and

No. 78–139. PUGET SOUND GILLNETTERS ASSN. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST). [Certiorari granted, *ante,* p. 909.] Motion of Pacific Seafood Processors Assn. for leave to file a brief as *amicus curiae* granted.

No. 77–1511. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ELLIOTT ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 816.] Motion of respondents to dismiss or remand denied.

No. 78–6. MOORE ET AL. *v.* SIMS ET UX. D. C. S. D. Tex. [Probable jurisdiction noted, *ante,* p. 925.] Motion of John Quincy Carter for leave to present oral argument *pro hac vice* denied. Motion of appellees for divided argument denied.

No. 78–17. UNITED GAS PIPE LINE CO. *v.* MCCOMBS ET AL.; and

No. 78–249. FEDERAL ENERGY REGULATORY COMMISSION v. MCCOMBS ET AL. C. A. 10th Cir. [Certiorari granted, *ante,* p. 892.] Motion of petitioners for divided argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 78–160. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and

No. 78–161. IOWA ET AL. *v.* OMAHA INDIAN TRIBE ET AL. C. A. 8th Cir. [Certiorari granted, *ante,* p. 963.] Motions of parties for additional time for oral argument and for divided argument granted, and a total of one and one-half hours allotted for that purpose to be divided as follows: 45 minutes for petitioners, 25 minutes for the United States, and 20 minutes for the Omaha Indian Tribe. Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 78–225. BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL. D. C. Ariz. [Probable jurisdiction postponed, *ante*, p. 891.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 78–330. HUNERWADEL *v.* BAIRD ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 925.] Motion of appellants for divided argument granted.

No. 78–5384. SANDSTROM *v.* MONTANA. Sup. Ct. Mont. [Certiorari granted, *ante*, p. 1067.] Motion for appointment of counsel granted, and it is ordered that Byron W. Boggs, Esquire, of Anaconda, Mont., be appointed to serve as counsel for petitioner in this case.

No. 78–5420. PAYTON *v.* NEW YORK; and

No. 78–5421. RIDDICK *v.* NEW YORK. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 1044.] Motion of appellee for divided argument denied.

No. 78–5907. CAMACHO *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 78–5808. CLARK *v.* FIFTH JUDICIAL DISTRICT COURT OF EDDY COUNTY, NEW MEXICO. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 78–808. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BOLES ET AL. Appeal from D. C. W. D. Tex. Probable jurisdiction noted. Reported below: 464 F. Supp. 408.

Certiorari Granted

No. 78–605. UNITED STATES ET AL. *v.* RUTHERFORD ET AL. C. A. 10th Cir. Motion of American Cancer Society for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 582 F. 2d 1234.

Certiorari Denied. (See also Nos. 78–339 and 78–5814, *supra.*)

No. 78–503. FRISBY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va ——, 245 S. E. 2d 622.

No. 78–516. BORDEN, INC. *v.* BERGLAND, SECRETARY OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 746.

No. 78–641. STIVERS ET AL. *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 575 F. 2d 200.

No. 78–673. DAWSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 656.

No. 78–687. LOUISIANA LAND & EXPLORATION CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 204.

No. 78–693. BANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 583 F. 2d 832.

No. 78–708. GREENE ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 F. 2d 978.

No. 78–709. WETTERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 346.

No. 78–714. WELCH, ADMINISTRATOR *v.* CLAYTOR, SECRETARY OF THE NAVY. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 78–724. WALKER *v.* HOFFMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 583 F. 2d 1073.

No. 78–730. AMERICAN EXPORT LINES, INC., ET AL. *v.* METAL TRADERS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 1271.

No. 78–746. GROSSMANN *v.* REDINGTON, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–763. RUTHERFORD ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 582 F. 2d 1234.

No. 78–771. QUINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1053.

No. 78–778. NATTER MANUFACTURING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 948.

No. 78–785. ESPINOZA *v.* COPENHAVER, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied.

No. 78–786. MCDANNALD *v.* HILL, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–787. DEJAYNES ET AL. *v.* GENERAL FINANCE CORP. OF ILLINOIS. C. A. 7th Cir. Reported below: 583 F. 2d 918.

No. 78–790. SHIPPERS DISPATCH, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 2d 582.

No. 78–813. MATTHEWS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 295 N. C. 265, 245 S. E. 2d 727.

No. 78–822. WILCZYNSKI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 518, 409 N. Y. S. 2d 325.

No. 78–830. HITSON ET AL. *v.* BAGGETT, SECRETARY OF STATE OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 1051.

No. 78–839. LEGUENNEC, REGISTRAR OF VOTERS OF SAN FRANCISCO, ET AL. *v.* CHINESE FOR AFFIRMATIVE ACTION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1006.

No. 78–841. SHEPHERD ET UX. *v.* TREVINO, TAX ASSESSOR, COLLECTOR, AND REGISTRAR OF HIDALGO COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 1110.

No. 78–844. PLANTE ET AL. *v.* GONZALEZ, EXECUTIVE DIRECTOR OF FLORIDA COMMISSION ON ETHICS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 1119.

No. 78–850. MORRIS *v.* TEXAS. County Crim. Ct., Hunt County, Tex. Certiorari denied.

No. 78–853. CRAMER *v.* GENERAL TELEPHONE & ELECTRONICS CORP., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 259.

No. 78–859. GRASECK *v.* MIDDLEMISS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 203.

No. 78–862. ANDERSON *v.* NEUBERGER ET AL.; and MORRIS *v.* HAYDUK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 708, 381 N. E. 2d 168 (first case); 45 N. Y. 2d 793, 381 N. E. 2d 159 (second case).

No. 78–864. PERRELLO *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: 380 N. E. 2d 72.

No. 78–876. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 570 S. W. 2d 599.

No. 78–878. GILMARTIN ET AL. *v.* BOARD OF DENTAL EXAMINERS OF CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–898. F. C. Y. CONSTRUCTION & EQUIPMENT CO., INC., ET AL. *v.* HARRISON, INC., ET AL. Ct. App. Ariz. Certiorari denied.

No. 78–902. SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 135.

No. 78–922. MEDICAL THERAPY SCIENCES, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 583 F. 2d 36.

No. 78–963. LONDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 18.

No. 78–969. CHARLES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–976. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 178.

No. 78–996. PERL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 1316.

No. 78–5556. SMITH *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 283 Md. 187, 388 A. 2d 539.

No. 78–5569. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 2d 1036.

No. 78–5575. OKOROHA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1288.

No. 78–5581. BURCIAGO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 81 Cal. App. 3d 151, 146 Cal. Rptr. 236.

No. 78–5589. STEWART *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–5604. ACOSTA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5620. GOULDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–5650. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5685. POLLY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 78–5706. MORENO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1137.

No. 78–5739. HERRINGTON *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5779. WALKER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5806. MACK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5811. GROOMS ET AL. *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 212, 379 N. E. 2d 458.

No. 78–5817. CARLSEN *v.* CITY OF LOGAN, UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 585 P. 2d 449.

No. 78–5819. ALERS *v.* TOLEDO ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–5824. SILO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 480 Pa. 15, 389 A. 2d 62.

No. 78–5828. SHARP *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 78–5832. O'NEILL ET AL. *v.* WALT DISNEY PRODUCTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 751.

No. 78–5866. ASKEW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 584 F. 2d 960.

No. 78–5867. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5874. SCHERMERHORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5883. LEDESMA *v.* COLEMAN, U. S. CIRCUIT JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5891. HACKNEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 389 A. 2d 1336.

No. 78–5892. CLINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 78–5894. MANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1332.

No. 78–5895. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 518.

No. 78–5896. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 587 F. 2d 365.

No. 78–5898. HADDAD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 F. 2d 12.

No. 78–5900. HEYDON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 78–5905. McFARLAND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–5911. KLEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 837.

No. 78–5913. WENTLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 1022.

No. 78–5920. GREENE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 648.

No. 78–5927. GALE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 391 A. 2d 230.

No. 78–5934. PARSONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 2d 941.

No. 78–5935. AGURS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 78–213. AUGER, WARDEN *v.* COLLINS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 577 F. 2d 1107.

No. 78–719. REPRODUCTIVE SERVICES, INC. *v.* WALKER, JUDGE. Sup. Ct. Tex. Certiorari denied for want of jurisdiction.

MR. JUSTICE STEVENS.

On June 23, 1978, the Texas Supreme Court denied petitioner's application for a writ of mandamus and dissolved its earlier order requiring discovery concerning certain patients of petitioner's abortion clinic. On July 10, 1978, MR. JUSTICE BRENNAN stayed the order of the Texas Supreme Court. On July 17, 1978, MR. JUSTICE BRENNAN vacated that stay and filed an opinion, *post,* p. 1307, stating in part:

> "The question sought to be raised by applicant—whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or

clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients—is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it. However, this issue is not presented here. First, the order of the trial court challenged by applicant's petition for mandamus did in fact provide that the names of applicant's patients could be deleted. Second, the State of Texas has represented in its response in this Court that it is prepared to enter into a protective order which will ensure the privacy of all patients at applicant's clinics. In light of the representations of the State of Texas, there is no irreparable injury to any patient's privacy interests which would justify a stay of the order of the Supreme Court of Texas.

"Therefore, on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application." *Post,* at 1308–1309 (footnote omitted).

On August 21, 1978, MR. JUSTICE BRENNAN re-entered his stay because the parties had not satisfied the express condition identified in his opinion of July 17, 1978. *Post,* p. 1354.

On September 16, 1978, MR. JUSTICE POWELL granted an extension of time, until October 30, 1978, in which to file a petition for writ of certiorari. The petition for a writ of certiorari was timely filed on October 30, 1978.

Since the rationale for the Court's jurisdictional holding is unclear, and since adequate reasons for denying certiorari as a matter of discretion are disclosed by MR. JUSTICE BRENNAN'S opinion of July 17, 1978, I would simply deny the petition without further explanation.

No. 78–855. COHEN *v.* ILLINOIS INSTITUTE OF TECHNOLOGY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 581 F. 2d 658.

No. 78–5198. HOVILA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 562 S. W. 2d 243.

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. 78–5571. WILLIAMS *v.* RICKETTS, WARDEN. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 240 Ga. 148, 240 S. E. 2d 41.

Rehearing Denied

No. 77–1464. HUCH ET AL. *v.* UNITED STATES, *ante,* p. 1007;

No. 78–284. LICHTIG *v.* UNITED STATES, *ante,* p. 981;

No. 78–296. SALVUCCI *v.* REVERE RACING ASSN., INC., ET AL., *ante,* p. 1002;

No. 78–344. UNION PACIFIC RAILROAD CO. *v.* SHEEHAN, *ante,* p. 89;

No. 78–648. CITY OF SAN ANTONIO *v.* SAN PEDRO NORTH, LTD., ET AL., *ante,* p. 1004;

No. 78–5014. BLANKNER *v.* GOODWIN, COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *ante,* p. 867; and

No. 78–5180. JOHNSON *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL.; *ante,* p. 986. Petitions for rehearing denied.

No. 78–5539. CLIFTON *v.* CALIFORNIA, *ante,* p. 989; and No. 78–5611. HINDMAN *v.* KELLY ET AL., *ante,* p. 1050. Petitions for rehearing denied.

No. 77–1388. MASSACHUSETTS *v.* WHITE, *ante,* p. 280. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

FEBRUARY 1, 1979

Dismissal Under Rule 60

No. 77–1665. BONANNO *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1045.] Writ of certiorari dismissed under this Court's Rule 60. Reported below: 571 F. 2d 588.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1136 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

NEW YORK TIMES CO. ET AL. *v.* JASCALEVICH

ON APPLICATION FOR STAY

No. A–38. Decided July 11, 1978

MR. JUSTICE WHITE.

Since MR. JUSTICE BRENNAN has disqualified himself in this matter, I have before me an application for stay of an order of the Supreme Court of New Jersey of July 6, 1978, which refused to stay and denied leave to appeal from an order of a state trial court refusing to quash a subpoena issued in the course of an ongoing criminal trial for murder. The order of the trial court, issued June 30, ordered the New York Times Co. and Myron Farber, a reporter for the New York Times, to produce certain documents covered by a subpoena served upon them in New York pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, N. J. Stat. Ann. §§ 2A:81–18 to 2A:81–23 (West 1976). The subpoena was issued at the behest of the defendant in the New Jersey murder trial; and the documents, which were sought for the purpose of cross-examining prosecution witnesses, included statements, pictures, recordings, and notes of interviews with respect to witnesses for the defense or prosecution. The subpoena was challenged by applicants on the grounds that it was overbroad and sought irrelevant material and hence was illegal under state law; that it violated the state Reporter's Shield Law; and that it invaded rights of the reporter and the press protected by the First Amendment to the United States Constitution.

In denying the motion to quash and in ordering *in camera*

inspection, the trial judge, having already certified that the documents sought were "necessary and material for the defendant in this criminal proceeding," stated that when the materials had been produced for his inspection, he would afford applicants a full hearing on the issues, including the state-law issues of the scope of the subpoena and the materiality of the documents sought, as well as upon the claim under the state Shield Law.

I cannot with confidence predict that four Members of the Court would now vote to grant a petition for certiorari at this stage of the proceedings. Orders denying motions to quash subpoenas are not usually appealable in the federal court system, *United States* v. *Nixon*, 418 U. S. 683, 690–691 (1974); *United States* v. *Ryan*, 402 U. S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U. S. 323, 324–326 (1940); *Alexander* v. *United States*, 201 U. S. 117 (1906), and since leave to appeal was denied in this case it may be that such orders are not appealable in the New Jersey system. The applicants insist that, as a constitutional matter, the rule must be different where, as here, the subpoena runs against a reporter and the press, and that more basis for enforcing the subpoena must be shown than appears in this record. There is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, cf. *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances. But if the Court is to address the issue tendered by applicants, it appears to me that it would prefer to do so at a later stage in these proceedings. The asserted federal issue might not survive the trial court's *in camera* inspection should applicants prevail on any of their state-law issues. Nor, in light of the trial court's evident views that the documents sought appear sufficiently material to warrant *in camera* in-

spection, do I perceive any irreparable injury to applicants' rights that would warrant staying the enforcement of the subpoena at this juncture. Cf. *United States* v. *Nixon, supra,* at 714.

The application for stay is denied. Of course, applicants are free to seek relief from another Justice.

NEW YORK TIMES CO. ET AL. *v.* JASCALEVICH

ON REAPPLICATION FOR STAY

No. A–38. Decided July 12, 1978

Reapplication for stay of New Jersey Supreme Court's order, following denial of initial application, see *ante*, p. 1301, is denied. At this premature stage of the state-court proceedings, applicants have failed to meet the burden for issuance of such a stay—a showing that there is "a balance of hardships in their favor" and that four Justices of this Court likely would vote to grant certiorari.

MR. JUSTICE MARSHALL.

The New York Times and one of its journalists have applied to me for a stay of an order of the Supreme Court of New Jersey, issued July 6, 1978, pending the filing and disposition of applicants' petition for certiorari. MR. JUSTICE WHITE yesterday denied the application, and the pertinent facts are stated in his opinion. *Ante*, p. 1301. The principle issue that applicants intend to raise in their petition for certiorari is whether,

> "when a motion to quash a subpoena *duces tecum* issued to the news media is made, the court before which such motion is returnable shall be required to make threshold determinations with respect to the facial invalidity of the subpoena, as well as preliminary rulings on materiality and privilege, *prior to* compelling the production of all subpoenaed materials." Application 10 (emphasis in original).

The standards for issuance of a stay pending disposition of a petition for certiorari are well established. Applicants bear the burden of persuasion on two questions: whether there is "a balance of hardships in their favor"; and whether four Justices of this Court would likely vote to grant a writ of certiorari. *Beame* v. *Friends of the Earth*, 434 U. S. 1310,

1312–1314 (1977) (MARSHALL, J., in chambers). Their "burden is particularly heavy when, as here, a stay has been denied by the [lower courts]," *id.*, at 1312, in this case including two appellate courts as well as the trial court. Here, moreover, a stay has been denied by another Justice of this Court.

I do not believe that applicants have met their burden. There are, of course, important and unresolved questions regarding the obligation of a newsperson to divulge confidential files and other material sought by the prosecution or defense in connection with criminal proceedings. It may well be, moreover, that forced disclosure of these materials, even to a judge for *in camera* inspection, will have a deleterious effect on the ability of the news media effectively to gather information in the public interest, as is alleged by applicants.

It does not follow, however, that applicants are entitled to a stay at this stage in the proceedings. It has been the rule in the federal courts for many years that

> "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States* v. *Ryan,* 402 U. S. 530, 532 (1971), citing *Cobbledick* v. *United States,* 309 U. S. 323 (1940).

While this rule is based on a federal statute and is thus not directly applicable here, the policies underlying it are clearly relevant to resolution of this stay application. These policies include a desire to avoid "obstructing or impeding an ongoing judicial proceeding" and a corresponding interest in "hasten[ing] the ultimate termination of litigation." *United States* v. *Nixon,* 418 U. S. 683, 690 (1974); see *Cobbledick* v. *United States, supra,* at 324–326. Such considerations cannot be ignored in evaluating the "balance of hardships" in this case

and the likelihood that four Justices would vote to grant certiorari.

Applicants are seeking a stay and certiorari in the midst of an ongoing criminal trial. If a stay were granted, the trial might be interrupted to await this Court's decision on the certiorari petition, or, if the trial proceeded to conviction, reversal on appeal might result from the defendant's inability to obtain evidence that he apparently considers vital to his defense. It is true, of course, that either of these undesirable outcomes might occur if applicants refuse to comply with the subpoena and are adjudicated in contempt. At that point, however, the judicial system would have done all that it could do to obtain the materials sought by the defense.

In light of these considerations, applicants are plainly not entitled to a stay at this time. This conclusion is buttressed by the fact that, if applicants do refuse to comply with the subpoena, they presumably will have an opportunity in subsequent contempt proceedings to raise the same arguments that they seek to raise here. This case, moreover, involves an order to turn materials over to a judge for *in camera* inspection; whether the materials will eventually be released to the defense and the public is a matter yet to be litigated.

The application for a stay is denied.

REPRODUCTIVE SERVICES, INC. *v.* WALKER, DISTRICT JUDGE

ON APPLICATION FOR STAY

No. A–1091. Decided July 17, 1978

Application to stay Texas Supreme Court's order denying applicant medical clinic operator's motion for a writ of mandamus directed to respondent trial judge to overturn his order that applicant produce certain medical records in a medical malpractice suit against it is denied on the condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics. It does not appear at this time that there is any irreparable injury to any patient's privacy interests justifying a stay.

MR. JUSTICE BRENNAN.

I have before me an application [1] to stay an order of the Supreme Court of Texas, which denied applicant's motion for a writ of mandamus directed to respondent. The questions at issue here arise in a suit brought by Claudia E. Lott against applicant, which in essence charged applicant with medical malpractice in performing an abortion on Mrs. Lott. The complaint further charged applicant with violating the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Com. Code Ann. § 17.41 *et seq.* (Supp. 1977), in that applicant misrepresented the quality of care it was prepared to provide and failed to disclose material information regarding the risks involved in procedures used at applicant's abortion clinics. The State of Texas was allowed to intervene in this action pursuant to the Deceptive Practices Act. Mrs. Lott and the State of Texas are the true parties in interest here.

Mrs. Lott caused a subpoena *duces tecum* to be issued against applicant. This subpoena sought the medical records

[1] This application was originally presented to MR. JUSTICE POWELL as Circuit Justice and, in his absence, was referred to MR. JUSTICE REHNQUIST, who denied the application.

of five named patients at applicant's clinics and also sought the medical records of any other patient who had any major or serious complications arising from an abortion at applicant's clinics or who had received certain medications. Applicant sought to quash this subpoena on the ground of invasion of its patients' privacy. This motion was granted in part by the respondent trial judge, who ruled that the records must be turned over, but that patients' names could be deleted. Applicant sought mandamus in the Supreme Court of Texas to overturn this order. Subsequently counsel for applicant, Mrs. Lott, and the State of Texas entered into a consent order and temporary injunction in which applicant agreed that on determination of applicant's petition for mandamus the State could take discovery "on all names of all patients of [applicant's] Clinics throughout the State and all records on the nature of the conditions shown in those records."

The question sought to be raised by applicant—whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients—is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.[2] However, this issue is not presented here. First, the order of the trial court challenged by applicant's petition for mandamus did in fact provide that the names of applicant's patients could be deleted. Second, the State of Texas has represented in its response in this Court that it is prepared to enter into a protective order which will ensure the privacy of all patients at applicant's clinics. In light of the representations of the State of Texas, there is no irreparable injury to any patient's privacy interests which

[2] Applicant has styled its application as one for a stay pending petition for mandamus, but the appropriate avenue of relief would be by certiorari, and I so read the papers.

would justify a stay of the order of the Supreme Court of Texas.

Therefore, on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application.

FARE, ACTING CHIEF PROBATION OFFICER *v.* MICHAEL C.

ON APPLICATION FOR STAY

No. A–33. Decided July 28, 1978

Application to stay, pending the filing of a petition for certiorari, California Supreme Court's judgment ordering a rehearing in the trial court for respondent juvenile on the ground that a confession obtained after respondent had requested his probation officer's presence and relied on by the trial court in finding respondent guilty of murder was inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436, is granted. The order in question was predicated on federal, not state, grounds; the balance of equities favors applicant; and it is likely that four Justices of this Court will vote to grant certiorari.

See: 21 Cal. 3d 471, 579 P. 2d 7.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests a stay of enforcement of a judgment of the California Supreme Court ordering a rehearing for respondent under Cal. Welf. & Inst. Code Ann. § 602 (West Supp. 1978). The Superior Court of Los Angeles County had originally committed respondent to the California Youth Authority as a ward of the court after finding that he was guilty of murder. That committal was affirmed by the California Court of Appeal. On May 30, 1978, the California Supreme Court reversed, holding that a confession relied on by the Superior Court was inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436 (1966). *In re Michael C.,* 21 Cal. 3d 471, 579 P. 2d 7. It ruled that when a juvenile, during the course of a custodial interrogation, requests the presence of his probation officer, all interrogation must cease and any statement taken after that point is inadmissible at the adjudication hearing. I have decided to grant the stay so that the full Court can consider the applicant's petition for certiorari and the important *Miranda* questions that underlie it.

Three pertinent inquiries are usually made in evaluating a request for stay of enforcement of an order of a state court: whether that order is predicated on federal as opposed to state grounds; whether the "balance of equities" militates in favor of the relief requested by applicant; and whether it is likely that four Justices of this Court will vote to grant certiorari. Recognizing that the case for a stay is a relatively close one, I conclude that each of these questions must be answered in the affirmative.

The decision of the California Supreme Court is clearly premised on the Federal Constitution. It is posited as an extrapolation of *Miranda* and there are no references to state statutory or constitutional grounds. The California Supreme Court cases relied on were also efforts to determine the implications of *Miranda* and did not purport to construe the State Constitution. See *People* v. *Burton,* 6 Cal. 3d 375, 491 P. 2d 793 (1971); *People* v. *Randall,* 1 Cal. 3d 948, 464 P. 2d 114 (1970).

The "balance of equities" presents a more difficult question. Applicant argues that a stay is imperative, because a rehearing in Superior Court would preclude this Court's review of the California Supreme Court's decision. If on retrial the respondent is committed to the Youth Authority on the basis of evidence other than the confession, the instant controversy will be moot.* On the other hand, should the Superior Court find the remaining evidence insufficient to order a committal, this prosecution would terminate and any effort by the State to appeal such a determination would be bound to raise serious if not insuperable difficulties under both California law and the Double Jeopardy Clause. See *Miranda* v. *Arizona, supra,* at 497–499, and n. 71.

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*The California Court of Appeal suggested that if the confession were suppressed, there would be insufficient evidence in the record to sustain a finding of guilt. *In re Michael C.*, 21 Cal. 3d 471, 481 n. 2, 579 P. 2d 7, 13 n. 2 (1978) (Clark, J., dissenting).

The law enforcement efforts of the State of California will be substantially affected by the California Supreme Court's decision. The ruling builds upon the *Miranda* prescription that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present," 384 U. S., at 474; but it goes well beyond the express language of the *Miranda* decision. For example, the Supreme Court of California said in the course of its opinion here:

> "Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer—a personal advisor who would understand his problems and needs and on whose advice the minor could rely. By analogy to [*People* v. *Burton,* 6 Cal. 3d 375, 491 P. 2d 793 (1971)], we hold that the minor's request for his probation officer—essentially a 'call for help'—indicated that the minor intended to assert his Fifth Amendment privilege. By so holding, we recognize the role of the probation officer as a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court.
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> . . . . .
>
> "Here . . . we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney." 21 Cal. 3d, at 476–477, 579 P. 2d, at 10–11.

The court explicitly eschewed a "totality of circumstances" analysis; respondent's waiver of his *Miranda* rights, his experi-

ence in custodial settings, or any other factor that might bear on the voluntariness of his confession was simply irrelevant.

Although the California Supreme Court made some effort to limit its holding to probation officers, it is unclear what types of requests authorities must now regard as *per se* invocations of the Fifth and Fourteenth Amendment privilege against self-incrimination. Many relationships could be characterized as ones of trust and understanding; indeed, it seems to me that many of these would come to mind long before the probationer-probation officer relationship. In fact, under California law the probation officer is charged with the duty to file charges against a minor if he has any knowledge of an offense. Cal. Welf. & Inst. Code Ann. §§ 650, 652–655 (West Supp. 1978). Certainly that also encompasses a duty of reasonable investigation. It would be a breach of that duty for the probation officer to withhold information regarding an offense or advise a probationer that he should not cooperate with the police. These considerations troubled Justice Mosk, who noted in his separate concurrence in this case that "[w]here a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner." 21 Cal. 3d, at 479, 579 P. 2d, at 12. To treat a request for the presence of an enforcement officer as a *per se* invocation of the right to remain silent cannot but create serious confusion as to where the line is to be drawn in other custodial settings.

Respondent asserts that this injury is outweighed by the fact that a stay delays ultimate disposition of the charges against him, and that he has been in the custody of the Youth Authority for over two years. Obviously the weight of this argument depends on one's view of the merits. If certiorari is granted in this case and a majority of this Court finds respondent's confession admissible as a matter of federal constitutional law, then the original disposition order will not be disturbed and detention during deliberations in this Court will not exceed the time set in the original order.

Ultimately, therefore, my decision to stay enforcement of the California Supreme Court's order must rest on my assessment of the likelihood that four Justices will vote to grant certiorari and that the applicant will prevail on the merits. This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on *Miranda* and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders. But some pattern has developed in the handling of *Miranda* issues that, I think, portends a substantial likelihood of success for the instant petition.

Miranda v. *Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of "interpreting" *Miranda,* particularly if their decisions evinced no principled limitations. Sensitive to this tension, and to the substantial burden which the original *Miranda* rules have placed on local law enforcement efforts, this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. I think this reluctance is shown by our decisions reviewing state-court interpretations of *Miranda.* As we noted in *Oregon* v. *Hass,* 420 U. S. 714, 719 (1975), "a State may not impose . . . greater [*Miranda*] restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original.)

In *Michigan* v. *Tucker,* 417 U. S. 433 (1974), we overturned a federal habeas ruling that all evidence proving to be the fruit of statements made without full *Miranda* warnings must

be excluded at the subsequent state criminal trial. We overruled a State Supreme Court in *Oregon* v. *Hass, supra;* we held that a statement was admissible for purposes of impeachment even though it was given after the defendant indicated a desire to telephone an attorney. This Court has also recently rejected contentions that a confession was inadmissible after a reiterated *Miranda* warning if some hours earlier the defendant had indicated he did not want to discuss a different charge. *Michigan* v. *Mosley,* 423 U. S. 96 (1975). These are not to suggest that refusals to extend *Miranda* always please prosecutors, see *Brown* v. *Illinois,* 422 U. S. 590 (1975), or that this Court has shunned all logical developments of that opinion, see *Doyle* v. *Ohio,* 426 U. S. 610 (1976). But the overall thrust of these cases represents an effort to contain *Miranda* to the express terms and logic of the original opinion.

In our most recent pronouncement on the scope of *Miranda,* we found that the Oregon Supreme Court's expansive definition of "custodial interrogation" read *Miranda* too broadly. *Oregon* v. *Mathiason,* 429 U. S. 492 (1977). Our reason for so ruling is probably best encapsulated in an observation we made in a similar context: "[S]uch an extension of the *Miranda* requirements would cut this Court's holding in that case completely loose from its own explicitly stated rationale." *Beckwith* v. *United States,* 425 U. S. 341, 345 (1976). I think the decision of the California Supreme Court also risks cutting *Miranda* loose from its doctrinal moorings. The special status given legal counsel in *Miranda*'s prophylactic rules is related to the traditional role of an attorney as expositor of legal rights and their proper invocation. He is also the principal bulwark between the individual and the state prosecutorial and adjudicative system. A probation officer simply does not have the same relationship to the accused and to the system that confronts the accused, and I believe this fact would lead four Justices of this Court to grant the State's petition for certiorari in this case.

The request for stay of the judgment of the California Supreme Court pending consideration of a timely petition for certiorari by the applicant is accordingly granted, to remain in effect until disposition of the petition for certiorari. If the petition is granted, this stay is to remain in effect until this Court decides the case or until this Court otherwise orders.

NEW YORK TIMES CO. ET AL. *v.* JASCALEVICH

ON APPLICATION FOR STAY

No. A–111. Decided August 1, 1978

MR. JUSTICE WHITE.

This is an application for a stay of an order of the Supreme Court of New Jersey refusing to stay, except temporarily to permit this application, an order of the Superior Court of New Jersey holding applicants in civil contempt for refusing to obey a subpoena for documents that was issued at the behest of the defendant in the course of an ongoing murder trial and that the Superior Court refused to quash.[1] Applicant Farber, a reporter for the New York Times, a newspaper, was committed to jail until he complied with the subpoena by submitting the requested documents for *in camera* inspection by the trial judge; and the New York Times Co., the corporation owning and controlling the newspaper, was ordered to pay $5,000 for each day of noncompliance with the subpoena. Both applicants were also found guilty of criminal contempt. On appeal to the Superior Court of New Jersey, Appellate Division, that court stayed the convictions for criminal contempt but refused to stay the civil contempt judgment. It did expedite the appellate proceedings, which are still pending. The Supreme Court of New Jersey in turn refused to stay the Superior Court's judgment and to take immediate jurisdiction of the appeal.

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[1] Judge Arnold informed applicants that he would not rule on the merits of their motion to quash until he had the opportunity to examine the documents *in camera*. He then ordered the production of the documents for his inspection. Applicants unsuccessfully appealed through the New Jersey system seeking a stay of Judge Arnold's order. They then took their application to two individual Justices of this Court, both of whom denied relief. *Ante*, p. 1301 (WHITE, J., in chambers); *ante*, p. 1304 (MARSHALL, J., in chambers).

This application for stay, which then followed, was addressed to MR. JUSTICE BRENNAN, but upon his recusal was referred to me at 11 a. m. on July 28. Because the stay entered by the New Jersey Supreme Court would otherwise have expired an hour later, a temporary stay was entered to permit an examination of the somewhat voluminous papers filed in support of the application and to consider a response which was requested from respondent.

There is an initial question of the jurisdiction of an individual Justice or of the Court to enter a stay in circumstances such as these. Under 28 U. S. C. § 2101 (f), a stay is authorized only if the judgment sought to be stayed is final *and* is subject to review by the Supreme Court on writ of certiorari.[2] Whether a state-court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 U. S. C. § 1257, which provides that we have jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Also, it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

Although an order, such as is involved in this case, refusing to quash a subpoena and directing compliance would ordinarily

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[2] "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allowed therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

not satisfy the finality requirement, *United States* v. *Nixon,* 418 U. S. 683, 690–691 (1974), and cases cited, a criminal or civil contempt judgment imposed for refusing to obey the order presents a different consideration. At least where such judgments are entered against nonparty witnesses, such as the present applicants, the judgments are "final" for the purposes of appellate jurisdiction within the federal system.[3] They are also final for purposes of this Court's jurisdiction to review state-court judgments if they have been rendered by the highest court of the State in which decision could be had.

In this case, the New Jersey Superior Court entered civil and criminal contempt judgments against each of the applicants. Appeals from these judgments are pending in the Appellate Division. The criminal contempt judgments have been stayed; but both the Appellate Division and the New Jersey Supreme Court have refused to stay the judgments for civil contempt, and it is the civil judgment that is the object of the present stay application. Because the judgment for civil contempt remains under review in the New Jersey appellate courts, it would not appear to be a final judgment "rendered by the highest court of a State in which a decision could be had." This was the case in *Valenti* v. *Spector,* 79 S. Ct. 7, 3 L. Ed. 2d 37 (1958), where Mr. Justice Harlan, as Circuit Justice, was asked to stay an order committing applicants to jail for contumacious refusal to answer certain questions. He denied the applications "for lack of jurisdiction,

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[3] *Nelson* v. *United States,* 201 U. S. 92, 97–98 (1906); *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 337–338 (1904); *United States* v. *Reynolds,* 449 F. 2d 1347 (CA9 1971); *In re Vericker,* 446 F. 2d 244 (CA2 1971); *In re Manufacturers Trading Corp.,* 194 F. 2d 948, 955 (CA6 1952); see *Doyle* v. *London Guarantee Co.,* 204 U. S. 599, 605 (1907); cf. *Nye* v. *United States,* 313 U. S. 33 (1941); *Fox* v. *Capital Co.,* 299 U. S. 105, 107 (1936); *Alexander* v. *United States,* 201 U. S. 117, 121 (1906). See generally 9 J. Moore, Federal Practice ¶ 110.13 [4], p. 166 (1975).

and, in any event, in the exercise of my discretion," saying among other things:

> ". . . The federal questions sought to be presented going to the validity of these commitments are prematurely raised here, since none of them has yet been passed upon by the highest court of the State in which review could be had. See 28 U. S. C. § 1257. . . . The appeals of petitioners Valenti, Riccobono, Mancuso and Castellano are still pending undetermined in the state Appellate Division. The direct appeal of petitioner Miranda to the state Court of Appeals also stands undetermined." *Id.*, at 8, 3 L. Ed. 2d, at 39.

The rule would appear to be, as Mr. Justice Goldberg observed: "Of course, no stay should be granted pending an appeal which would not lie." *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 3, 15 L. Ed. 2d 39, 42 (1965) (in chambers).

Applicants insist, however, that the refusal to stay the civil contempt judgments brings the case within 28 U. S. C. §§ 1257 and 2101 (f) because (1) if the applicants comply with the order, they forfeit the very First Amendment right which they claim, that is, the right to refuse to turn over to a court what they consider to be the confidential files of the reporter, at least until the court demanding them has provided further justification for its order than it has to this date; and (2) if applicants do not comply, they will suffer continuing and irreparable penalties for exercising their claimed First Amendment rights.

Applicants are not without some support for their position. In *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327 (1975) (BLACKMUN, J., in chambers), a state trial court had entered an order prohibiting the publication of certain information about a pending criminal case. The order was not stayed pending appeal to the Nebraska Supreme Court. After initi-

ally refusing a stay, 423 U. S. 1319 (1975), MR. JUSTICE BLACKMUN concluded that the delay in the Nebraska courts "exceed[ed] tolerable limits" and entered a partial stay. He recognized that in a meaningful sense "the lower court's judgment is not one of the State's highest court, nor is its decision the final one in the matter," 423 U. S., at 1329; but he reasoned that a partial stay should be entered anyway:

> "Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state-court decision." *Id.*, at 1329–1330.

It should also be noted that the Court later found it unnecessary to decide whether the stay had been properly entered, *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1010 (1975), but

that in deciding the merits of the controversy, the Court referred to MR. JUSTICE BLACKMUN'S "careful decision" with respect to the stay issue, *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 544 n. 2 (1976).

Of course, MR. JUSTICE BLACKMUN partially stayed an order imposing a prior restraint upon the press, and this is not a prior-restraint case. Farber has been jailed and the company has been fined until they comply with the court's order, but it is doubtful, to say the least, that a state court's refusal to grant bail or to stay a criminal judgment pending appeal in the state courts automatically transforms the judgment into a case reviewable here on the merits and hence subject to a stay order under § 2101 (f) by the Court or by an individual Justice. I am nevertheless inclined to think that the question of our jurisdiction is not frivolous and is sufficiently substantial that the Court and an individual Justice necessarily have power to issue a stay pending a final determination of the jurisdictional issue—and should enter such a stay if there are otherwise adequate grounds for doing so.

Proceeding on this basis, then, I conclude that the application for stay should be denied. There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had. Cf. *Branzburg* v. *Hayes,* 408 U. S. 665 (1972); see *Zurcher* v. *Stanford Daily,* 436 U. S. 547, 566–567 (1978). But even if four or more Members of the Court would hold that a reporter's obligation to comply with the subpoena is subject to some special showing of materiality not applicable in the case of ordinary third-party witnesses, I would not think that they would accept review of this case at this time. The order at issue directs submission of the documents and other materials for only an

in camera inspection; it anticipates a full hearing on all issues of federal and state law; and it is based on the trial court's evident views that the documents sought are sufficiently material to warrant at least an *in camera* inspection.

In *United States* v. *Nixon,* 418 U. S. 683 (1974), we recognized a constitutionally based privilege protecting Presidential communications in the exercise of Art. II powers, but we held that there had been a sufficient initial showing of materiality to warrant requiring the President to submit the subpoenaed documents for *in camera* examination. Here, the Superior Court has twice issued a certificate under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, N. J. Stat. Ann. §§ 2A:81–18 to 2A:81–23 (West 1976), declaring that the documents sought "are necessary and material" for the defendant on trial for murder in the New Jersey courts. In the first certificate the court declared that the materials sought

> "contain statements, pictures, memoranda, recordings and notes of interviews of witnesses for the defense and prosecution in the above proceeding as well as information delivered to the Bergen County Prosecutor's Office, and contractual information relating to the above. Specifically, the documents include a statement given to Mr. Farber by Lee Henderson of Whitmere, South Carolina and other witnesses and notes, memoranda, recordings, pictures and other writings in the possession, custody or control of The New York Times and/or Myron Farber."

On the second occasion, the court certified:

> ". . . That I have reviewed the petition of Raymond A. Brown and find, inter alia, that substantial constitutional rights of Dr. Jascalevich to a fair trial, compulsory process and due process of law are in jeopardy without the appearance of Myron Farber and the documents so that an in camera examination can be made.

> ". . . That this certificate is made with the full awareness of the totality of the proceeding before the Court—pre-trial, in the presence of the jury and outside the presence of the jury—which are hereby referenced. These include the testimony of: Myron Farber, Dr. Baden, Mr. Herman Fuhr, Judge Galda, Judge Calissi, Mr. Herman Fuhr [*sic*], Mr. John Fischer, Detective Lange, Mr. Joseph Woodcock, and the proceedings regarding Myron Farber and the New York Times."

These determinations were made by a trial judge after sitting through some 22 weeks of a criminal trial and based, among other grounds, on a defendant's right to call witnesses for his defense, which includes the right to secure witnesses and materials for the purpose of impeaching the witnesses against him. Cf. *Davis* v. *Alaska,* 415 U. S. 308 (1974). Furthermore, these conclusions have not been disturbed by the New Jersey appellate courts, each of which has refused to stay the order for *in camera* inspection as well as the ensuing civil contempt judgments. In my view, the proceedings to date satisfy whatever preconditions to the enforcement of the subpoena that may be applicable in this case.

On this record, I would not vote to grant certiorari and am unconvinced that four other Justices would do so. It also appears to me, as it did on the earlier application for stay, that *in camera* inspection of these documents by the court will not result in any irreparable injury to applicants' claimed, but unadjudicated, rights that would warrant staying the enforcement of the subpoena at this time, with its consequent impact on a state criminal trial. It should also be noted that applicants' resistance to the subpoena and the order rest on state law as well as federal grounds; that the Superior Court deems inspection necessary to inspect the documents in connection with ruling on the state claims including the claim of protection under the state "Shield" statute; and that if applicants prevail on those grounds, it will be unnecessary to deal

with whatever federal constitutional grounds might also be urged.

For these reasons, I decline to grant the application for stay pending the filing of a petition for certiorari, and the temporary stay I have entered will expire at 12 noon tomorrow, August 2, 1978.

TRUONG DINH HUNG *v.* UNITED STATES

ON APPLICATION FOR BAIL

No. A–73. Decided August 4, 1978

Application of Vietnamese citizen for bail, pending his appeal to the Court of Appeals from his conviction for espionage and related offenses, is granted where there was insufficient basis for the District Court to revoke bail on the ground of a risk that applicant would flee from the country.

MR. JUSTICE BRENNAN.

This is an application [1] for bail pending appeal to the Court of Appeals for the Fourth Circuit from the conviction of applicant on May 19, 1978, following a jury trial in the United States District Court for the Eastern District of Virginia, of conspiracy to commit espionage (Count 1); conspiracy to violate laws prohibiting the unlawful conversion of Government property and the communication of classified information to a foreign agent (Count 2); espionage (Count 3); theft of Government property (Count 5); acting as a foreign agent without registration (Count 6); and unlawful transmission of defense information (Count 7).[2] Applicant was sentenced to 15 years' imprisonment on Counts 1 and 3, 2 years' imprisonment on Count 2, and 5 years' imprisonment on Counts 5, 6, and 7, all sentences to be served concurrently.

The District Court admitted applicant to bail prior to trial in the amount of $250,000, but immediately after applicant's conviction revoked the bail pursuant to 18 U. S. C. § 3148,[3] stating three reasons: (1) the substantial evidence

[1] This application was originally presented to MR. CHIEF JUSTICE BURGER as Circuit Justice. In his absence it was referred to me.

[2] See 18 U. S. C. §§ 371, 641, 793 (e), 794 (a) and (c), 951; 50 U. S. C. §§ 783 (b) and (c) (1970 ed.).

[3] The statute states in the pertinent part:

"A person . . . who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of [18

of guilt; (2) the seriousness of the crimes and the length of the potential sentences; [4] and (3) the risk of flight, given the severity of the potential sentences and the fact that applicant was not an American citizen. The Court of Appeals in an unreported opinion sustained the revocation, stating:

> "The defendant is a Vietnamese citizen. The charge upon which he was convicted involved the receipt and transmission of classified information to the Vietnamese Ambassador in Paris. The defendant has not established a permanent residence in this country, and, should he flee to Vietnam, the United States would have no means to procure his return for the imposition of sentence or for sentence service.
>
> "Under the circumstances, we find no abuse of discretion of the district judge in denying the defendant bail pending appeal."

See Application for Release Upon Reasonable Bail, Exhibit A, p. 2.

Applicant's appeal presents, *inter alia,* an important question heretofore specifically reserved by this Court in *United States* v. *United States District Court,* 407 U. S. 297 (1972), namely, "the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.,* at 308. There is a difference of view

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U. S. C. § 3146] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee . . . . If such a risk of flight . . . is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained."

[4] At the time applicant faced the possibility of two life sentences as well as additional terms of imprisonment totaling 35 years. After the Court of Appeals had affirmed the District Court's revocation of bail, applicant was sentenced to a maximum of only 15 years. He has not, however, brought this fact to the attention of either the District Court or the Court of Appeals by way of a motion for reconsideration of bail revocation.

among the Courts of Appeals on this question. Compare *Zweibon* v. *Mitchell,* 170 U. S. App. D. C. 1, 58, 516 F. 2d 594, 651 (1975) (en banc), with *United States* v. *Butenko,* 494 F. 2d 593, 605 (CA3 1974) (en banc). See also *Katz* v. *United States,* 389 U. S. 347, 359 (1967) (Douglas, J., concurring); *id.,* at 362 (WHITE, J., concurring). The question arises in this case because of applicant's challenge to the admission of evidence obtained from a wiretap placed in applicant's apartment over a period of approximately three months without prior judicial warrant. As phrased in the application: "The court of appeals . . . will be asked to rule upon the government's claim of power to conduct lengthy warrantless surveillance of domestic premises, in light not only of the fourth amendment but of the express authorization of 18 U. S. C. § 2516 (1)(a) for the use of warrants in espionage cases."

The uncertainty of the ultimate answer to this important constitutional question is not of itself, however, sufficient reason to continue applicant's bail. Section 3148 expressly authorizes the detention of a convicted person pending appeal when "risk of flight . . . is believed to exist." It was the risk "[u]nder the circumstances" upon which the Court of Appeals rested its conclusion that "we find no abuse of discretion of the district judge in denying the defendant bail pending appeal." This judgment is entitled to "great deference." *Harris* v. *United States,* 404 U. S. 1232 (1971) (Douglas, J., in chambers). Nevertheless, "where the reasons for the action below clearly appear, a Circuit Justice has a nondelegable responsibility to make an independent determination of the merits of the application." *Reynolds* v. *United States,* 80 S. Ct. 30, 32, 4 L. Ed. 2d 46, 48 (1959) (Douglas, J., in chambers). See *Mecom* v. *United States,* 434 U. S. 1340, 1341 (1977) (POWELL, J., in chambers). The question for my "independent determination" is thus whether the evidence justified the courts below in reasonably believing that there

is a risk of applicant's flight. In making that determination, I am mindful that "[t]he command of the Eighth Amendment that '[e]xcessive bail shall not be required . . .' *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." *Sellers* v. *United States,* 89 S. Ct. 36, 38, 21 L. Ed. 2d 64, 66 (1968) (Black, J., in chambers).

Given this constitutional dimension, I have concluded that the reasons relied upon by the courts below do not constitute sufficient "reason to believe that no one or more conditions of release will reasonably assure" that applicant will not flee. The evidence referred to by the Court of Appeals is that applicant maintained contact with the Vietnamese Ambassador in Paris; that he has not established a permanent residence in this country; and that, should applicant flee to Vietnam, the United States would have no means to procure his return.[5] But if these considerations suggest opportunities for flight, they hardly establish any inclination on the part of applicant to flee. And other evidence supports the inference that he is not so inclined. Applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail. He has resided continuously in this country since 1965, and has extensive ties in the community. He has produced numerous affidavits attesting to his character and to his reliability as a bail risk.[6] He has maintained a close relationship with his sister, a permanent resident of the United States since 1969. The equity in his sister's Los Angeles home constitutes a substantial measure of the security for applicant's bail. In addition, applicant's reply to the memorandum for

[5] The Solicitor General, in his memorandum in opposition, notes in addition that applicant's parents and other close relatives still reside in Vietnam, and that applicant's lack of a passport or other travel documents would present no great obstacle to his flight.

[6] Applicant has filed 11 such affidavits; affiants include Ramsey Clark, Noam Chomsky, Richard Falk, and George Wald.

the United States in opposition informs us that the "American Friends Service Committee and the National Council of Churches have come forward with large sums which are now in the registry of the court in Alexandria."

I conclude, therefore, that there was insufficient basis for revocation of applicant's bail following his conviction, and that his bail should be continued at $250,000 pending decision of his appeal by the Court of Appeals. The application is therefore remanded to the District Court for the determination of further appropriate conditions of release, and for further proceedings consistent with this opinion.

NEW YORK TIMES CO. ET AL. *v.* JASCALEVICH

ON REAPPLICATION FOR STAY

No. A–111. Decided August 4, 1978

Reapplication for stay of New Jersey Supreme Court's order declining to stay civil contempt penalties imposed by the New Jersey Superior Court, pending the filing of a petition for certiorari, is denied. The imposition of contempt penalties in order to coerce applicants, a newspaper and one of its reporters, to submit for *in camera* inspection materials sought by the defendant in an ongoing murder trial, without first making an independent, threshold determination of materiality, relevance, and necessity, likely inhibits the exercise of First Amendment rights and raises a substantial constitutional question. However, it does not appear that four Justices of this Court would vote to grant certiorari at this time.

MR. JUSTICE MARSHALL, Circuit Justice.

The New York Times and one of its reporters, Myron Farber, have reapplied to me for a stay of an order issued by the Supreme Court of New Jersey on July 25, 1978, after MR. JUSTICE WHITE denied their initial application on August 1, 1978. *Ante,* p. 1317.

At issue is the New Jersey Supreme Court's denial of a motion for a stay of civil contempt penalties imposed by the Superior Court of Bergen County in order to coerce the applicants to submit for *in camera* inspection materials sought by the defendant in a murder trial now in progress. The New Jersey Supreme Court also denied the applicants' motion for direct certification of their appeals from the contempt orders entered by the Superior Court.

The applicants have requested a stay pending the filing and determination of their petition for certiorari, which would raise the issue

> "whether the First and Fourteenth Amendments to the Constitution of the United States permit a State to incarcerate and fine a newsperson or newspaper to force them

> to disclose to a court, *in camera,* all materials, including confidential sources and unpublished information, called for by a subpoena *duces tecum, prior to* making determinations with respect to the facial invalidity of the subpoenas as well as claims of First Amendment and statutory shield law privileges, when such issues are raised in a motion to quash the subpoena *duces tecum.*"

Alternatively, they seek a stay pending review of those issues by the New Jersey appellate courts. This application was denied by MR. JUSTICE WHITE and then referred to me. Although a single Justice would ordinarily refer a reapplication for a stay to the full Conference of this Court, as we are now in recess and widely scattered, such a referral is not immediately practicable.

I

A preliminary question is whether a Justice of this Court has jurisdiction to grant a stay under the circumstances of this case. Under 28 U. S. C. § 2101 (f), the execution and enforcement of a judgment or decree may be stayed by a Member of this Court in "any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari." The application of that provision, in turn, depends upon 28 U. S. C. § 1257, which provides that this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

The proceedings relevant here began with an order of the Superior Court on June 30, 1978, denying the applicants' motion to quash the subpoena and directing them to produce the subpoenaed materials. The Superior Court declined to consider any constitutional or statutory claims of privilege until the applicants submitted the materials for *in camera* review. The applicants sought review of the Superior Court's order before the Appellate Division and the New Jersey Supreme Court, on the grounds they intend to raise in their

petition for certiorari. Both courts denied leave to appeal and declined to stay the order to produce. With the case in that posture, both MR. JUSTICE WHITE and I denied the applicants' request for a stay.

Since the initial application for a stay, a different judge of the Superior Court on July 24 found the applicants guilty of both criminal and civil contempt for refusing to comply with the June 30 order to produce the subpoenaed materials. Without considering the issues that I previously had expected would be addressed in a contempt proceeding, see *ante,* at 1305–1306, the Superior Court held that the applicants could not raise their constitutional or statutory challenges to the validity of the June 30 order to produce. As a coercive sanction for the civil contempt, the court sentenced Farber to jail and fined the New York Times $5,000 per day until the applicants complied with the order to produce. On the criminal contempt charges, Farber received a sentence of six months in jail and the New York Times was assessed a fine of $100,000.

The applicants appealed both the criminal and civil sanctions, and the Appellate Division agreed to accelerate those appeals to the extent possible. The Appellate Division decided to stay the criminal penalties against the applicants, but not the coercive civil penalties, which mandate immediate imprisonment of Farber. On July 25, the New Jersey Supreme Court also declined to stay the coercive penalties and refused to certify the applicants' appeals for direct consideration by that court. At present, the Appellate Division still has not set a date for hearing the applicants' appeals.

In most cases where an appeal is still pending in the state courts, Members of this Court would not have jurisdiction to issue a stay under 28 U. S. C. § 2101 (f). See *United States* v. *Nixon,* 418 U. S. 683, 690–691 (1974). However, this Court has shown a special solicitude for applicants who seek stays of actions threatening a significant impairment of First Amendment interests. The inability of an applicant to

obtain timely substantive review by state courts of a serious First Amendment issue, prior to incurring substantial coercive penalties, may justify a determination that the applicant has satisfied the jurisdictional requirements of 28 U. S. C. § 2101 (f). Even though this application does not involve a direct prior restraint, MR. JUSTICE BLACKMUN's analysis in *Nebraska Press Assn.* v. *Stuart,* 423 U. S. 1327 (1975) (in chambers), is applicable here:

> "When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state-court decision." *Id.,* at 1330.

As in *Nebraska Press,* the delay by the appellate courts has left standing a serious intrusion on constitutionally protected rights. MR. JUSTICE WHITE credited these same First Amendment considerations when he determined to reach the merits of the present applicants' request for a stay. *Ante,* p. 1317.

II

Although I agree with MR. JUSTICE WHITE's conclusion that he had the power to issue a stay at least until a final determination of the jurisdictional issue, I must differ with his conclusion on the merits of the constitutional questions raised by the applicants. As I observed in my previous opinion in this case:

> "There are, of course, important and unresolved questions regarding the obligation of a newsperson to divulge confidential files and other material sought by the prosecution or defense in connection with criminal proceedings. It may well be, moreover, that forced disclosure of these materials, even to a judge for *in camera* inspection, will have a deleterious effect on the ability of the news media

> effectively to gather information in the public interest, as is alleged by applicants." *Ante,* at 1305.

Many potential criminal informants, for example, might well refuse to provide information to a reporter if they knew that a judge could examine the reporter's notes upon the request of a defendant.

Given the likelihood that forced disclosure even for *in camera* review will inhibit the reporter's and newspaper's exercise of First Amendment rights, I believe that some threshold showing of materiality, relevance, and necessity should be required. Cf. *United States* v. *Nixon, supra.* See generally *Carey* v. *Hume,* 160 U. S. App. D. C. 365, 492 F. 2d 631, cert. dismissed, 417 U. S. 938 (1974); *Baker* v. *F & F Investment,* 470 F. 2d 778 (CA2 1972), cert. denied, 411 U. S. 966 (1973); *Democratic National Committee* v. *McCord,* 356 F. Supp. 1394 (DC 1973). Examination of the record submitted with this application discloses that the Superior Court did not make any independent determinations of materiality, relevance, or necessity prior to ordering the applicants to submit the subpoenaed materials for *in camera* review.

Initially defense counsel submitted *ex parte* to the Superior Court Judge an affidavit averring the need for "notes, memoranda, reports, statements, tape recordings and other written memorializations" of Farber's interviews of witnesses. The affidavit provided only one example of a statement given to Farber by a potential witness. With respect to the other material requested, the affidavit included only a general assertion of necessity, but afforded no factual basis for the judge to determine whether any of the documents other than the statement mentioned above were material, relevant, or necessary for the defense. It cannot be supposed that the Superior Court Judge knew from conducting the trial that the material requested met those criteria, because counsel failed to specify the materials that came within the terms of his extremely broad request. Conclusory assertions by de-

fense counsel are insufficient to justify a subpoena of the breadth of the one involved here.

Moreover, an *ex parte* determination of materiality, relevance, and necessity provides little assurance that First Amendment interests will not be infringed unnecessarily. Without affording counsel for the applicants an opportunity to respond and narrow the scope of the subpoena, the Superior Court issued a certificate under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, N. J. Stat. Ann. §§ 2A:81–18 to 2A:81–23 (West 1976), for all documents in the possession of the applicants that

> "contain statements, pictures, memoranda, recordings and notes of interviews of witnesses for the defense and prosecution in the above proceeding as well as information delivered to the Bergen County Prosecutor's Office, and contractual information relating to the above."

Similarly, the second certificate issued by the Superior Court reveals no further consideration of materiality, relevance, and necessity. Although the certificate did add a list of a few of the witnesses who appeared at the trial, that listing at best argued in favor of a subpoena confined to documents regarding those particular witnesses.

Just as the Superior Court Judge did not make any independent determinations of materiality, relevance, and necessity before issuing the certificates to obtain the subpoenas, neither did he make those determinations before requiring *in camera* inspection. Even after the criminal and civil contempt proceedings, the applicants have been unable to obtain a state-court decision, except perhaps by implication from the Superior Court's order of June 30, on the issue of whether a judge must make a threshold determination of materiality, relevance, and necessity before requiring them to submit the materials for *in camera* inspection.

III

Were I deciding this issue on the merits, I would grant a stay pending the timely filing of a petition for certiorari or at least pending the Appellate Division's consideration of the important constitutional and statutory issues raised by the applicants. But the well-established criteria for granting a stay are that the applicants must show "a balance of hardships in their favor" *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari. *Beame* v. *Friends of the Earth,* 434 U. S. 1310, 1312–1314 (1977) (MARSHALL, J., in chambers). The applicants here bear an especially heavy burden, for a single Justice will seldom grant an order that has been denied by another Justice. See *Levy* v. *Parker,* 396 U. S. 1204, 1205 (1969) (Douglas, J., in chambers).

After reviewing the applicable decisions of this Court, I cannot conclude in good faith that at least four Justices would vote to grant a writ of certiorari with the case in its present posture. See *United States* v. *Nixon,* 418 U. S. 683 (1974); *Branzburg* v. *Hayes,* 408 U. S. 665 (1972). Consequently, I am compelled to deny this application for a stay.

MIROYAN *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–99. Decided August 8, 1978*

Applications to stay, pending the filing and disposition of a petition for certiorari, Court of Appeals' mandate issued upon affirming applicants' drug convictions against the contention that evidence obtained through the use of a "beeper" attached to an airplane used by applicants to import marihuana into the country violated applicants' rights under the Search and Seizure Clause of the Fourth Amendment is denied, where it appears unlikely that four Justices of this Court would vote to grant certiorari.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants McGinnis and Miroyan seek a stay of the mandate of the United States Court of Appeals for the Ninth Circuit pending both the filing of a petition for a writ of certiorari and this Court's final disposition of their case. Their convictions for several drug-related offenses were secured largely on evidence obtained through the use of an electronic tracking device, or "beeper," attached to an airplane used by applicants to import several hundred pounds of Mexican marihuana into this country. Applicants maintain that the Government's installation and use of the beeper violated their rights under the Search and Seizure Clause of the Fourth Amendment and that the decision of the Ninth Circuit conflicts with decisions of other Courts of Appeals. Twice within the last year this Court has declined to review similar Fourth Amendment claims in strikingly similar cases. *Houlihan* v. *State,* 551 S. W. 2d 719 (Tex. Crim. App.), cert. denied, 434 U. S. 955 (1977); *United States* v. *Abel,* 548 F. 2d 591 (CA5), cert. denied, 431 U. S. 956 (1977). This fact leads me to conclude that unless applicants can demonstrate

*Together with No. A–87, *McGinnis* v. *United States,* also on application for stay of the same mandate.

a conflict among the Courts of Appeals of which this Court was unaware at the time of the previous denials of certiorari, or which has developed since then, applicants' petition for certiorari will not command the four votes necessary for the granting of the writ in their case. While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist. I think it quite doubtful that applicants' petition for certiorari will be granted and have accordingly decided to deny the application for a stay.

Miroyan arranged with Aero Trends, Inc., of San Jose, Cal., to rent a Cessna aircraft for one week. On the day before the beginning of the rental period, pursuant to a United States Magistrate's order and with the aircraft owner's express permission, Drug Enforcement Administration (DEA) agents installed a beeper in the aircraft. Miroyan and McGinnis then departed in the rented airplane and journeyed to Ciudad Obregon in the Republic of Mexico. Following in a United States Customs aircraft, federal agents monitored applicants' trip into Mexico by means of the beeper's signals and visual sightings. On May 11 Customs personnel in Phoenix, Ariz., picked up the beeper's signals and determined that the aircraft was returning to the United States. Federal agents again took to the air and tracked the aircraft's progress to Lompoc, Cal., where McGinnis deplaned and checked into a Lompoc motel. Miroyan flew on to nearby Santa Ynez airport and was arrested while transferring several hundred pounds of marihuana from the airplane to a pickup truck. McGinnis was arrested at his motel room in Lompoc. Both men were separately tried and convicted of conspiracy to possess a controlled substance with intent to distribute, importation of a controlled substance, and possession of a controlled substance with intent to distribute.

Applicants appealed their convictions to the Ninth Circuit, urging, *inter alia,* that the District Court had erred in refusing to suppress the marihuana and other evidence obtained as a result of the use of the beeper. In essence, applicants argued that the installation of the beeper and the monitoring of its signals constituted a search or searches within the meaning of the Fourth Amendment. Because the installation of the beeper had been authorized by a federal Magistrate, applicants focused their attack on the sufficiency of the affidavit upon which the Magistrate's order had been predicated. The Ninth Circuit examined the Fourth Amendment implications of both the installation of the beeper and the monitoring of its signals. Finding no distinction between visual surveillance and surveillance accomplished through the use of an electronic tracking device, the court held that the mere use of the beeper to monitor the location of the aircraft as it passed through public airspace did not infringe upon any reasonable expectation of privacy and therefore did not constitute a search subject to the warrant requirement of the Fourth Amendment. It went on to hold that the installation of the device, having been performed with the owner's express consent and prior to the beginning of the rental period, did not violate applicants' Fourth Amendment rights. The court, having found neither search nor seizure, did not reach the question concerning the sufficiency of the affidavit.

Both the decision in this case and the decisions with which applicants claim it is in conflict used *Katz* v. *United States,* 389 U. S. 347 (1967), as their point of departure. There this Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's [telephone conversation] violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.,* at 353.

In other cases in which enterprises similar to applicants'

have been frustrated with the aid of electronic tracking devices, defendants have frequently cited *Katz* for the proposition that installation and use of the devices are searches subject to the strictures of the Fourth Amendment. In support of their contention that the Ninth Circuit's position on this question is at odds with that of other Circuits, applicants point to *United States* v. *Moore,* 562 F. 2d 106 (CA1 1977) and *United States* v. *Holmes,* 521 F. 2d 859 (CA5 1975).

In *Moore* DEA agents, without the benefit of a warrant or the owner's consent, surreptitiously attached beepers onto two vehicles parked by defendants in a shopping center parking lot. As the Court of Appeals for the First Circuit framed the issue: "The basic question [was] whether the use of beepers so implanted to monitor the movements of the U-Haul van and the 1966 Mustang . . . violated defendants' reasonable expectations of privacy." *United States* v. *Moore, supra,* at 112. That court answered the question affirmatively, but reasoned that the lessened expectation of privacy associated with motor vehicles justifies the installation and use of beepers without a warrant so long as the officers installing and using the device have probable cause. Finding the electronic surveillance in that case supported by probable cause to believe that defendants planned to manufacture a controlled substance, the court held that use of the beepers did not violate defendants' Fourth Amendment rights.

In *Holmes* Government agents attached a beeper to defendant's van while defendant was in a nearby lounge negotiating with an undercover agent for the sale of 300 pounds of marihuana. The tracking device ultimately led to the seizure of over a ton of marihuana. In affirming the District Court's order suppressing all evidence obtained through the use of the beeper, a panel of the Fifth Circuit held that installation of the beeper constituted a search within the Fourth Amendment and that Government agents "had no right to attach the beacon without consent or judicial authorization." *United*

States v. *Holmes, supra,* at 865. An evenly divided en banc court affirmed the panel's decision. 537 F. 2d 227 (1976).

Both *Moore* and *Holmes* are plainly different from this case with respect to one important fact: the beeper leading to the arrest of McGinnis and Miroyan was installed on their rented airplane with the owner's express consent before possession of the aircraft passed to applicants. Equally plainly, the Fourth Amendment analysis employed by the Court of Appeals for the First Circuit differs from that employed by the Court of Appeals for the Ninth Circuit in this case. I do not think that the same can be said with respect to the Fifth and Ninth Circuits: *Holmes* was ultimately an affirmance of the District Court by an equally divided Court of Appeals on rehearing en banc; and, indeed, on two separate occasions since *Holmes,* the Fifth Circuit has rejected Fourth Amendment claims on facts virtually identical to those of the instant case on the ground that the owner-authorized installation of beepers on the airplanes there involved came within the third-party-consent exception to the warrant requirement. See *United States* v. *Cheshire,* 569 F. 2d 887 (1978); *United States* v. *Abel,* 548 F. 2d 591, cert. denied, 431 U. S. 956 (1977).

The question, then, it seems to me, boils down to how significant the difference between the approaches of the First and Ninth Circuits is. Assuming that it is sufficiently significant to ultimately lead this Court to grant certiorari to resolve the difference, is the Court likely to do so in this case? I think that in all probability this Court may eventually feel bound to decide whether Government agencies must have probable cause to install tracking devices on motor vehicles or in articles subsequently used in a criminal enterprise when the installation is expressly authorized by the owner of the vehicle or article. Such a decision could require a choice between the Ninth Circuit's view that the operator of an airplane has no legitimate expectation of

privacy which would prevent observation of the plane's movement through the public airspace, and the First Circuit's view that the operator of a vehicle does have an expectation "not to be carrying around an uninvited device that continuously signals his presence." *United States* v. *Moore, supra,* at 112. Or conceivably this Court could choose to adopt the third-party-consent ruling of the Fifth Circuit. See *United States* v. *Cheshire, supra.*

But because the question is an important and recurring one, the Court is apt to feel that the case taken under consideration should pose the issue as clearly as possible. Having within the past year denied certiorari in two cases strikingly similar to applicants', the Court is not likely to grant certiorari in this case unless such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists. I simply cannot tell from the applicants' motion papers or from the opinion of the Court of Appeals for the Ninth Circuit whether the District Court made any finding on the existence of probable cause, or whether the applicants' arguments to that court went to a lack of probable cause as well as to the insufficiency of the affidavit in support of the warrant. If upon review of the applicants' petition for certiorari and the Government's response thereto, it appears that there was in fact probable cause to justify installation of the beeper in this case, it seems to me very likely that this Court would hesitate to grant certiorari to decide the abstract proposition of whether probable cause is in fact required.

This latter factor also bears to some extent on applicants' claim of irreparable injury should a stay not be granted. That claim is the customary one that should a stay be denied, but certiorari be granted and the position of the First Circuit be adopted as the law by this Court, they will have served time in prison under a judgment of conviction which will eventually be reversed. But on the papers before me, I think that even under their most favorable hypothesis, the most

applicants could expect is a remand to the Ninth Circuit for consideration by that court or by the District Court of whether there was probable cause. And if that question was resolved adversely to the applicants, there is no reason to think that their judgments of conviction would not again be affirmed by the Ninth Circuit.

Accordingly, applicants' motions to stay the mandate of the United States Court of Appeals for the Ninth Circuit are denied.

BRENNAN ET AL. *v.* UNITED STATES POSTAL SERVICE

ON APPLICATION FOR STAY

No. A–152. Decided August 11, 1978

Application for stay, pending the filing and disposition of a petition for certiorari, of Court of Appeals' judgment affirming an injunction against further operation of applicants' hand delivery mail service in violation of the Private Express Statutes is denied, where it appears unlikely that four Justices of this Court would vote to grant certiorari.

MR. JUSTICE MARSHALL, Circuit Justice.

Patricia H. Brennan and J. Paul Brennan have applied to me for a stay of the judgment of the Court of Appeals for the Second Circuit pending the filing and disposition by this Court of their petition for a writ of certiorari. Applicants operate a hand delivery mail service in Rochester, N. Y. The United States Postal Service (USPS) brought suit in the Western District of New York to enjoin operation of this service on the ground that the Private Express Statutes, 39 U. S. C. §§ 601–606 and 18 U. S. C. §§ 1693–1699, proscribe private carriage and delivery of "letters and packets." Applicants concede that the Private Express Statutes do indeed prohibit their activities, but they challenge the prohibition principally on the basis that the Constitution does not confer upon Congress exclusive power to operate a postal system.[1] The District Court rejected the challenge and permanently enjoined further violations. The Court of Appeals affirmed, denied motions for rehearing and rehearing en banc, and refused to

[1] They contend also that the legislation violates the Tenth Amendment because it denies to the States and to the people a concurrent power reserved to them, that Congress improperly delegated to the USPS the power to define "letters and packets," and that the extension of the postal monopoly only to letter mail arbitrarily discriminates against their business. Applicants intend to pursue these challenges in their petition for certiorari, but do not elaborate on them here.

stay its judgment pending disposition of a petition for a writ of certiorari. Applicants invoke the jurisdiction of this Court under 28 U. S. C. § 2101 (f).

The argument applicants press here is that Congress exceeded its powers by granting the USPS a monopoly over the conveyance of letter mail. Article I, § 8, cl. 7, of the Constitution provides that "Congress shall have Power . . . To establish Post Offices and post Roads." Nothing in this language or in any other provision of the Constitution, applicants submit, implies that the postal power is invested *exclusively* in the Legislative Branch. Although Congress has authority under Art. I, § 8, cl. 18, to make such laws as are "necessary and proper" for carrying out its delegated functions, applicants argue that this provision does not permit it to convert a nonexclusive power into an exclusive one.

The well-established criteria for granting a stay are "that the applicants must show 'a balance of hardships in their favor' *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari." *New York Times Co.* v. *Jascalevich, ante,* at 1337. I cannot conceive that four Justices would agree to review the Court of Appeals' ruling on the argument advanced here. That argument rests on the tenuous premise that the Framers intended to create categories of exclusive and nonexclusive powers so inviolable that a subsequent Congress could not determine that a Government monopoly over letter mail was "necessary and proper" to prevent private carriers from securing all of the profitable postal routes and relegating to the USPS the unprofitable ones. Applicants have presented no convincing evidence of such an intent, and such a miserly construction of congressional power transgresses principles of constitutional adjudication settled since *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). As Mr. Chief Justice Marshall stated there, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means

by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *Id.*, at 421.

Moreover, long historical practice counsels against reviewing this novel constitutional claim. The Private Express Statutes have existed in one form or another since passed by the First Congress in 1792,[2] and their constitutionality has never been successfully challenged. While such longevity does not ensure that a statute is constitutional, it is certainly probative here of whether four Justices would vote to hear the merits of applicants' case. Cf. *Myers* v. *United States,* 272 U. S. 52, 175 (1926). This Court's recent refusal to review the Tenth Circuit's decision upholding the Private Express Statutes, *United States* v. *Black,* 569 F. 2d 1111, cert. denied, 435 U. S. 944 (1978), and the absence of any conflict among the Circuits on this point also indicate that applicants have not satisfied the criteria for the granting of a stay.

Accordingly, the application is denied.

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[2] Indeed, the 1792 Act continued in effect a statute of the Continental Congress that had created a postal monopoly. Act of Feb. 20, 1792, 1 Stat. 232, 236, adopting Act of Oct. 18, 1782, 23 J. Cont. Cong. 672–673.

COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL.

ON APPLICATION FOR STAY

No. A–134. Decided August 11, 1978

Application for stay, pending consideration of a petition for certiorari, of Court of Appeals' judgment and mandate affirming an extensive desegregation order for the Columbus, Ohio, public school system is granted, where it appears that such order will place severe burdens, financial and otherwise, on the school system and the community in general and that it is likely that four Justices of the Court will vote to grant certiorari.

See: 583 F. 2d 787.

MR. JUSTICE REHNQUIST.

The Columbus, Ohio, Board of Education and the Superintendent of the Columbus public schools request that I stay execution of the judgment and the mandate of the Court of Appeals for the Sixth Circuit and execution of the judgment of the United States District Court for the Southern District of Ohio in this case pending consideration by this Court of their petition for certiorari. The Court of Appeals' judgment at issue affirmed findings of systemwide violations of the Equal Protection Clause of the Fourteenth Amendment on the part of the Columbus Board of Education, and upheld an extensive school desegregation plan for the Columbus school system. The remedy will require reassignment of 42,000 students; alteration of the grade organization of almost every elementary school in the Columbus system; the closing of 33 schools; reassignment of teachers, staff, and administrators; and the transportation of over 37,000 students. The 1978–1979 school year begins on September 7, and the applicants maintain that failure to stay immediately the judgment and mandate of the Court of Appeals will cause immeasurable and irreversible harm to the school system and the commu-

nity. The respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus public schools, together with their parents and guardians.

This stay application comes to me after extensive and complicated litigation. On March 8, 1977, the District Court for the Southern District of Ohio issued an opinion declaring the Columbus school system unconstitutionally segregated and ordering the defendants to develop and submit proposals for a systemwide remedy. 429 F. Supp. 229. That decision predated this Court's opinions in three important school desegregation cases: *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Brennan* v. *Armstrong,* 433 U. S. 672 (1977); and *School District of Omaha* v. *United States,* 433 U. S. 667 (1977). In the lead case, *Dayton,* this Court held that when fashioning a remedy for constitutional violations by a school board, the court "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." 433 U. S., at 420. The defendants moved that the District Court reconsider its violation findings and adjust its remedial order in light of our *Dayton* opinion. Upon such reconsideration, the District Court concluded that *Dayton* simply restated the established precept that the remedy must not exceed the scope of the violation. Since it had found a systemwide violation, the District Court deemed a systemwide remedy appropriate without the specific findings mandated by *Dayton* on the impact discrete segregative acts had on the racial composition of individual schools within the system. The Sixth Circuit affirmed. 583 F. 2d 787 (1978).

Prior to its submission to me, this application for stay was denied by MR. JUSTICE STEWART. While I am naturally reluctant to take action in this matter different from that

taken by him, this case has come to me in a special context. Four days before the application for stay was filed in this Court, the Sixth Circuit issued its opinion in the *Dayton* remand. *Brinkman* v. *Gilligan,* 583 F. 2d 243 (1978) (*Dayton IV*). Pursuant to this Court's opinion in *Dayton,* the District Court for the Southern District of Ohio had held a new evidentiary hearing on the scope of any constitutional violations by the Dayton school board and the appropriate remedy with regard to those violations. It had concluded that *Dayton* required a finding of segregative intent with respect to each violation and a remedy drawn to correct the incremental segregative impact of each violation. On that basis the District Court had found no constitutional violations and had dismissed the complaint. The Sixth Circuit reversed, characterizing as a "misunderstanding" the District Court's reading of our *Dayton* opinion. *Dayton IV, supra,* at 246. It reinstated the systemwide remedy that it had originally affirmed in *Brinkman* v. *Gilligan,* 539 F. 2d 1084 (1976) (*Dayton III*), vacated and remanded *sub nom. Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977).

Dayton IV and the instant case clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion. During the Term of the Court, I would refer the application for a stay in a case as significant as this one to the full Court. But that is impossible here. The opinions of the District Court and the Court of Appeals total almost 200 pages of some complexity. It would be impracticable for me to even informally circularize my colleagues, with an opportunity for meaningful analysis, within the time necessary to act if the applicants are to be afforded any relief and the Columbus community's expectations adjusted for the coming school year.

I am of the opinion that the Sixth Circuit in this case evinced an unduly grudging application of *Dayton.* Simply the fact that three Justices of this Court might agree with me

would not necessarily mean that the petition for certiorari would be granted. But this case cannot be considered without reference to the Sixth Circuit's opinion in *Dayton IV*. In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. 583 F. 2d, at 805. The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of *Dayton* and it appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 schoolchildren, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first.

On the basis of the District Court's findings, some relief may be justified in this case under the principles laid down in *Dayton*. Two instances where the school system set up discontiguous attendance areas that resulted in white children being transported past predominantly black schools may be clear violations warranting relief. But the failure of the District Court and the Court of Appeals to make any findings on the incremental segregative effect of these violations makes it impossible for me to tailor a stay to allow the applicants a more limited form of relief.

In their response, the plaintiffs/respondents also take an "all or nothing" approach and do not offer any suggestions as to how the mandate and judgment of the Court of Appeals can be stayed only in part consistent with the applicants' legal contentions. I therefore have no recourse but to grant or deny the stay of the mandate and judgment in its entirety.

The last inquiry in gauging the appropriateness of a stay is the balance of equities. If the stay is granted the respondent children's opportunity for a more integrated educational experience is forestalled. How many children and how integrated an educational experience are impossible to discern because of the failure of the courts below to inquire how the complexion of the school system was affected by specific violations.

In contrast, the impact of the failure to grant a stay on the applicants is quite concrete. Extensive preparations toward implementation of the desegregation plan have taken place, but an affidavit filed in this Court by the Superintendent of the Columbus public schools indicates that major activities remain for the four weeks before the new school term begins. These activities include inventory, packing, and moving of furniture, textbooks, equipment, and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new busdrivers; and notification to parents of pupil reassignments and bus information. Such activities cannot be easily reversed. Most important, on September 7 there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of whom will be transported by bus.

The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of $9.5 million, $7.3 million of which is calculated to be desegregation expenses. Under Ohio law school districts are not permitted to operate when cash balances fall to zero and it is now projected that the Columbus school system will be forced to close in mid-November 1978. Financial exigency is not an excuse for failure to comply with a court order, but it is a relevant consideration in balancing the equities of a temporary stay.

Given the severe burdens that the school desegregation order

will place on the Columbus school system and the Columbus community in general, and the likelihood that four Justices of this Court will vote to grant certiorari in this case, I have decided to grant the stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit and the judgment of the District Court.

As this Court noted in *Dayton,* "local autonomy of school districts is a vital national tradition." 433 U. S., at 410. School desegregation orders are among the most sensitive encroachments on that tradition, not only because they affect the assignment of pupils and teachers, but also because they often restructure the system of education. In this case the desegregation order requires alteration of the grade organization of virtually every elementary school in Columbus. As this Court emphasized in *Dayton,* judicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations.

It is therefore ordered that the application for a stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit and the judgment of the District Court for the Southern District of Ohio be granted pending consideration of a timely petition for certiorari. The stay is to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay shall remain in effect until further order of this Court.

REPRODUCTIVE SERVICES, INC. *v.* WALKER, DISTRICT JUDGE

ON REAPPLICATION FOR STAY

No. A–1091. Decided August 21, 1978

Reapplication to stay Texas Supreme Court's order denying applicant medical clinic operator's motion for a writ of mandamus directed to respondent trial judge to overturn his order that applicant produce certain medical records in a medical malpractice suit against it, is granted. It appears that an order entered by respondent after denial of the initial application for a stay does not satisfy the express condition for such denial that a "protective order" ensuring the privacy of patients at applicant's clinics be entered.

MR. JUSTICE BRENNAN.

On July 17, 1978, in an in-chambers opinion, I stated: "[O]n express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application." *Ante,* at 1309.

On August 14, 1978, applicant renewed its application, filing therewith a copy of an order entered August 1, 1978, by respondent, which it alleged did not constitute "such a protective order." Upon examination of said order of August 1, 1978, it is my view that said order does not constitute "such a protective order." Accordingly, the "express condition" upon which my stay entered on July 10, 1978, was to be dissolved not having been satisfied, said stay of July 10, 1978, is continued in effect pending the timely filing of a petition for writ of certiorari.

Should said petition for writ of certiorari be denied, the stay of July 10, 1978, is to terminate automatically. In the event said petition for writ of certiorari is granted, the stay of July 10, 1978, is to continue in effect pending the issuance of the mandate of this Court.

GENERAL COUNCIL ON FINANCE & ADMINISTRATION, UNITED METHODIST CHURCH *v.* CALIFORNIA SUPERIOR COURT, SAN DIEGO COUNTY (BARR ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A–200. Decided August 24, 1978

Application to stay, pending consideration of a petition for certiorari, California Superior Court proceedings in which applicant is a defendant is granted temporarily, pending receipt and consideration of a response to the application, notwithstanding inexcusable delay in filing the application.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that proceedings in the Superior Court of the State of California for the County of San Diego in which it is a defendant be stayed as to it pending consideration by this Court of its petition for a writ of certiorari to review the judgment of that court filed March 20, 1978. I have decided to grant a temporary stay of the proceedings against applicant pending receipt and my consideration of a response to the application.

Applicant has, in my opinion, inexcusably delayed the filing of its application for a stay. The Supreme Court of the State of California denied applicant's petition for hearing on its request for a writ of mandate on July 27, 1978. On August 3, 1978, the Superior Court granted applicant 30 days from July 27, 1978, until August 28, in which to plead, but denied any additional stay of the proceedings. Applicant did not seek any further stay of the proceedings from either the California Court of Appeal or the California Supreme Court. Nevertheless, it did not file its application for a stay in this Court until August 22, nearly three weeks after the Superior Court's order and only six days before it was required to plead.

It is only because a delay of a few days will have virtually no effect on the progress of the state-court proceedings that I have decided to grant this temporary stay. It should be noted, however, that in deciding whether to grant or deny any further relief of this nature beyond that provided in this order, I shall take into consideration the above-described delay on the applicant's part.

DAYTON BOARD OF EDUCATION *v.* BRINKMAN ET AL.

ON APPLICATION FOR STAY

No. A–212. Decided August 28, 1978

Application for stay, pending consideration of a petition for certiorari, of Court of Appeals' judgment and mandate ordering an extensive school desegregation plan continued in Dayton, Ohio, is denied to preserve the status quo of the school system during this Court's consideration of the petition. *Columbus Board of Education* v. *Penick, ante,* p. 1348, distinguished.

MR. JUSTICE STEWART, Circuit Justice.

The Dayton, Ohio, Board of Education requests that I stay execution of the judgment and mandate of the Court of Appeals for the Sixth Circuit in this case pending consideration by this Court of the Board's petition for certiorari. The judgment reversed the dismissal by the District Court of the plaintiffs' school desegregation suit, and ordered the extensive desegregation plan continued.

The applicant urges that this case be stayed because it raises many of the issues presented by *Columbus Board of Education* v. *Penick, ante,* p. 1348. MR. JUSTICE REHNQUIST stayed the mandate of the Sixth Circuit in that case on August 11, 1978. A crucial distinction between these cases leads me to believe that this application should be denied. Columbus had never been the subject of a school desegregation remedy; the Dayton system, by contrast, will enter its third year under the current plan on September 7. In *Columbus* the status quo was preserved by granting a stay; here it can be preserved only by denying one. To avoid disrupting the school system during our consideration of the case, the stay should be denied. This disposition, of course, does not reflect any view on the merits of the issues presented.

The application for a stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit is denied.

DAYTON BOARD OF EDUCATION *v.* BRINKMAN ET AL.

ON REAPPLICATION FOR STAY

No. A–212. Decided August 30, 1978

Reapplication for stay, pending consideration of a petition for certiorari, of Court of Appeals' judgment and mandate ordering extensive school desegregation plan continued in Dayton, Ohio, is denied to maintain status quo in school system.

MR. JUSTICE REHNQUIST.

The applicant, Dayton Board of Education, has presented to me an application for stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit, which has been denied by MR. JUSTICE STEWART. In his in-chambers opinion MR. JUSTICE STEWART stated:

> "The applicant urges that this case be stayed because it raises many of the issues presented by *Columbus Board of Education* v. *Penick, ante,* p. 1348. MR. JUSTICE REHNQUIST stayed the mandate of the Sixth Circuit in that case on August 11, 1978. A crucial distinction between these cases leads me to believe that this application should be denied. Columbus had never been the subject of a school desegregation remedy; the Dayton system, by contrast, will enter its third year under the current plan on September 7. In *Columbus* the status quo was preserved by granting a stay; here it can be preserved only by denying one. To avoid disrupting the school system during our consideration of the case, the stay should be denied. This disposition, of course, does not reflect any view on the merits of the issues presented." *Ante,* at 1357.

I am in complete agreement with MR. JUSTICE STEWART that there is a difference between the status quo in the Dayton

school system and that in the Columbus school system. Since the maintenance of the status quo is an important consideration in granting a stay, I agree with MR. JUSTICE STEWART that the application for a stay should be denied.

BUCHANAN ET AL. *v.* EVANS ET AL.

ON APPLICATION FOR STAY

No. A–188. Decided September 1, 1978

Application to stay, pending the filing of a petition for certiorari, Court of Appeals' judgment and mandate affirming District Court's order prescribing a school desegregation plan for Wilmington, Del., and suburban districts, is denied. The record is replete with findings that *de jure* segregation has not been dismantled, thus (contrary to the situation in *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406) justifying the District Court's extensive interdistrict remedy. Hence, it does not appear that four Justices of this Court would vote to grant certiorari or that the balance of equities favors applicant.

MR. JUSTICE BRENNAN, Circuit Justice.

The Delaware State Board of Education and eight intervening defendant suburban school districts [1] request that I stay execution of the judgment and mandate of the Court of Appeals for the Third Circuit in this case pending consideration by this Court of their petition for certiorari. The judgment affirmed an order of the District Court for the District of Delaware prescribing a school desegregation plan involving

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[1] Pursuant to the desegregation order of the United States District Court for the District of Delaware these eight suburban school districts, along with three others, were abolished as of July 1, 1978, and replaced by a single unified school district administered by the New Castle County Board of Education. The District Court, however, granted the suburban school districts limited legal status "for the limited purpose of pursuing rights of appeal or judicial review." 447 F. Supp. 982, 1039 (1978). Applicants do not now request that the order abolishing these school districts be stayed. "The independent school districts having been dissolved effective July 1, 1978, [applicants] believe that any attempt to reconstitute those districts and to operate them separately at this late date would be more disruptive than to permit the single judicial district to operate at least for the current school year." Application for Stay 8.

the city of Wilmington and 11 surrounding suburban school districts.[2]

In deciding whether to grant a stay pending disposition of a petition for certiorari, I must consider two factors.

> "First, 'a Circuit Justice should "balance the equities" . . . and determine on which side the risk of irreparable injury weighs most heavily.' *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether 'it is likely that four Members of this Court would vote to grant a writ of certiorari.' *Id.*, at 1310. The burden of persuasion as to both of these issues rests on the applicant . . . ." *Beame* v. *Friends of the Earth*, 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers).

That burden is "particularly heavy," *ibid.*, when, as here, a stay has been denied both by the District Court and unanimously by the Court of Appeals sitting en banc.

The thrust of applicants' position is that the desegregation plan ordered by the District Court and approved by the Court of Appeals is administratively and financially onerous, and that it is inconsistent with the precepts enunciated in *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977).[3]

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[2] Applicants request a stay of so much of the District Court's order as compels mandatory pupil and staff reassignment as well as other forms of ancillary relief. See *ibid.*; *id.*, Exhibit A, pp. 10–13.

[3] Applicants also contend that since the District Court's order entails "the extinction of eleven historic, independent political entities of the State of Delaware," it "constitutes an unprecedented exercise of judicial power which should be reviewed by this Court pursuant to certiorari." Application for Stay 11. Applicants, however, do not seek to stay that aspect of the District Court's order that abolishes the 11 school districts; indeed, applicants state that they will not suffer an irreparable injury if this aspect of the order is not presently stayed. See n. 1, *supra*. Were a grant of certiorari appropriate to this issue, any relief pertinent if applicants were to prevail as to this claim would in my view be distinct

Dayton vacated the order of a Court of Appeals which had "imposed a remedy . . . entirely out of proportion to the constitutional violations found by the District Court . . . ." *Id.*, at 418. The District Court had found only "three separate . . . relatively isolated instances of unconstitutional action on the part of petitioners," *id.*, at 413, but the Court of Appeals had nevertheless ordered a systemwide remedy. *Dayton* invoked the familiar "rule laid down in *Swann*, and elaborated upon in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976)," that "'[o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U. S., at 744; *Swann* [v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S.], at 16.' [*Hills* v. *Gautreaux*, 425 U. S.,] at 293–294." *Id.*, at 419–420. Applying this rule, *Dayton* required the District Court on remand to determine the "incremental segregative effect [constitutional] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U. S., at 213." *Id.*, at 420.

The facts of *Dayton* are fundamentally different from the circumstances presented by this application. Segregation in Delaware, unlike that in Ohio, was mandated by law until 1954.[4] In the instant case the District Court found that "at

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from the relief presently requested by applicants. See n. 2, *supra*. Consideration of this contention is therefore not relevant to my determination as to whether to grant a stay.

[4] A lineal ancestor of the present case was *Gebhart* v. *Belton*, 33 Del. Ch. 144, 91 A. 2d 137 (1952), in which the Delaware Supreme Court ordered the immediate admission of black children to certain schools previously attended only by whites. The case was appealed to this Court and consolidated and decided with *Brown* v. *Board of Education*, 347 U. S. 483 (1954). The instant case has been in the federal courts at least since

that time . . . Wilmington and suburban districts were not meaningfully 'separate and autonomous' " because "*de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs." 393 F. Supp. 428, 437 (1975). So far from finding only isolated examples of unconstitutional action, the District Court in this case concluded "that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system." 379 F. Supp. 1218, 1223 (1974). The District Court found that this dual school system has been perpetuated through constitutional violations of an interdistrict nature,[5] necessitating for their rectification an interdistrict remedy. See 393 F. Supp. 428 (1975). See also 416 F. Supp. 328, 338–341 (1976). The District Court's finding of these interdistrict violations was summarily affirmed by this Court, 423 U. S. 963 (1975), and it thus constitutes the law of the case for purposes of this stay application. Unlike the situation in *Dayton*, therefore, the record before the Court of Appeals in the instant case was replete with findings justifying, if not requiring, the extensive interdistrict remedy ordered by the District Court.

Applicants argue, however, that the order of the District Court violates the principles of *Dayton* because no findings were made as to "incremental segregative effect." But even assuming that such an analysis were appropriate when, as here, there is an explicit finding that a *de jure* school system

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1957. See 379 F. Supp. 1218, 1220 (Del. 1974); 424 F. Supp. 875, 876 n. 1 (Del. 1976).

[5] The District Court concluded that an interdistrict remedy would be appropriate, based on its findings that:

"1) there had been a failure to alter the historic pattern of inter-district segregation in Northern New Castle County;

"2) governmental authorities at the state and local levels were responsible to a significant degree for increasing the disparity in residential and school populations between Wilmington and the suburbs;

"3) the City of Wilmington had been unconstitutionally excluded from

has never been dismantled,[6] the remedy of the District Court was consciously fashioned to implement the familiar rule of *Swann* and *Gautreaux* that equitable relief should be tailored to fit the violation. "Our duty," stated the District Court in 1976, "is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred." 416 F. Supp., at 341. And, as the District Court most recently stated:

> "[T]he firmly established constitutional violations in this case are the perpetuation of a dual school system and the vestige effects of pervasive *de jure* inter-district segregation. *Evans* v. *Buchanan,* 416 F. Supp. at 343; 393 F. Supp. at 432–438, 445, 447. *Dayton* reaffirms that '[o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." ' [433 U. S. at 420]; see *Milliken* [v. *Bradley*], 418 U. S. [717,] 744; *Swann,* 402 U. S. at 16. . . . Eradication of the constitutional violation to the scope and extent enumerated by the three-judge court is all that any of the plans and concepts submitted purport to accomplish, and that is all the concept endorsed by the Court does accomplish." 447 F. Supp. 982, 1011 (1978) (footnote omitted).[7]

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other school districts by the State Board of Education, pursuant to a withholding of reorganization powers under the Delaware Educational Advancement Act of 1968." *Id.,* at 877.

The court specifically found that "the acts of the State and its subdivisions . . . had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts." 416 F. Supp. 328, 339 (Del. 1976).

[6] In *Dayton,* of course, "mandatory segregation by law of the races in the schools [had] long since ceased . . . ." 433 U. S., at 420.

[7] Applicants' strenuous insistence upon such a narrow reading of the phrase "incremental segregative effect" entangles them in a contradiction. Before the District Court they took the position that " 'it is not "feasible"

The Court of Appeals accepted the principles of this analysis, and approved their application by the District Court. See Application for Stay, Exhibit B, p. 22; 555 F. 2d 373, 379–380 (CA3 1977). In these circumstances, I find no violation of the principles of *Dayton* sufficient to justify the conclusion that four Justices of this Court would vote to grant certiorari.

Applicants strenuously urge that irreparable financial and administrative difficulties attend upon the District Court's order. But both the District Court and the Court of Appeals, sitting en banc, have rejected this contention and concluded that, balancing the equities of this protracted litigation, applicants are not entitled to a stay. The judgments of these Courts are entitled to great deference. See *Board of Education of New Rochelle* v. *Taylor,* 82 S. Ct. 10, 11 (1961) (BRENNAN, J., in chambers). "It is clear that the . . . Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter." *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 164 (1923).

The "devastating, often irreparable, injury to those children who experience segregation and isolation was noted [24] years ago in *Brown* v. *Board of Education,* 347 U. S. 483 (1954)." *Jefferson Parish School Board* v. *Dandridge,* 404 U. S. 1219, 1220 (1971) (MARSHALL, J., in chambers). This case has been in continuous litigation for the past 21 years. As my Brother MARSHALL stated seven years ago when asked to stay a school desegregation order:

"Whatever progress toward desegregation has been made

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to determine what the affected school districts and school populations would be today "but for" the constitutional violations found by the three-judge court and affirmed on appeal.'" 447 F. Supp., at 1010 n. 123. The end result of applicants' positions is thus apparently that *no* equitable remedy would be appropriate.

> apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult." *Ibid.*

In such circumstances, I cannot conclude that the balance of equities lies in favor of applicants. The application for a stay is accordingly denied.

DIVANS *v.* CALIFORNIA

ON APPLICATION FOR STAY

No. A–233. Decided September 1, 1978

Application to stay, pending the filing of a petition for certiorari, California Superior Court's retrial of applicant for murder is denied. The application contains nothing to contradict the Superior Court's finding that the prosecutor's error that resulted in a mistrial at the first trial was not calculated to force applicant to move for a mistrial, and, accordingly, it is unlikely that this Court would grant certiorari to review applicant's double jeopardy claim.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant's motion to stay the proceedings in the Superior Court of Santa Clara County, Cal., is denied.

In July 1977 applicant filed a similar motion for stay pending review in this Court of his claim that the Double Jeopardy Clause of the United States Constitution prohibits the State of California from retrying him for murder. In denying the stay, I noted the California Superior Court's finding that the error resulting in the court's mistrial declaration was not intentionally committed by the prosecution for the purpose of provoking applicant's mistrial request. *Divans* v. *California,* 434 U. S. 1303 (1977) (in chambers). During January of last Term, both MR. JUSTICE BRENNAN and I denied applicant's second stay application, in which he alleged that additional facts had come to light which proved that the prosecutor had acted in bad faith at the first trial.

In the instant motion applicant contends that he has acquired still more information demonstrating the prosecutor's bad faith. Applicant presents, however, only his own assertions to this effect, and none of the moving papers before me contain any findings which contradict the Superior Court's finding, referred to in my earlier in-chambers opinion, that

the prosecutor's error was not calculated to force applicant to move for a mistrial. On the contrary, repeated summary rejections of applicant's claim in the California state courts indicate that the Superior Court's original finding stands undisturbed. Accordingly, I remain convinced that this Court would not grant certiorari to review applicant's double jeopardy claim.

Opinion in Chambers

GENERAL COUNCIL ON FINANCE & ADMINISTRATION, UNITED METHODIST CHURCH *v.* CALIFORNIA SUPERIOR COURT, SAN DIEGO COUNTY (BARR ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A–200 (78–300). Decided September 1, 1978

Application to stay, pending review by certiorari, California Superior Court proceedings in which applicant nonresident religious organization is a defendant and in which the Superior Court had denied applicant's motion to quash service of process for lack of *in personam* jurisdiction is denied, where it appears unlikely that four Justices of this Court will vote to grant certiorari.

MR. JUSTICE REHNQUIST, Circuit Justice.

The General Council on Finance and Administration of the United Methodist Church requests that proceedings in the Superior Court of the State of California for the County of San Diego, in which it is a defendant, be stayed as to it pending this Court's consideration of its petition for a writ of certiorari. Applicant, an Illinois not-for-profit corporation, is one of six defendants in a class action seeking, *inter alia,* damages for breach of contract, fraud, and violations of state securities laws arising out of the financial collapse of the Pacific Homes Corp., a California nonprofit corporation that operated 14 retirement homes and convalescent hospitals on the west coast. *Barr* v. *United Methodist Church,* No. 404611 (Cal. Super. Ct., San Diego County, Mar. 20, 1978). Respondent real parties in interest (hereafter respondents), some 1,950 present and former residents of the homes, allege that Pacific Homes was the alter ego, agency, or instrumentality of the United Methodist Church (Methodist Church), applicant, and certain other defendants affiliated with the Methodist Church. The judgment at issue is the Superior

Court's denial of applicant's motion to quash service of process for lack of *in personam* jurisdiction. That court, in a minute order decision, concluded that applicant was "doing business" in the State of California and, therefore, was subject to the jurisdiction of the California courts. Applicant's petition for a writ of mandate to review the judgment of the Superior Court was denied by the Court of Appeal for the Fourth Appellate District in a one-sentence order, and the California Supreme Court summarily denied applicant's petition for a hearing on the issue. Thereafter, applicant was ordered by the Superior Court to respond to respondents' complaint on or before August 28, 1978. I granted a temporary stay of the proceedings below to permit consideration of a response to the application. *Ante,* p. 1355.

Applicant challenges the Superior Court's order on three grounds. First, citing this Court's decision in *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696 (1976), applicant maintains that the Superior Court violated the First and Fourteenth Amendments in basing its assertion of jurisdiction on respondents' characterization of applicant's role in the structure of the Methodist Church and rejecting contrary testimony of church officials and experts and statements set forth in the Book of Discipline, which contains the constitution and bylaws of the Methodist Church. Applicant's next contention is that use of the "minimum contacts" standard of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), in determining jurisdiction over a nonresident religious organization violates the First and Fourteenth Amendments. Finally, applicant argues that even under the traditional minimum-contacts mode of analysis, its connection with the State of California is too attenuated, under the standards implicit in the Due Process Clause of the Fourteenth Amendment, to justify imposing upon it the burden of a defense in California.

Because the Superior Court's order denied a pretrial motion,

an initial question is whether the judgment below is "final" within the meaning of 28 U. S. C. § 1257, which permits this Court to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Applicant argues that it can preserve its jurisdictional argument only by suffering a default judgment, since under California law in order to defend on the merits it must appear generally and, accordingly, waive its objection to *in personam* jurisdiction. See *McCorkle* v. *Los Angeles,* 70 Cal. 2d 252, 449 P. 2d 453 (1969). It therefore finds itself between Scylla and Charybdis, and, citing *Shaffer* v. *Heitner,* 433 U. S. 186 (1977), asserts that under such circumstances the Superior Court's judgment is final. In *Shaffer,* this Court, taking a "pragmatic approach" to the question of finality, held that a Delaware court's pretrial decision to assert jurisdiction over the defendants was final within the meaning of § 1257 because under Delaware law the defendants' only choices were to incur default judgments or to file general appearances and defend on the merits, thereby submitting themselves to the court's jurisdiction. 433 U. S., at 195–196, n. 12. Respondents contest applicant's interpretation of California procedural law. They claim that a defendant can defend on the merits and still preserve his jurisdictional objections so long as he seeks immediate appellate review of an adverse decision on a motion to quash. See Cal. Civ. Proc. Code Ann. § 418.10 (West 1973). As noted above, applicant did avail itself of this procedure.

If the views of the respective parties are each to be credited, California law may not be clear on this issue, and it certainly is not within my province to resolve their differences with respect to it.* If California procedural law is as applicant

*I recognize that in determining whether to grant a stay, Members of this Court may hold differing views on the weight to be accorded any doubt as to the finality of a state-court judgment. See *New York Times Co.* v. *Jascalevich, ante,* p. 1331 (MARSHALL, J., in chambers); *New York Times*

describes it, I am convinced that this Court would find the Superior Court's judgment to be "final" within the meaning of § 1257. See *Shaffer* v. *Heitner, supra; Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975). I need not resolve this issue, however, since I have concluded that even if the Superior Court's order were a final judgment under § 1257, a stay is nonetheless not warranted in this case.

Any intrusion into state-court proceedings at an interlocutory stage must be carefully considered and will be granted only upon a showing of compelling necessity. *Bateman* v. *Arizona,* 429 U. S. 1302, 1305 (1976) (REHNQUIST, J., in chambers). Those proceedings are presumptively valid. See *Whalen* v. *Roe,* 423 U. S. 1313, 1316 (1975) (MARSHALL, J., in chambers). A party seeking a stay of a state-court judgment or proceeding must first demonstrate that there is a reasonable probability that four Justices will consider the issues sufficiently meritorious to vote to grant certiorari or note probable jurisdiction. *Bateman* v. *Arizona, supra,* at 1305. Applicant has failed to clear this first hurdle.

In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich.* But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point.

Co. v. *Jascalevich, ante,* p. 1317 (WHITE, J., in chambers); *Bateman* v. *Arizona,* 429 U. S. 1302, 1306 (1976) (REHNQUIST, J., in chambers). It is not necessary to explore that issue in this case.

Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U. S., at 709–710. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940). Nor is it entirely clear that the Superior Court's determination of the jurisdictional question was based upon its interpretation of Methodist polity; it is equally likely that the court's decision was founded on the related but separate issue of applicant's contacts with the State of California.

Likewise untenable, in my view, is applicant's claim that the First and Fourteenth Amendments somehow forbid resort to traditional minimum-contacts analysis in determining the existence of *in personam* jurisdiction over a defendant that is affiliated with an organized religion. Not surprisingly, applicant has failed to cite any authority in support of this novel proposition.

The only remaining issue presented by applicant is whether the quality and nature of its contacts with the State of California are such that "maintenance of the suit [in the forum state] does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington,* 326 U. S., at 316, quoting, *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940). Such questions generally tend to depend on the particular facts of each case, *Kulko* v. *California Superior Court,* 436 U. S. 84 (1978), and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. While

the Superior Court's decision does not purport to resolve all of the factual disputes between the parties, there is no indication that it failed to apply the due process standards enunciated in *International Shoe,* and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari.

Accordingly, the application for a stay pending review on certiorari is denied. The temporary stay I previously entered is hereby terminated.

ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL.

ON REAPPLICATION FOR STAY

No. A–188. Decided September 8, 1978

Reapplication to stay Court of Appeals' judgment and mandate affirming District Court's school desegregation order (see *ante,* p. 1360) is denied. It appears unlikely that four Justices of this Court would vote to grant certiorari at this time to consider the liability issues decided below, and, although four Justices might grant certiorari to consider the scope of the District Court's authority to grant such a drastic remedy as it did, the case is not presently at the certiorari stage, and a stay would be too disruptive since school is to begin in three days.

MR. JUSTICE REHNQUIST.

Applicants, seven defendant suburban school districts in the area of Wilmington, Delaware, have requested that I stay execution of the judgment and mandate of the Court of Appeals for the Third Circuit in this case pending consideration by this Court of their petition for certiorari.*

MR. JUSTICE BRENNAN denied the application for a stay one week ago, on September 1, 1978, *Buchanan* v. *Evans, ante,* p. 1360. Although earlier this summer I granted a stay in *Columbus Board of Education* v. *Penick, ante,* p. 1348, after it had been denied by MR. JUSTICE STEWART, I have decided to deny this application. Since my reasons are somewhat different from those expressed by MR. JUSTICE BRENNAN in his opinion, I shall state them here.

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*The Delaware State Board of Education joined in the application to MR. JUSTICE BRENNAN, but has now advised the Clerk's Office that because of the shortness of time it does not join in the reapplication to me. It has advised the Clerk, however, that it does intend to petition for certiorari for review of the judgment of the Court of Appeals for the Third Circuit. Intervenor, Alfred I. du Pont School District, also does not join in this reapplication.

As MR. JUSTICE BRENNAN noted, the District Court earlier in this litigation found interdistrict violations on the part of several of the independent school districts located in New Castle County. It also declared unconstitutional a Delaware statute granting to the State Board of Education the authority to reorganize school districts within the State, but exempting from the operation of the statute the Wilmington School District. The judgment of the District Court was summarily affirmed without an opinion by this Court over three dissents. *Buchanan* v. *Evans,* 423 U. S. 963 (1975). For the reasons expressed in my dissent in that case, I cannot agree with my Brother BRENNAN that the unexplicated summary affirmance renders the District Court's finding that "this dual school system has been perpetuated through constitutional violations of an interdistrict nature" the law of the case. *Buchanan* v. *Evans, ante,* at 1363 (BRENNAN, J., in chambers).

The case later came to this Court on a petition for certiorari from a judgment of the Court of Appeals for the Third Circuit that had concluded that some consolidation of school districts would be necessary in order to formulate an appropriate decree. Certiorari was denied by this Court, *Delaware Board of Education* v. *Evans,* 434 U. S. 880 (1977), with three Justices voting to grant certiorari, and vacate and remand the case for reconsideration in light of this Court's opinion in *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977). Were I alone deciding these issues on the merits, I would probably grant a stay pending the timely filing of a petition for certiorari. Cf. *New York Times Co.* v. *Jascalevich, ante,* at 1337 (MARSHALL, J., in chambers). But as MR. JUSTICE MARSHALL went on to point out in his in-chambers opinion, the Circuit Justice must be reasonably satisfied that four Justices would vote to grant certiorari in the case, and while I do not view any of the prior actions of this Court as dispositive of the merits of the issues decided by the District Court or the Court of Appeals for the Third Circuit, neither do I feel that I can in good con-

science say that four Justices of this Court would vote to grant certiorari to consider them at this time.

Present in the instant application, however, is an elaborate, specific plan devised by the District Court to remedy the violations which it had previously found. That remedy consists in part of a court-ordered reorganization and consolidation of 11 independent school districts in northern New Castle County. What had been 11 independent governing boards is for the present 1 interim board having supervisory authority over all 11 districts. The order requires the Delaware State Board of Education to appoint the five-person governing board. Included within the interim board's authority is the assignment of students, the levying of necessary taxes, the hiring of faculty, and the choice of curriculum.

The second aspect of the remedy is a system of pupil assignment which the District Court ordered the Board to adopt in the judgment which the Court of Appeals affirmed in the case now before me. The *modus operandi* of that plan is that all students from the two predominantly black school districts are to be reassigned to the nine predominantly white districts for nine years of their elementary and secondary education, and all students in the predominantly white districts are to be reassigned to the predominantly black districts for three consecutive years. In affirming this judgment of the District Court, the Court of Appeals for the Third Circuit relied in part on this quotation from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15–16 (1971):

> "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."

However, the language in *Swann* immediately following the language quoted by the Court of Appeals for the Third Circuit states:

> "The task is to correct, by a balancing of the individual

and collective interests, the condition that offends the Constitution.

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Id.*, at 16.

In the succeeding cases of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), *Hills* v. *Gautreaux,* 425 U. S. 284 (1976), and *Dayton Board of Education* v. *Brinkman, supra,* this Court has with increasing emphasis insisted that the scope of the District Court's authority to fashion a remedy is limited by the constitutional wrong that is to be righted. I believe that before a remedy of this drastic a nature is finally imposed, not merely on 1 school board but on 11 previously independent school boards, four Justices of this Court would wish to grant certiorari and consider that question on its merits. No case from this Court has ever sanctioned a remedy of this kind, or any remedy remotely like it. The only case in which a District Court has become this deeply involved in the day-to-day management of school affairs is *Morgan* v. *Kerrigan,* 530 F. 2d 401 (CA1 1976), in which this Court denied certiorari, 426 U. S. 935 (1976). In that case, however, the District Court was dealing with a single school district, and it does not appear that the community superintendents appointed to oversee particular schools by the District Court's order had any authority to levy taxes. If the Court meant what it said in *Dayton,* that "local autonomy of school districts is a vital national tradition," 433 U. S., at 410, I think it would give plenary consideration to a case where the District Court has treated a series of independent school districts which were found to have

committed constitutional violations much as if they were a railroad in reorganization.

This case, however, is not presently at the certiorari stage, and no petition for certiorari has been filed. The applicants seek only a partial stay of the District Court's order, conceding that the pressures of time would render inappropriate a complete stay in view of the fact that the schools in question are scheduled to open Monday, September 11.

This case was argued to the Court of Appeals for the Third Circuit on May 10, 1978, and that court handed down its opinion on July 24. No application for stay of the mandate of the Court of Appeals was presented to MR. JUSTICE BRENNAN until August 18. He denied the application on September 1, and it was presented to me late in the day on Tuesday, September 5. In a case of this magnitude, with a school opening date of September 11 rapidly approaching, it could be said that applicants might have acted more quickly than they did in seeking a stay from MR. JUSTICE BRENNAN. But be that as it may, equitable considerations involving stays do not necessarily turn on notions of laches. I conclude that in view of all the considerations which must be weighed in a matter such as this, the application for stay should be denied. The consolidated school system has been subject to the desegregation order, without interruption, since January 1978. It would simply be too disruptive to upset established expectations now. "This disposition, of course, does not reflect any view on the merits of the issues presented." *Dayton Board of Education* v. *Brinkman, ante,* at 1357 (STEWART, J., in chambers).

BUSTOP, INC. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON APPLICATION FOR STAY

No. A–249. Decided September 8, 1978

Application to stay, pending the filing of a petition for certiorari or an appeal, California Supreme Court's order vacating Court of Appeal's stay against enforcement of trial court's desegregation order for the Los Angeles school system requiring extensive busing of students, is denied. It appears that the California Supreme Court continues to be of the view that the State Constitution requires less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similar relief under the Federal Constitution. Thus, applicant's complaint involves state law and should be resolved in the state courts. Accordingly, it is unlikely that four Justices of this Court would vote to grant certiorari to review the California Supreme Court's judgment.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Bustop, Inc., supported by the Attorney General of California, requests that I stay, pending the filing of a petition for certiorari or an appeal, the order of the Supreme Court of California. That order vacated a supersedeas or stay issued by the California Court of Appeal, which had in turn stayed the enforcement of a school desegregation order issued by the Superior Court of Los Angeles County.

The desegregation plan challenged by applicant apparently requires the reassignment of over 60,000 students. In terms of numbers it is one of the most extensive desegregation plans in the United States. The essential logic of the plan is to pair elementary and junior high schools having a 70% or greater Anglo majority with schools having more than a 70% minority enrollment. Paired schools are often miles apart, and the result is extensive transportation of students. Applicant contends that round-trip distances are generally in the range of 36 to 66 miles. Apparently some students must

catch buses before 7 a. m. and have a 1½-hour ride to school. The objective of the plan is to insure that all schools in the Los Angeles Unified School District have Anglo and minority percentages between 70% and 30%.

Applicant urges on behalf of students who will be transported pursuant to the order of the Superior Court that the order of the Supreme Court of California is at odds with this Court's recent school desegregation decisions in *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977), *Brennan* v. *Armstrong,* 433 U. S. 672 (1977), and *School District of Omaha* v. *United States,* 433 U. S. 667 (1977). The California Court of Appeal, which stayed the order of the Superior Court, observed that the doctrine of these cases "reflects a refinement of earlier case law which should not and cannot be ignored." The majority of the Supreme Court of California, however, in a special session held Wednesday, September 6, vacated the supersedeas or stay issued by the Court of Appeal and denied applicant's request for a stay of the order of the Superior Court.

Were the decision of the Supreme Court of California premised on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, I would be inclined to agree with the conclusion of the California Court of Appeal that the remedial order entered by the Superior Court in response to earlier decisions of the Supreme Court of California was inconsistent with our decisions cited above. But the earlier opinion of the Supreme Court of California in this case, *Crawford* v. *Board of Education,* 17 Cal. 3d 280, 551 P. 2d 28 (1976), and *Jackson* v. *Pasadena City School District,* 59 Cal. 2d 876, 382 P. 2d 878 (1963), construe the California State Constitution to require less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similar relief under the United States Constitution. Although the California Court of Appeal is of the view that this Court's cases would require a different result

from that reached by the Supreme Court of California in *Crawford,* and although the order of the Supreme Court of California issued Wednesday was not accompanied by a written opinion, in the short time available to me to decide this matter I think the fairest construction is that the Supreme Court of California continues to be of the view which it announced in *Jackson* and adhered to in *Crawford.* Quite apart from any issues as to finality, it is this conclusion which effectively disposes of applicant's suggestion that four Justices of this Court would vote to grant certiorari to review the judgment of the Supreme Court of California, which in effect overturned the order of the Court of Appeal and reinstated the order of the Superior Court.

Applicant relies upon my action staying the judgment and order of the Court of Appeals for the Sixth Circuit in *Columbus Board of Education* v. *Penick, ante,* p. 1348, but that case is, of course, different in that the only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as this Court is concerned, they are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board.

Applicant phrases its contention in this language:

> "Unlike desegregation cases coming to this Court through the lower federal courts, of which there must be hundreds, if not thousands, here the issue is novel. The issue: May California in an attempt to racially balance schools use its doctrine of independent state grounds to ignore the federal rights of its citizens to be free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy." Application for Stay 16.11.

But this is not the traditional argument of a local school board contending that it has been required by court order to imple-

ment a pupil assignment plan which was not justified by the Fourteenth Amendment to the United States Constitution. The argument is indeed novel, and suggests that each citizen of a State who is either a parent or a schoolchild has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy." While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.

Even if I were of the view that applicant had a stronger federal claim on the merits, the fact that the Los Angeles schools are scheduled to open on Tuesday, September 12, is an equitable consideration which counsels against once more upsetting the expectations of the parties in this case. The Los Angeles Board of Education has been ordered by the Superior Court of Los Angeles County to bus an undoubtedly large number of children to schools other than those closest to where they live. The Board, however, raises before me no objection to the plan, and the Supreme Court of California has apparently placed its imprimatur on it. I conclude that the complaints of the parents and the children in question are complaints about California state law, and it is in the forums of that State that these questions must be resolved. The application for a stay is accordingly

Denied.

BUSTOP, INC. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON REAPPLICATION FOR STAY

No. A–249. Decided September 9, 1978

Reapplication to stay California Supreme Court's order is denied for same reasons initial application was denied, *ante,* p. 1380.

MR. JUSTICE POWELL.

The application for a stay in this case, denied by MR. JUSTICE REHNQUIST by his in-chambers opinion and order of September 8, 1978, *ante,* p. 1380, has now been referred to me.

As I am in accord with the reasons advanced by MR. JUSTICE REHNQUIST in his opinion, I also deny the application.

KIMBLE ET AL. *v.* SWACKHAMER, SECRETARY OF STATE OF NEVADA, ET AL.

ON APPLICATION FOR INJUNCTION

No. A–354 (78–657). Decided October 20, 1978

Application to enjoin, pending disposition of an appeal, the placement on the November 1978 ballot in Nevada of an advisory referendum for the Nevada Legislature's benefit on the Equal Rights Amendment, is denied. It appears unlikely that four Justices of this Court would vote to note probable jurisdiction to consider applicants' claim that the Nevada statute authorizing the referendum violates Art. V of the Federal Constitution.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I "summarily reverse" a judgment of the Supreme Court of Nevada holding that the Constitution of the United States does not prohibit the Nevada Legislature from providing for an advisory referendum on the proposed amendment to the United States Constitution commonly known as the Equal Rights Amendment. In the alternative, they apparently request that I either enjoin the placement of the referendum question on the November ballot in Nevada, or require that the ballots be impounded and their counting be deferred until this Court has had an opportunity to pass on applicants' jurisdictional statement seeking review of the judgment of the Supreme Court of Nevada.

It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to "summarily reverse" a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits. 28 U. S. C. § 1651 (b); this Court's Rule 51 (1). Since the likelihood that applicants' claim on the merits would induce four Justices of this Court to note

probable jurisdiction on their appeal seems to me very remote, I find it unnecessary to deal with their contention that failure on the part of a single Justice to grant some sort of interim relief will cause them irreparable injury.

In 1977 the Nevada Legislature enacted a statute requiring the submission of an advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature. The statute expressly provides that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." 1977 Nev. Stats., ch. 174, §§ 3, 5. Applicants asked the Nevada state courts to enjoin respondent Swackhamer, the Secretary of State of Nevada, from complying with the statute. The trial court in Carson City denied their request for relief, and the Supreme Court of Nevada affirmed that ruling by a vote of four to one.

Applicants contend that the Nevada statute providing for an advisory referendum for the benefit of the legislature is repugnant to Art. V of the United States Constitution because it "alters the mode of ratification of a proposed constitutional amendment by . . . providing for citizen participation in the amendatory process through the State's electoral machinery." Juris. Statement 3. Applicants also contend that Art. V is offended insofar as the statute requires the Nevada Legislature to defer action on ratification until it receives the results of the referendum, which is not to occur until the next regularly scheduled election of Nevada legislators.

The plain meaning of the Nevada statute and the opinion of the Supreme Court of Nevada convince me that the deferral issue presented by the latter contention is not in this case because the Nevada statute does not *prevent* the state legislature from acting on the Equal Rights Amendment before the referendum. That the Nevada Legislature is *unlikely* to vote on the amendment before a referendum that it mandated

is not a constitutionally cognizable grievance. Applicants' other contention, objecting to citizen participation in the amendatory process, is in my opinion not substantial because of the nonbinding character of the referendum. The Supreme Court of Nevada said with respect to the statute that it "does not concern a binding referendum, nor does it impose a limitation upon the legislature. As already noted, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only." App. to Juris. Statement 4a.

Under these circumstances, applicants' reliance upon this Court's decisions in *Leser* v. *Garnett,* 258 U. S. 130 (1922), and *Hawke* v. *Smith,* 253 U. S. 221 (1920), is obviously misplaced. Both seem to me to stand for the proposition that the two methods for state ratification of proposed constitutional amendments set forth in Art. V of the United States Constitution are exclusive: Ratification must be by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. *Leser, supra,* held that Art. V afforded no basis for the argument that an amendment was not properly ratified because ratification resolutions in certain States had not complied with state statutory requirements over and above those prescribed for ratification by Congress and by Art. V. *Hawke, supra,* held that a state statute providing for ratification by a binding referendum of the electorate was contrary to Art. V, since that Article had specified one of the alternative methods as being ratification by the state legislature and Congress had chosen that alternative.

Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature, as provided by Congress and by Art. V. I would be most disinclined to read either *Hawke, supra,* or *Leser, supra,* or Art. V as ruling out communication between the members of the legislature and

their constituents. If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort. The application for interim relief is accordingly

Denied.

CITY OF BOSTON ET AL. *v.* ANDERSON ET AL.

ON APPLICATION FOR STAY

No. A–355 (78–649). Decided October 20, 1978

Application to stay, pending disposition of an appeal, Massachusetts Supreme Judicial Court's judgment enjoining applicant city and city officials from expending funds in support of a referendum proposal on the November 1978 state general election ballot changing the state real property tax system, is granted. It appears that the balance of equities favors granting the application and that at least four Members of this Court would vote to grant plenary review of the question whether the Massachusetts statute barring municipalities from expending funds to influence elections is constitutional.

MR. JUSTICE BRENNAN, Circuit Justice.

The city of Boston, its mayor, and several of its elected officials, have applied to me for a stay of the judgment of the Massachusetts Supreme Judicial Court entered October 4, 1978, enjoining them, *inter alia,* from expending city funds in support of a referendum proposal on the ballot of the November 1978 general election. If adopted, the proposal would authorize the Massachusetts Legislature to supersede the present tax system of 100% valuation of real property by a system that would, *inter alia,* classify real property according to its use in no more than four classes and assess, rate, and tax such property differently in the classes so established.

The Supreme Judicial Court held that Mass. Gen. Laws Ann., ch. 55 (West Supp. 1978–1979), barred municipalities from engaging in the expenditure of funds to influence election results. —— Mass. ——, 380 N. E. 2d 628 (1978). Only last Term this Court struck down a provision of chapter 55 that imposed a ban on private corporate financing of advocacy on referendum questions as abridging expression that the First and Fourteenth Amendments were meant to protect. *First*

Nat. Bank of Boston v. *Bellotti,* 435 U. S. 765 (1978). The Supreme Judicial Court held in the instant case, however, that even if "constitutionally protected speech includes the right of a municipality to speak militantly about a referendum issue of admitted public importance where the Legislature of the State has said it may not," — Mass., at —, 380 N. E. 2d, at 637, "there are demonstrated, compelling interests of the Commonwealth which justify the 'restraint' which the Commonwealth has placed on the city," *id.,* at —, 380 N. E. 2d, at 637, namely, "[t]he Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree." *Id.,* at —, 380 N. E. 2d, at 639.

In deciding whether to grant a stay pending disposition of the jurisdictional statement I must consider two factors:

> "First, 'a Circuit Justice should "balance the equities" . . . and determine on which side the risk of irreparable injury weighs most heavily.' *Holtzman* v. *Schlesinger,* 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether 'it is likely that four Members of this Court would vote to grant a writ of certiorari.' *Id.,* at 1310. The burden of persuasion as to both of these issues rests on the applicant . . . ." *Beame* v. *Friends of the Earth,* 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers).

In my view the balance of the equities favors the grant of the application. In light of *Bellotti,* corporate industrial and commercial opponents of the referendum are free to finance their opposition. On the other hand, unless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interests of all taxpayers, including residential property owners.

I am also of the view that at least four Members of this Court will vote to grant plenary review of this important constitutional question.

Accordingly, I grant the application and stay the judgment of October 4, 1978, pending further action of this Court or myself as Circuit Justice.

WARM SPRINGS DAM TASK FORCE ET AL. *v.* GRIBBLE ET AL.

APPLICATION FOR STAY

No. A–357. Decided October 20, 1978

Application to stay, pending Court of Appeals' disposition of appeal, District Court's order denying a permanent injunction to halt further construction of the Warm Springs Dam, as against the contention that the environmental impact statement filed in connection with the Dam did not comply with the National Environmental Policy Act of 1969, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I stay an order of the United States District Court for the Northern District of California pending disposition of their appeal therefrom by the United States Court of Appeals for the Ninth Circuit. The District Court's order denied applicants' request for a permanent injunction to halt further construction in connection with the Warm Springs Dam-Lake Sonoma project on Dry and Warm Springs Creeks in Sonoma County, Cal. (Dam). Applicants also ask that pending disposition of their appeal I enjoin all further construction activity at the site, except work for the purpose of protecting the soil from effects of weathering and erosion.

The Dam will be an earthen-filled dam, holding back a reservoir of water, across Dry Creek, a major tributary of the Russian River in Sonoma County. It is a multipurpose project designed to provide flood control, water supply, and recreation. The Dam was first authorized in the Flood Control Act of 1962, Pub. L. 87–874, 76 Stat. 1173, 1192, and was under construction when the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.* (NEPA), became law. An environmental impact statement was filed prior to the award of a contract for a major segment of the Dam and it is the

adequacy of that statement under NEPA which has been the focus of this litigation. When built, the Dam will sit atop the Dry Creek earthquake fault. A second fault is about 1½ miles away and the San Andreas fault is 18 miles distant.

Applicants brought an action in the District Court on March 22, 1974, seeking a preliminary injunction to stay further construction activity with respect to the Dam. During 14 days of hearings on the motion for a preliminary injunction, applicants raised questions about the integrity of the Dam should an earthquake occur and alleged poisoning of the water in the reservoir behind the Dam. On May 23, 1974, the District Court found that the environmental impact statement fully complied with NEPA and denied applicants' motion for the injunction. Thereafter, the Ninth Circuit denied applicants' motion for an injunction pending appeal. On June 17, 1974, Mr. Justice Douglas issued an order staying further disturbance of the soil in connection with the Dam, other than for research, investigation, planning, and design activity, pending decision of their appeal by the Court of Appeals. *Warm Springs Dam Task Force* v. *Gribble,* 417 U. S. 1301.

On August 18, 1975, the Court of Appeals remanded the case to the District Court to permit it to consider further the adequacy of the environmental impact statement in the areas of seismicity and purity of water in the proposed reservoir. The Court of Appeals continued the existing stay in effect until further action by the District Court. Although not ordered by the court, the Army Corps of Engineers prepared and widely circulated a supplement to the environmental impact statement covering the archaeological aspects of the Dam and the seismicity and water purity problems. After holding three days of hearings, the District Court concluded that all segments of the environmental impact statement fully complied with NEPA and denied applicants' motion for a permanent injunction.

On November 23, 1977, the Court of Appeals expedited

applicants' appeal of the District Court's order but denied applicants' request for interim injunctive relief in an opinion in which it concluded that applicants had not shown that they would suffer "significant harm" during the pendency of the expedited appeal. Oral argument on the appeal was heard on March 13, 1978. When decision of the appeal was not forthcoming, applicants renewed their request for a stay on May 8, 1978. A hearing on the motion was held on May 11, 1978, and on May 30, the Court of Appeals again denied applicants' request for interim relief. That same day, the Corps signed a major construction contract for the Dam.

On October 4, 1978, the Corps opened bids on a new contract for the construction of a proposed fish hatchery for the Dam. The Corps intends to let the contract on October 20, 1978. This development prompted applicants to make the instant request for a stay to me. They claim that this work will entail extensive expenditures and will have a direct impact on the physical environment of the area. Applicants did not first present their request to the Court of Appeals.

After considering all of the factors required by our rules and customary Circuit Justice practice, I have decided to deny applicants' request for a stay pending disposition of their appeal by the Ninth Circuit.

Denied.

DOLMAN ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–534 (78–987). Decided December 21, 1978

Application to stay Court of Appeals' judgment and mandate affirming applicants' criminal contempt convictions for violating District Court's injunction is denied. The Court of Appeals apparently has granted a stay with respect to other individuals who were convicted of criminal contempt for violation of the same injunction; it is uncertain whether applicants have sought a stay from the Court of Appeals pending this Court's disposition of *their* petition for certiorari; and this Court has granted certiorari in a related case in which applicants' asserted basis for a stay will be reviewed. Accordingly, it is the better exercise of discretion to require applicants to apply to the Court of Appeals for a stay pending this Court's disposition of *their* petition for certiorari.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants Dolman and Wilson were convicted of criminal contempt of court pursuant to 18 U. S. C. § 401 (3) for violation of an injunction entered by the United States District Court for the Western District of Washington. Their convictions were affirmed by the Court of Appeals for the Ninth Circuit on September 7, 1978, and their application to stay issuance of the mandate of the Court of Appeals pending determination by this Court of related petitions for certiorari pending before it was denied on November 16. Meanwhile, this Court granted certiorari on October 16 in No. 78–139, *Puget Sound Gillnetters Assn.* v. *United States District Court,* and No. 78–119, *Washington* v. *United States,* 439 U. S. 909. There is no question, as the Government maintains in the response which I have requested, that a conviction for criminal contempt may be valid quite apart from the validity of the underlying injunction which was violated, and that the invalidity of an injunction may not ordinarily be raised as a defense in contempt proceedings for its violation. *Walker* v.

Birmingham, 388 U. S. 307, 315–320 (1967); *United States* v. *Mine Workers,* 330 U. S. 258, 293–294 (1947).

Applicants' basic contention here is that since they were not named as parties in the action in the District Court in which the United States was plaintiff and the State of Washington defendant, they were not bound by any injunctive decree which was issued by that court. The District Court rejected this contention, and the Court of Appeals affirmed the convictions for criminal contempt relying upon cases from this Court holding that in some circumstances citizens of a State who claim rights pursuant to state law may be deemed "in privity" with a State and be bound by an injunction or decree to which only the State was a party. *Tacoma* v. *Taxpayers of Tacoma,* 357 U. S. 320, 340–341 (1958); *Wyoming* v. *Colorado,* 286 U. S. 494, 506–509 (1932).

One of the questions presented in No. 78–139 is this:

> "Is an individual who conducts business in a state in such privity to that state that a court may directly enjoin the citizen without his being a party to or a participant in the cause of action in which the State is a party? Assuming privity, if an injunctive order is sought against an individual, is that individual entitled to notice of and participation in the injunctive hearing prior to its issuance?"

The Government in its response to this application simply does not address that question, and the fact that certiorari has been granted in No. 78–139 suggests that at least some Members of the Court regard the question as being of substance.

Both *Walker, supra,* and *Mine Workers, supra,* contain language limiting the doctrine that the validity of a conviction for criminal contempt is not vitiated by the invalidity of the underlying injunction to cases in which the court issuing the injunction had jurisdiction of the parties. In

Walker, the court quoted approvingly the following language from *Howat* v. *Kansas,* 258 U. S. 181, 189–190 (1922):

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon *persons made parties therein and within the jurisdiction,* must be obeyed by them however erroneous the action of the court may be . . . ." 388 U. S., at 314. (Emphasis supplied.)

See also Fed. Rule Civ. Proc. 65 (d). The claim made by these applicants is that they were not in fact parties to the proceedings in the District Court, and that the District Court did not have jurisdiction over them merely because the State of Washington was a party. Since this question will be reviewed in No. 78–139, and since there is some possibility that applicants' convictions for criminal contempt would be moot once having been served, even under cases such as *Sibron* v. *New York,* 392 U. S. 40 (1968), I think there are substantial arguments which favor the granting of a stay in this case.

Nonetheless, I have decided as of now to deny the application. The information available to me as to related proceedings in the Court of Appeals for the Ninth Circuit may not be completely accurate, but I am advised that that court granted a stay at the request of Denne M. Harrington and Gary D. Rondeau, whose appeals from convictions for criminal contempt for violation of the same injunction were consolidated with those of applicants in the Court of Appeals and decided by that court in the same opinion. While applicants did seek a stay from the Court of Appeals of its affirmance of their contempt convictions, it is not apparent from the information available to me that they did so after this Court granted certiorari in No. 78–139, or that they requested the stay pending disposition of a petition for certiorari in their own cases, rather than pending disposition of No. 78–139. Our Rule 27 provides that applications for a stay here will not

normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed. On the basis of the information before me, I cannot say that applicants have requested a stay from the Court of Appeals for the Ninth Circuit pending disposition by this Court of *their* petition for certiorari seeking to review the affirmance of their contempt convictions, though I cannot say with certainty that they have not. Because of this uncertainty on my part, because of our grant of certiorari in No. 78–139, and because the Court of Appeals apparently has granted a stay with respect to Harrington and Rondeau, I think it the better exercise of my discretion to require applicants to apply to the Court of Appeals for the Ninth Circuit for a stay pending this Court's disposition of their petition for certiorari. In the event that such an application is denied, I shall entertain a renewed application for a stay on behalf of applicants Dolman and Wilson.

Denied.

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CAPITAL PUNISHMENT. See **Constitutional Law,** II, 5.

CHARITABLE SET-ASIDES FROM CAPITAL GAINS. See **Internal Revenue Code,** 1.

"CHECKERBOARD" PATTERN OF STATE JURISDICTION OVER INDIAN RESERVATIONS. See **Constitutional Law,** III, 1.

CITIES. See **Constitutional Law,** II, 3; III, 4; **Jurisdiction; Stays,** 6.

CITY EXPENDITURES IN SUPPORT OF REFERENDUM PROPOSAL. See **Stays**, 6.

CIVIL CONTEMPT. See **Stays**, 3, 4.

CIVIL RIGHTS. See **Civil Rights Act of 1964**; **Stays**, 12–18.

CIVIL RIGHTS ACT OF 1964.

Employment discrimination—Prima facie case—Rebuttal.—Where Court of Appeals in employment discrimination action appears to have imposed heavier burden on employer than *Furnco Construction Co.* v. *Waters*, 438 U. S. 567, requires as to meeting employee's prima facie case of discrimination, its judgment is vacated and case is remanded for reconsideration. Board of Trustees v. Sweeney, p. 24.

CLINICS. See **Stays**, 8, 9.

COLLATERAL ESTOPPEL. See **Constitutional Law**, VI, 1; **Judgments.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Railway Labor Act.**

COLUMBUS, OHIO. See **Stays**, 12.

COMMUNITY PROPERTY. See **Railroad Retirement Act of 1974.**

COMPUTATION OF ALTERNATIVE INCOME TAX. See **Internal Revenue Code**, 1.

CONFESSIONS. See **Stays**, 10.

CONSTITUTIONAL LAW.

I. Delegation of Power.

Automobile franchises—State statutory requirements for opening or relocating.—Scheme of California Automobile Franchise Act does not constitute an impermissible delegation of state power to private citizens by requiring New Motor Vehicle Board to delay automobile franchise establishments and relocations only when protested by existing franchisees. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., p. 96.

II. Due Process.

1. *Automobile franchises—State statutory requirements for opening or relocating.*—Scheme of California Automobile Franchise Act with respect to opening or relocating of automobile dealerships does not violate due process. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., p. 96.

2. *Out-of-state attorneys—Right to appear pro hac vice.*—Interest of out-of-state attorneys, who were not admitted to Ohio Bar, in representing defendants in Ohio criminal prosecution is not cognizable property or liberty interest under Fourteenth Amendment, and hence Constitution

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did not obligate Ohio courts to accord attorneys procedural due process on their application to appear *pro hac vice*. Leis v. Flynt, p. 438.

3. *"Police jurisdiction" statutes.*—Alabama "police jurisdiction" statutes that extend municipal police, sanitary, and business-licensing powers over those residing within three miles of corporate boundaries without permitting such residents to vote in municipal elections, do not violate due process. Holt Civic Club v. Tuscaloosa, p. 60.

4. *State statutory abortion requirements—Vagueness.*—Provisions of Pennsylvania Abortion Control Act requiring physician, if he determines that fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," to exercise certain standard of care to preserve fetus' life and health and to use certain abortion technique, are unconstitutionally vague. Colautti v. Franklin, p. 379.

5. *Unconstitutional affirmance of death sentence and conviction.*—Georgia Supreme Court's affirmance, based on underlying rape charge of which accused was not properly tried and convicted, of death sentence for murder and of kidnaping conviction violates due process. Presnell v. Georgia, p. 14.

III. Equal Protection of the Laws.

1. *"Checkerboard" pattern of state jurisdiction over Indian reservations.*—"Checkerboard" pattern of state jurisdiction over Indian reservations ordained by Washington statute is not on its face invalid under Equal Protection Clause of Fourteenth Amendment. Washington v. Yakima Indian Nation, p. 463.

2. *First-degree murder—Jury conviction—Mandatory life imprisonment.*—New Jersey sentencing scheme under which life imprisonment is mandatory punishment for first-degree murder jury convictions while defendant pleading *non vult* may be sentenced to either life imprisonment or lesser term prescribed for second-degree murder, does not infringe right to equal protection under Fourteenth Amendment of defendant who was convicted by jury of first-degree murder and accordingly sentenced to life imprisonment. Corbitt v. New Jersey, p. 212.

3. *Inheritance by illegitimate children—State restrictions.*—New York Court of Appeals' judgment upholding, against contention that it violated Equal Protection Clause of Fourteenth Amendment, New York statute allowing an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction has, during father's lifetime, entered an order declaring paternity, is affirmed. Lalli v. Lalli, p. 259.

4. *"Police jurisdiction" statutes.*—Alabama "police jurisdiction" statutes that extend municipal police, sanitary, and business-licensing powers over those residing within three miles of corporate boundaries without per-

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mitting such residents to vote in municipal elections, do not violate Equal Protection Clause of Fourteenth Amendment. Holt Civic Club v. Tuscaloosa, p. 60.

IV. Freedom of Speech.

Public employees—Private communications.—A public employee (such as petitioner, who was dismissed from employment as a teacher for complaints and opinions expressed privately to school principal) does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. Givhan v. Western Line Consolid. School Dist., p. 410.

V. Privilege Against Self-Incrimination.

First-degree murder—Jury conviction—Mandatory life imprisonment.—New Jersey sentencing scheme under which life imprisonment is mandatory punishment for first-degree murder jury convictions while defendants pleading *non vult* may be sentenced to either life imprisonment or lesser term prescribed for second-degree murder, does not impose unconstitutional burden on Fifth and Fourteenth Amendment right against self-incrimination of defendant who was convicted by jury of first-degree murder and accordingly sentenced to life imprisonment. Corbitt v. New Jersey, p. 212.

VI. Right to Jury Trial.

1. *Effect of collateral estoppel.*—Use of collateral estoppel to prevent petitioners from relitigating, in stockholder's action against them, issue resolved against them in action by Securities and Exchange Commission, of whether proxy statement issued by them was materially false and misleading, would not violate petitioners' Seventh Amendment right to a jury trial. Parklane Hosiery Co. v. Shore, p. 322.

2. *First-degree murder—Jury conviction—Mandatory life imprisonment.*—New Jersey sentencing scheme under which life imprisonment is mandatory punishment for first-degree murder jury convictions while defendants pleading *non vult* may be sentenced to either life imprisonment or lesser term prescribed for second-degree murder, does not impose unconstitutional burden on Sixth and Fourteenth Amendment jury trial right of defendant who was convicted by jury of first-degree murder and accordingly sentenced to life imprisonment. Corbitt v. New Jersey, p. 212.

3. *Selection of jury—Exemption of women.*—Exemption on request of women from jury service under Missouri law, resulting in an average of less than 15% women on jury venires in forum county, violates "fair cross section" requirement of Sixth Amendment as made applicable to States by Fourteenth. Duren v. Missouri, p. 357.

CONSTITUTIONAL LAW—Continued.

4. *Selection of jury—Exemption of women.*—Missouri Supreme Court and Missouri Court of Appeals judgments affirming convictions as against fair-cross-section claims based on exemption of women from juries, are vacated, and cases are remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357. Lee v. Missouri, p. 461.

5. *Selection of jury—Exemption of women.*—Missouri Supreme Court's judgment rejecting petitioner's challenge, on appeal of his conviction, to Missouri statute allowing any woman who so elects to be excused from jury service, is vacated, and case is remanded for reconsideration in light of *Duren* v. *Missouri, ante,* p. 357. Harlin v. Missouri, p. 459.

VII. Right to Travel.

Supplemental Security Income benefits not payable when recipient abroad.—Section 1611 (f) of Social Security Act, which provides that SSI benefits are not to be paid for any month that recipient is outside United States, does not impose an impermissible burden on freedom of international travel in violation of Fifth Amendment. Califano v. Aznavorina, p. 170.

VIII. Searches and Seizures.

Nonowner passengers' right to challenge search of automobile.—Nonowner passengers in suspected robbery getaway car were not entitled to challenge, on Fourth Amendment grounds, search of glove compartment and area under seat where police found and seized shells and rifle admitted in evidence at robbery trial. Rakas v. Illinois, p. 128.

CONSTRUCTION OF WARM SPRINGS DAM. See **Stays**, 2.

CONTEMPT. See **Stays**, 1, 3, 4.

CONVENING OF THREE-JUDGE DISTRICT COURT. See **Appeals**, 1; **Jurisdiction.**

COUNTY SCHOOL BOARDS. See **Voting Rights Act of 1965**, 1, 2.

COURTS OF APPEALS. See **Interstate Commerce Act; Judicial Review; Railway Labor Act; Stays**, 1.

CREDIT CARDS. See **National Bank Act.**

CRIMINAL CONTEMPT. See **Stays**, 1.

CRIMINAL LAW. See **Bail; Constitutional Law**, II, 5; III, 2; V; VI, 2–5; VIII; **Extradition; Stays**, 1, 3–5, 10, 11, 19, 20.

DAYTON, OHIO. See **Stays**, 13, 14.

DEATH SENTENCES. See **Constitutional Law**, II, 5.

DECLARATORY JUDGMENTS. See **Appeals**, 2.

DEDUCTIONS FOR BAD DEBTS. See **Internal Revenue Code**, 2.

DELEGATION OF POWER. See **Constitutional Law**, I.

DESEGREGATION OF SCHOOLS. See **Stays**, 12–18.

DETERMINATION OF FETUS' VIABILITY. See **Constitutional Law**, II, 4.

DISCHARGE OR DISMISSAL FROM EMPLOYMENT. See **Constitutional Law**, IV.

DISCRIMINATION. See **Civil Rights Act of 1964**; **Stays**, 12–18.

DISTRICT COURTS. See **Appeals**; **Jurisdiction**; **Railway Labor Act.**

DIVISION OF RAILROAD EMPLOYEES' RETIREMENT BENEFITS. See **Railroad Retirement Act of 1974.**

DIVORCE. See **Railroad Retirement Act of 1974.**

DRUG OFFENSES. See **Stays**, 5.

DUE PROCESS. See **Constitutional Law**, II.

ELECTIONS. See **Constitutional Law**, II, 3; III, 4; **Voting Rights Act of 1965.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974. See **Pensions.**

EMPLOYEE SOLICITATION BY LABOR UNIONS. See **National Labor Relations Act.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964**; **Constitutional Law**, IV; **National Labor Relations Act**; **Pensions**; **Railway Labor Act**; **Voting Rights Act of 1965**, 1.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

ENVIRONMENTAL LAW. See **Stays**, 2.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III.

EQUAL RIGHTS AMENDMENT. See **Injunctions.**

EVIDENCE. See **Civil Rights Act of 1964**; **Constitutional Law**, VIII; **Stays**, 10.

EXCLUSION OF CHARITABLE SET-ASIDES FROM TAXABLE CAPITAL GAINS. See **Internal Revenue Code**, 1.

EXCLUSION OR EXEMPTION OF WOMEN FROM JURY SERVICE. See **Constitutional Law**, VI, 3–5.

EXECUTIVE GRANT OF EXTRADITION. See **Extradition.**

EXPENDITURE OF CITY FUNDS IN SUPPORT OF REFERENDUM PROPOSAL. See **Stays**, 6.

EXTRADITION.

Executive grant of extradition—Probable cause—Judicial inquiry precluded.—Once asylum State's Governor has acted on requisition for extradition based on demanding State's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in asylum State. Michigan v. Doran, p. 282.

"FAIR CROSS SECTION" REQUIREMENT FOR JURIES. See **Constitutional Law**, VI, 3–5.

FALSE PROXY STATEMENTS. See **Constitutional Law**, VI, 1; **Judgments.**

FEDERAL ENERGY REGULATORY COMMISSION. See **Judicial Review**; **Natural Gas Act.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT. See **Appeals**, 1.

FEDERAL RESERVE SYSTEM. See **Bank Holding Company Act of 1956.**

FEDERAL-STATE RELATIONS. See also **Railroad Retirement Act of 1974.**

State regulation of automobile franchises—"State action" exemption from antitrust laws.—California Automobile Franchise Act does not conflict with Sherman Act but is outside reach of antitrust laws under "state action" exemption. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., p. 96.

FETUSES' VIABILITY. See **Constitutional Law**, II, 4.

FIFTH AMENDMENT. See **Constitutional Law**, V; VII.

FINANCE CHARGE ON CREDIT CARD UNPAID BALANCES. See **National Bank Act.**

FINANCIAL OR MANAGERIAL UNSOUNDNESS AS GROUND FOR DISAPPROVING BANK HOLDING COMPANY. See **Bank Holding Company Act of 1956.**

FIRST AMENDMENT. See **Constitutional Law**, IV; **Stays**, 3, 4, 19, 20.

FIRST-DEGREE MURDER. See **Constitutional Law**, III, 2; V; VI, 2.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 2, 3; III; V; VI, 2–5.

FOURTH AMENDMENT. See **Constitutional Law**, VIII; **Stays**, 5.

FREEDOM OF INTERNATIONAL TRAVEL. See **Constitutional Law**, VII.

FREEDOM OF SPEECH. See **Constitutional Law**, IV.

FREEDOM OF THE PRESS. See **Stays**, 3, 4, 19, 20.

GEORGIA. See **Constitutional Law**, II, 5.

GOVERNOR'S GRANT OF EXTRADITION. See **Extradition.**

HAND-DELIVERY MAIL SERVICE. See **Stays**, 7.

HOLDING COMPANIES. See **Bank Holding Company Act of 1956.**

HOMICIDE. See **Constitutional Law**, III, 2; V; VI, 2.

HOSPITALS. See **National Labor Relations Act.**

ILLEGITIMATE CHILDREN. See **Constitutional Law**, III, 3.

IN CAMERA INSPECTION. See **Stays**, 4.

INCOME TAXES. See **Internal Revenue Code.**

INCRIMINATION. See **Constitutional Law**, V.

INDIANS. See also **Constitutional Law**, III, 1.

1. *State jurisdiction over Indian reservations.*—Section 6 of Pub. L. 280 does not require disclaimer States to amend their constitutions to make an effective acceptance of jurisdiction over an Indian reservation, and here Washington, having enacted legislation obligating State to assume jurisdiction under Pub. L. 280 and thus having effectively repealed state constitutional disclaimer, has satisfied § 6's procedural requirements. Washington v. Yakima Indian Nation, p. 463.

2. *State jurisdiction over Indian reservations.*—Once procedural requirements of § 6 of Pub. L. 280 have been satisfied, § 7 governs scope of jurisdiction over Indian reservations conferred upon disclaimer States, and here statutory authorization for partial subject-matter and geographic jurisdiction asserted by Washington is found in words of § 7 permitting option States to assume jurisdiction "in such manner" as people of State shall "by affirmative legislative action, obligate and bind the State to assumption thereof." Washington v. Yakima Indian Nation, p. 463.

INHERITANCE BY ILLEGITIMATE CHILDREN. See **Constitutional Law**, III, 3.

INJUNCTIONS. See also **Stays**, 1, 2, 6, 7.

Advisory referendum—Equal Rights Amendment.—Application to enjoin placement on Nevada ballot of advisory referendum for state legislature's benefit on Equal Rights Amendment, is denied. Kimble v. Swackhamer (REHNQUIST, J., in chambers), p. 1385.

INTEREST ON CREDIT CARD UNPAID BALANCES. See **National Bank Act.**

INTERIM TERMINAL SURCHARGES BY RAILROADS. See **Interstate Commerce Act.**

INTERNAL REVENUE CODE.

1. *Long-term capital gains—Estate—Alternative income tax—Exclusion of charitable set-asides.*—Net long-term capital gains to which alternative income tax of a decedent's estate is applicable are reducible by amount set aside for charitable purposes pursuant to decedent's will. United California Bank v. United States, p. 180.

2. *Write-down of "excess" inventory—Bad-debt reserve.*—Commissioner of Internal Revenue did not abuse his discretion either in determining that petitioner tool manufacturer's write-down of "excess" inventory failed to reflect its 1964 income clearly or in recomputing a "reasonable" addition to petitioner's bad-debt reserve according to formula of *Black Motor Co.* v. *Commissioner,* 41 B. T. A. 300. Thor Power Tool Co. v. Commissioner, p. 522.

INTERNATIONAL TRAVEL RIGHTS. See **Constitutional Law,** VII.

INTERSTATE COMMERCE ACT.

Railroads—Retirement taxes—Interim surcharges—Trust fund—Court of Appeals' authority.—Court of Appeals' imposition of trust fund on interim terminal surcharge approved by Interstate Commerce Commission to offset increased railroad retirement taxes is contrary to § 15a (6) (b) of Act. Long Island R. Co. v. Aberdeen & Rockfish R. Co., p. 1.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

INTERSTATE EXTRADITION. See **Extradition.**

INVENTORY ACCOUNTING. See **Internal Revenue Code,** 2.

INVESTMENT CONTRACTS. See **Pensions.**

JUDGMENTS. See also **Constitutional Law,** VI, 1.

Collateral estoppel.—Petitioners, who had a "full and fair" opportunity, in Securities and Exchange Commission's action against them, to litigate issue, resolved against them, of whether proxy statement issued by them was materially false and misleading, are collaterally estopped from relitigating such issue in stockholder's action against them. Parklane Hosiery Co. v. Shore, p. 322.

JUDICIAL REVIEW. See also **Extradition; Interstate Commerce Act; Railway Labor Act.**

Federal Energy Regulatory Commission—Ratemaking authority—Court of Appeals.—Court of Appeals encroached upon FERC's ratemaking au-

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thority when it strongly suggested that FERC is required to grant relief to respondent natural gas producers as long as increase in royalty costs is not imprudent and relief when granted will merely sustain rather than increase producers' profits. FERC v. Pennzoil Producing Co., p. 508.

JURISDICTION. See also **Appeals; Constitutional Law**, III, 1; **Indians.**

Three-judge District Court—Challenge to "police jurisdiction" statutes.—Convening of three-judge District Court under then-applicable 28 U. S. C. § 2281 (1970 ed.) was proper in action challenging constitutionality of Alabama "police jurisdiction" statutes. Holt Civic Club v. Tuscaloosa, p. 60.

JURY SELECTION. See **Constitutional Law**, VI, 3–5.

JURY TRIALS. See **Constitutional Law**, VI.

JUVENILE DELINQUENTS. See **Stays**, 10.

LABOR UNIONS. See **National Labor Relations Act.**

LAWYERS. See **Constitutional Law**, II, 2.

LEAVES OF ABSENCE FOR PUBLIC EMPLOYEES SEEKING ELECTIVE OFFICE. See **Voting Rights Act of 1965**, 1.

LEGITIMATE EXPECTATION OF PRIVACY. See **Constitutional Law**, VIII.

LIBERTY INTERESTS. See **Constitutional Law**, II, 2.

LIFE IMPRISONMENT. See **Constitutional Law**, III, 2; V; VI, 2.

LONG-TERM CAPITAL GAINS. See **Internal Revenue Code**, 1.

LOS ANGELES, CAL. See **Stays**, 17, 18.

MAIL SERVICE. See **Stays**, 7.

MALPRACTICE. See **Stays**, 8, 9.

MANDAMUS. See **Stays**, 8, 9.

MANDATORY LIFE IMPRISONMENT. See **Constitutional Law**, III, 2; V; VI, 2.

MASSACHUSETTS. See **Stays**, 6.

MATERIALLY FALSE AND MISLEADING PROXY STATEMENTS. See **Constitutional Law**, VI, 1; **Judgments.**

MEDICAL MALPRACTICE. See **Stays**, 8, 9.

MINNESOTA. See **National Bank Act.**

MISLEADING PROXY STATEMENTS. See **Constitutional Law**, VI, 1; **Judgments.**

MISSOURI. See **Constitutional Law**, VI, 3–5.

MUNICIPAL CORPORATIONS. See **Constitutional Law**, II, 3; III, 4; **Jurisdiction**; **Stays**, 6.

MUNICIPAL EXPENDITURES IN SUPPORT OF REFERENDUM PROPOSAL. See **Stays**, 6.

MURDER. See **Constitutional Law**, III, 2; V; VI, 2.

NARCOTICS OFFENSES. See **Stays**, 5.

NATIONAL BANK ACT.

Bank's out-of-state credit card customers—Allowable interest rate.—Provision of Act authorizing national bank "to charge on any loan" interest at rate allowed by laws of State "where the bank is located," permits national bank in Nebraska to charge its Minnesota BankAmericard customers higher interest rate on unpaid balances, as sanctioned by Nebraska law, than is permitted by Minnesota. Marquette Nat. Bank v. First of Omaha Corp., p. 299.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969. See **Stays**, 2.

NATIONAL LABOR RELATIONS ACT.

Hospital—No-solicitation rule—Unfair labor practice.—Court of Appeals' judgment refusing to enforce National Labor Relations Board's order invalidating, as unfair labor practice under § 8 (a) (1) of Act, operation of hospital's no-solicitation rule in its cafeteria is vacated, and case is remanded for reconsideration in light of *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483. NLRB v. Baylor University Medical Center, p. 9.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act.**

NATURAL GAS ACT.

Special rate relief—Escalating royalty costs—Federal Energy Regulatory Commission's authority.—Act does not deny FERC authority to give special rate relief to producers where escalating royalty costs are a function of, or otherwise based upon, an unregulated market price for product whose sale in interstate market is regulated by FERC. FERC v. Pennzoil Producing Co., p. 508.

NATURAL GAS PRODUCERS. See **Judicial Review**; **Natural Gas Act.**

NEBRASKA. See **National Bank Act.**

NEEDY AGED, BLIND, AND DISABLED. See **Constitutional Law**, VII.

NET LONG-TERM CAPITAL GAINS. See **Internal Revenue Code**, 1.

NEVADA. See **Injunctions.**

NEW JERSEY. See **Constitutional Law**, III, 2; V; VI, 2.

NEWS MEDIA. See **Stays**, 3, 4, 19, 20.

NEW YORK. See **Constitutional Law**, III, 3.

NONCONTRIBUTORY, COMPULSORY PENSION PLANS. See **Pensions.**

NONOWNER'S RIGHT TO CHALLENGE SEARCH OF AUTOMOBILE. See **Constitutional Law**, VIII.

NON VULT PLEAS. See **Constitutional Law**, III, 2; V; VI, 2.

NO-SOLICITATION RULES. See **National Labor Relations Act.**

OFFENSIVE COLLATERAL ESTOPPEL. See **Constitutional Law**, VI, 1; **Judgments.**

OHIO. See **Constitutional Law**, II, 2.

OPENING OF AUTOMOBILE DEALERSHIPS. See **Constitutional Law**, I; II, 1; **Federal-State Relations.**

OUT-OF-STATE ATTORNEYS. See **Constitutional Law**, II, 2.

PATIENTS' MEDICAL RECORDS. See **Stays**, 8, 9.

PENNSYLVANIA ABORTION CONTROL ACT. See **Constitutional Law**, II, 4.

PENSIONS.

Pension plan—Applicability of securities laws.—Securities Act of 1933 and Securities Exchange Act of 1934 do not apply to a noncontributory, compulsory pension plan for employees. Teamsters v. Daniel, p. 551.

PHYSICIANS. See **Constitutional Law**, II, 4.

PLEAS IN MURDER CASES. See **Constitutional Law**, III, 2; V; VI, 2.

"POLICE JURISDICTION" STATUTES. See **Constitutional Law**, II, 3; III, 4; **Jurisdiction.**

POLITICAL SUBDIVISIONS. See **Voting Rights Act of 1965**, 2.

PRESERVATION OF FETUS' LIFE AND HEALTH. See **Constitutional Law**, II, 4.

PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

PRIVATE COMMUNICATIONS AS PROTECTED SPEECH. See **Constitutional Law**, IV.

PRIVATE EXPRESS STATUTES. See **Stays**, 7.

PRIVATE MAIL SERVICE. See **Stays**, 7.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, V.

PROBABLE CAUSE FOR EXTRADITION. See **Extradition.**

PROCEDURAL DUE PROCESS. See **Constitutional Law**, II, 2.

PRODUCTION OF DOCUMENTS. See **Stays**, 3, 4, 8, 9, 19, 20.

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PROOF OF PATERNITY OF ILLEGITIMATE CHILDREN. See **Constitutional Law**, III, 3.

PROPERTY INTERESTS. See **Constitutional Law**, II, 2.

PROXY STATEMENTS. See **Constitutional Law**, VI, 1; **Judgments.**

PUBLIC EMPLOYEES. See **Constitutional Law**, IV; **Voting Rights Act of 1965**, 1.

PUBLIC SCHOOLS. See **Stays**, 12–18.

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RACIAL DISCRIMINATION. See **Stays**, 12–18.

RAILROAD EMPLOYEES. See **Railway Labor Act.**

RAILROAD RATES. See **Interstate Commerce Act.**

RAILROAD RETIREMENT ACT OF 1974.

Benefits—Divisibility under community property law.—Retirement benefits payable to railroad employee under Act may not be divided under state community property law. Hisquierdo v. Hisquierdo, p. 572.

RAILROAD RETIREMENT AMENDMENTS OF 1973. See **Interstate Commerce Act.**

RAILWAY LABOR ACT.

Untimely appeal from wrongful discharge—National Railroad Adjustment Board's determination—Unreviewability.—National Railroad Adjustment Board's determination that railroad employee had not filed appeal from allegedly wrongful discharge within time prescribed by governing collective-bargaining agreement was final and binding under § 3 First (q) of Act, and neither District Court nor Court of Appeals had authority to disturb such decision. Union Pacific R. Co. v. Sheehan, p. 89.

RATEMAKING AUTHORITY OF FEDERAL ENERGY REGULATORY COMMISSION. See Judicial Review; Natural Gas Act.

RATIONAL BASIS. See Constitutional Law, VII.

REAL PROPERTY TAXES. See Stays, 6.

REBUTTAL OF PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964.

REFERENDUMS. See Injunctions; Stays, 6.

REFUSALS TO QUASH SUBPOENA. See Stays, 19, 20.

REGISTRATION OF PESTICIDES. See Appeals, 1.

REGULATION OF AUTOMOBILE FRANCHISES OR DEALERSHIPS. See Constitutional Law, I; II, 1; Federal-State Relations.

REGULATION OF NATURAL GAS RATES. See Judicial Review; Natural Gas Act.

REHEARINGS. See Stays, 10.

RELOCATION OF AUTOMOBILE DEALERSHIPS. See Constitutional Law, I; II, 1; Federal-State Relations.

RETIREMENT BENEFITS FOR RAILROAD EMPLOYEES. See Railroad Retirement Act of 1974.

RETIREMENT TAXES ON RAILROADS. See Interstate Commerce Act.

RETRIALS. See Stays, 11.

REVOCATION OF BAIL. See Bail.

RIGHT OF INHERITANCE BY ILLEGITIMATE CHILDREN. See Constitutional Law, III, 3.

RIGHT OF INTERNATIONAL TRAVEL. See Constitutional Law, VII.

RIGHT TO JURY TRIAL. See Constitutional Law, VI.

ROYALTIES ON NATURAL GAS. See Judicial Review; Natural Gas Act.

SALE OF NATURAL GAS. See Judicial Review; Natural Gas Act.

SCHOOL BOARDS. See Voting Rights Act of 1965.

SCHOOL DESEGREGATION. See Stays, 12–18.

SEARCHES AND SEIZURES. See Constitutional Law, VIII; Stays, 5.

SECURITIES ACT OF 1933. See Pensions.

SECURITIES EXCHANGE ACT OF 1934. See **Pensions.**

SECURITIES REGULATION. See **Constitutional Law,** VI, 1; **Judgments; Pensions.**

SELECTION OF JURIES. See **Constitutional Law,** VI, 3–5.

SELF-INCRIMINATION. See **Constitutional Law,** V.

SENTENCES. See **Constitutional Law,** II, 5; III, 2; V; VI, 2.

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SEVENTH AMENDMENT. See **Constitutional Law,** VI, 1.

SHERMAN ACT. See **Federal-State Relations.**

SIXTH AMENDMENT. See **Constitutional Law,** VI, 2–5.

SOCIAL SECURITY ACT. See **Constitutional Law,** VII.

SOLICITATION OF EMPLOYEES BY LABOR UNIONS. See **National Labor Relations Act.**

STANDARD OF CARE FOR PRESERVING FETUS' LIFE AND HEALTH. See **Constitutional Law,** II, 4.

STANDING TO RAISE VICARIOUS FOURTH AMENDMENT CLAIMS. See **Constitutional Law,** VIII.

"STATE ACTION" EXEMPTION FROM ANTITRUST LAWS. See **Federal-State Relations.**

STATE JURISDICTION OVER INDIAN RESERVATIONS. See **Constitutional Law,** III, 1; **Indians.**

STATE REAL PROPERTY TAXES. See **Stays,** 6.

STATE REGULATION OF AUTOMOBILE FRANCHISES OR DEALERSHIPS. See **Constitutional Law,** I; II, 1; **Federal-State Relations.**

STAYS.

1. *Affirmance of contempt convictions.*—Application to stay Court of Appeals' judgment and mandate affirming applicants' criminal contempt convictions for violating District Court's injunction, is denied. Dolman v. United States (REHNQUIST, J., in chambers), p. 1395.

2. *Construction of dam.*—Application to stay District Court's order denying injunction against construction of Warm Springs Dam is denied. Warm Springs Dam Task Force v. Gribble (REHNQUIST, J., in chambers), p. 1392.

3. *Contempt—Newspaper—Refusal to obey subpoena—Criminal trial.*—Application by newspaper and reporter to stay New Jersey Supreme Court's order denying stay of trial court's order holding applicants in

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civil contempt for refusing to obey subpoena for documents for use at criminal trial, is denied. New York Times Co. v. Jascalevich (WHITE, J., in chambers), p. 1317.

4. *Contempt—Newspaper—Refusal to obey subpoena—Criminal trial.*—Reapplication by newspaper and reporter to stay New Jersey Supreme Court's order declining to stay civil contempt penalties imposed by trial court for refusing to obey subpoena to produce documents for *in camera* inspection at criminal trial, is denied. New York Times Co. v. Jascalevich (MARSHALL, J., in chambers), p. 1331.

5. *Drug convictions—Use of "beeper."*—Application to stay Court of Appeals' mandate affirming drug convictions based on evidence obtained from "beeper" attached to airplane used to import drugs, is denied. Miroyan v. United States (REHNQUIST, J., in chambers), p. 1338.

6. *Injunction—City expenditures supporting referendum proposal.*—Application to stay Massachusetts Supreme Judicial Court's judgment enjoining Boston from expending funds in support of referendum proposal changing state real property tax system, is granted. Boston v. Anderson (BRENNAN, J., in chambers), p. 1389.

7. *Injunction—Private mail service.*—Application to stay Court of Appeals' affirmance of injunction against operation of private hand-delivery mail service is denied. Brennan v. United States Postal Service (MARSHALL, J., in chambers), p. 1345.

8. *Mandamus—Production of medical records—Malpractice suit.*—Application to stay Texas Supreme Court's order denying mandamus to overturn trial judge's order directing applicant medical clinic to produce medical records in malpractice suit against it, is denied conditioned on protective order. Reproductive Services, Inc. v. Walker (BRENNAN, J., in chambers), p. 1307.

9. *Mandamus—Production of medical records—Malpractice suit.*—Reapplication to stay Texas Supreme Court's order denying mandamus to overturn trial judge's order directing applicant medical clinic to produce medical records in malpractice suit against it, is granted. Reproductive Services, Inc. v. Walker (BRENNAN, J., in chambers), p. 1354.

10. *Rehearing—Juvenile—Criminal trial—Admissibility of confession.*—Application to stay California Supreme Court's judgment ordering rehearing for juvenile on ground confession relied on in finding him guilty of murder was inadmissible, is granted. Fare v. Michael C. (REHNQUIST, J., in chambers), p. 1310.

11. *Retrial of murder prosecution.*—Application to stay California Superior Court's retrial of applicant for murder is denied. Divans v. California (REHNQUIST, J., in chambers), p. 1367.

STAYS—Continued.

12. *School desegregation order.*—Application to stay Court of Appeals' affirmance of desegregation order for Columbus, Ohio, school system is granted. Columbus Board of Education v. Penick (REHNQUIST, J., in chambers), p. 1348.

13. *School desegregation order.*—Application to stay Court of Appeals' judgment and mandate ordering school desegregation plan continued in Dayton, Ohio, is denied. Dayton Board of Education v. Brinkman (STEWART, J., in chambers), p. 1357.

14. *School desegregation order.*—Reapplication to stay Court of Appeals' judgment and mandate ordering school desegregation plan continued in Dayton, Ohio, is denied. Dayton Board of Education v. Brinkman (REHNQUIST, J., in chambers), p. 1358.

15. *School desegregation order.*—Application to stay Court of Appeals' affirmance of order prescribing school desegregation plan for Wilmington, Del., and suburban districts is denied. Buchanan v. Evans (BRENNAN, J., in chambers), p. 1360.

16. *School desegregation order.*—Reapplication to stay Court of Appeals' affirmance of school desegregation order for Wilmington, Del., and suburban districts is denied. Alexis I. du Pont School District v. Evans (REHNQUIST, J., in chambers), p. 1375.

17. *School desegregation order.*—Application to stay California Supreme Court's order vacating California Court of Appeal's stay of school desegregation order for Los Angeles is denied. Bustop, Inc. v. Los Angeles Board of Education (REHNQUIST, J., in chambers), p. 1380.

18. *School desegregation order.*—Reapplication to stay California Supreme Court's order vacating California Court of Appeal's stay of school desegregation order for Los Angeles is denied. Bustop, Inc. v. Los Angeles Board of Education (POWELL, J., in chambers), p. 1384.

19. *Subpoena—Newspaper—Documents for use at criminal trial.*—Application by newspaper and reporter to stay New Jersey Supreme Court's order denying stay of trial court's refusal to quash subpoena directing applicants to produce documents for use in criminal trial, is denied. New York Times Co. v. Jascalevich (WHITE, J., in chambers), p. 1301.

20. *Subpoena—Newspaper—Documents for use at criminal trial.*—Reapplication by newspaper and reporter to stay New Jersey Supreme Court's order denying stay of trial court's refusal to quash subpoena directing applicants to produce documents for use at criminal trial, is denied. New York Times Co. v. Jascalevich (MARSHALL, J., in chambers), p. 1304.

21. *Trial proceedings.*—Application to stay California Superior Court proceedings in which applicant is a defendant is granted temporarily.

STAYS—Continued.

United Methodist Council v. Superior Court (REHNQUIST, J., in chambers), p. 1355.

22. *Trial proceedings.*—Application to stay California Superior Court proceedings in which applicant is a defendant and in which court had denied applicant's motion to quash service of process, is denied. United Methodist Council v. Superior Court (REHNQUIST, J., in chambers), p. 1369.

SUBPOENAS. See **Stays**, 3, 4, 19, 20.

SUPPLEMENTAL SECURITY INCOME PROGRAM. See **Constitutional Law**, VII.

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, VIII.

SUPREMACY CLAUSE. See **Railroad Retirement Act of 1974.**

SUPREME COURT. See **Appeals.**

SYSTEMATIC EXCLUSION OF WOMEN FROM JURIES. See **Constitutional Law**, VI, 3–5.

TAXES. See **Internal Revenue Code; Interstate Commerce Act; Stays**, 6.

TEACHERS. See **Constitutional Law**, IV.

TERMINAL SURCHARGES BY RAILROADS. See **Interstate Commerce Act.**

THREE-JUDGE DISTRICT COURTS. See **Appeals; Jurisdiction.**

TIME LIMITATIONS FOR APPEAL FROM RAILROAD EMPLOYEE'S DISCHARGE. See **Railway Labor Act.**

TRAVEL RIGHTS. See **Constitutional Law**, VII.

TRIAL BY JURY. See **Constitutional Law**, VI.

TRUST FUNDS FOR INTERIM TERMINAL SURCHARGES BY RAILROADS. See **Interstate Commerce Act.**

UNDERREPRESENTATION OF WOMEN ON JURIES. See **Constitutional Law**, VI, 3–5.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNIFORM CRIMINAL EXTRADITION ACT. See **Extradition.**

UNIONS. See **National Labor Relations Act.**

UNPAID-BALANCE FINANCE CHARGES ON CREDIT CARDS. See **National Bank Act.**

UNPAID LEAVES OF ABSENCE FOR PUBLIC EMPLOYEES SEEKING ELECTIVE OFFICE. See **Voting Rights Act of 1965**, 1.

USURY. See **National Bank Act.**

VAGUENESS OF ABORTION REQUIREMENTS. See **Constitutional Law**, II, 4.

VIABILITY OF FETUSES. See **Constitutional Law**, II, 4.

VICARIOUS FOURTH AMENDMENT CLAIMS. See **Constitutional Law**, VIII.

VIOLATION OF INJUNCTIONS. See **Stays**, 1.

VOTING RIGHTS. See **Constitutional Law**, II, 3; III, 4; **Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

1. *County school board—Employees seeking elective office—Rule requiring unpaid leaves of absence.*—County school board rule requiring employees to take unpaid leaves of absence while campaigning for elective office is "a standard, practice, or procedure with respect to voting" within meaning of § 5 of Act. Dougherty County Bd. of Ed. v. White, p. 32.

2. *County school board as within Act.*—A county school board is a political subdivision within purview of Act when it exercises control over electoral process. Dougherty County Bd. of Ed. v. White, p. 32.

WARM SPRINGS DAM. See **Stays**, 2.

WASHINGTON. See **Constitutional Law**, III, 1; **Indians.**

WILMINGTON, DEL. See **Stays**, 15, 16.

WORDS AND PHRASES.

1. *"A standard, practice, or procedure with respect to voting."* § 5, Voting Rights Act of 1965, 42 U. S. C. § 1973c. Dougherty County Bd. of Ed. v. White, p. 32.

2. *"Political subdivision."* § 5, Voting Rights Act of 1965, 42 U. S. C. § 1973c. Dougherty County Bd. of Ed. v. White, p. 32.

3. *"Security."* § 2 (1), Securities Act of 1933, 15 U. S. C. § 77b (1); § 3 (a) (10), Securities Exchange Act of 1934, 15 U. S. C. § 78c (a) (10). Teamsters v. Daniel, p. 551.

WRITE-DOWNS OF EXCESS INVENTORY. See **Internal Revenue Code**, 2.

WRITS OF MANDAMUS. See **Stays**, 8, 9.

WRONGFUL DISCHARGES. See **Railway Labor Act.**

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