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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1978

FEBRUARY 21 THROUGH APRIL 13, 1979

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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Errata

437 U. S. 195, line 16: "them" should be "then".
439 U. S. 38, line 15: "393 U. S., at 565" should be "393 U. S., at 570".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.[1]
HENRY C. LIND, Reporter of Decisions.[2]
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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[1] Mr. Putzel retired as Reporter of Decisions on February 24, 1979. See *post*, p. v.

[2] Mr. Lind was appointed Reporter of Decisions effective February 25, 1979. See *post*, p. 940.

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.)

RETIREMENT OF REPORTER OF DECISIONS

SUPREME COURT OF THE UNITED STATES

TUESDAY, FEBRUARY 27, 1979

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

THE CHIEF JUSTICE said:

I am authorized to announce that Mr. Henry Putzel who has been the official Reporter of Decisions of the Court for 15 years has retired.

The work of the Reporter of Decisions is not known to the public but is of great importance to the courts, the legal profession, and to the public. Mr. Putzel has performed the exacting duties of that important office with great distinction and in keeping with the tradition of the 12 men who preceded him in that position. The Court wishes to pay tribute to him and wish him well for the years ahead.

Mr. Henry Lind, Mr Putzel's deputy, has been appointed to succeed him.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

FRIEDMAN ET AL. *v.* ROGERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

No. 77–1163. Argued November 8, 1978—Decided February 21, 1979*

Section 5.13 (d) of the Texas Optometry Act prohibits the practice of optometry under a trade name and § 2.02 requires that four of the six members of the Texas Optometry Board, which regulates the practice of optometry in the State, be members of the Texas Optometric Association (TOA), a professional organization of optometrists. Rogers, a Board member but ineligible for membership in TOA because of noncompliance with the code of ethics required for membership, brought an action challenging the constitutionality of these provisions. A three-judge District Court held that § 2.02 is related reasonably to the State's purpose of ensuring enforcement of the Act and therefore constitutional under the Equal Protection Clause of the Fourteenth Amendment, but that § 5.13 (d) is an unconstitutional restriction of the "free flow of commercial information" under the First Amendment. *Held:*

1. Section 5.13 (d) is constitutional. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, and *Bates* v. *State Bar of Arizona*, 433 U. S. 350, distinguished. Pp. 8–16.

(a) The use of a trade name in connection with optometrical practice conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time

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*Together with No. 77–1164, *Rogers et al.* v. *Friedman et al.;* and No. 77–1186, *Texas Optometric Assn., Inc.* v. *Rogers et al.*, also on appeal from the same court.

by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public. Pp. 11–13.

(b) The State's interest in protecting the public from such deceptive and misleading use of optometrical trade names is substantial and well demonstrated in this case, and the prohibition against the use of trade names is a constitutionally permissible regulation in furtherance of this interest. Rather than stifling commercial speech, such prohibition ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past. Pp. 13–16.

2. Section 2.02 is also constitutional. Pp. 17–19.

(a) The history of the Texas Optometry Act shows that such provision is related reasonably to the State's legitimate purpose of securing a regulatory board that will administer the Act faithfully. Pp. 17–18.

(b) While Rogers has a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Texas Optometry Board, his challenge to the fairness of the Board does not arise from any disciplinary proceeding against him. *Gibson* v. *Berryhill,* 411 U. S. 564, and *Wall* v. *American Optometric Assn.,* 379 F. Supp. 175 (ND Ga.), summarily aff'd *sub nom. Wall* v. *Hardwick,* 419 U. S. 888, distinguished. Pp. 18–19.

438 F. Supp. 428, affirmed in part and reversed and remanded in part.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined, and in Part III of which MARSHALL and BLACKMUN, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post,* p. 19.

Larry Niemann argued the cause and filed briefs for appellant in No. 77–1186.

Dorothy Prengler, Assistant Attorney General of Texas, argued the cause for appellants in No. 77–1163 and appellees in No. 77–1164. With her on the briefs were *John L. Hill,* Attorney General, *David Kendall,* First Assistant, and *Steve Bickerstaff* and *Richard Arnett,* Assistant Attorneys General.

Robert Q. Keith argued the cause and filed briefs for appel-

lants in No. 77–1164 and appellees in Nos. 77–1163 and 77–1186.†

MR. JUSTICE POWELL delivered the opinion of the Court.

Texas law prohibits the practice of optometry under a trade name. It also requires that four of the six members of the State's regulatory board, the Texas Optometry Board, be members of the Texas Optometric Association, a professional organization of optometrists. A three-judge District Court sustained the constitutionality of the statute governing the composition of the Texas Optometry Board against a challenge based on the First and Fourteenth Amendments. But it held that the prohibition of the practice of optometry under a trade name ran afoul of First Amendment protection of commercial speech. 438 F. Supp. 428 (ED Tex. 1977). These appeals and the cross-appeal bring both of the District Court's holdings before the Court.[1]

I

The Texas Legislature approved the Texas Optometry Act (Act) in 1969, repealing an earlier law governing the practice of optometry in the State. Section 2.01 of the Act establishes the Texas Optometry Board (Board) and § 2.02 prescribes the qualifications for Board members.[2] The Board

†*Ellis Lyons, Bennett Boskey, Edward A. Groobert,* and *Edwin E. Huddleson III* filed a brief for the American Optometric Assn. as *amicus curiae* urging reversal in Nos. 77–1163 and 77–1186 and affirmance in No. 77–1164.

[1] The District Court also sustained a constitutional challenge to the statute prohibiting price advertising by optometrists, but upheld the statute regulating the referral of patients by optometrists to opticians. Neither of these holdings has been appealed to this Court.

[2] Section 2.02 provides:

"To be qualified for appointment as a member of the board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified

is responsible for the administration of the Act, and has the authority to grant, renew, suspend, and revoke licenses to practice optometry in the State.[3] The Act imposes numerous regulations on the practice of optometry,[4] and on several aspects of the business of optometry.[5] Many of the Act's business regulations are contained in § 5.13, which restricts fee splitting by optometrists and forbids an optometrist to allow his name to be associated with any optometrical office

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from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association."

The Act is codified as Art. 4552 of the Texas Revised Civil Statutes Annotated (Vernon 1976). The section numbers of the Act and those within Art. 4552 are the same, and we will refer only to the Act.

[3] Act § 4.04.

[4] It is unlawful to practice optometry without a license. § 5.04. An applicant for a license to practice optometry must meet certain educational standards, § 3.02, and must pass an examination covering subjects specified in the Act. §§ 3.01, 3.05. Once licensed, an optometrist must meet an annual continuing education requirement to be eligible for renewal of his license. § 4.01B. Optometrists are forbidden to treat diseases of the eye, and to prescribe ophthalmic lenses without a personal examination of the patient. §§ 5.05, 5.07. In a section entitled "Basic competence," the Act specifies the elements of the examination that an optometrist must conduct before he prescribes for a patient. § 5.12.

[5] An optometrist must display his license in his office; when practicing away from his office, he must include his name and license number on a receipt given to each patient. § 5.01. Fraudulent, deceitful, and misleading advertising is proscribed by § 5.09, though the ban placed by that section on truthful price advertising has been nullified by the decision of the District Court in this case. See n. 1, *supra*. An optometrist is forbidden to advertise in his office windows or reception rooms, and to use certain types of signs to advertise his practice. § 5.11. The practice of optometry on the premises of mercantile establishments is regulated, § 5.14, and relationships between optometrists and opticians are restricted. § 5.15.

unless he is present and practicing there at least half of the hours that the office is open or half of the hours that he practices, whichever is less. Section 5.13 (d), at issue here, prohibits the practice of optometry under an assumed name, trade name, or corporate name.[6]

The dispute in this case grows out of the schism between "professional" and "commercial" optometrists in Texas. Although all optometrists in the State must meet the same licensing requirements and are subject to the same laws regulating their practices, they have divided themselves informally into two groups according to their divergent approaches to the practice of optometry.[7] Rogers, an advocate of the com-

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[6] Section 5.13 (d) provides in part:

"No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . ."

The scope of the prohibition in § 5.13 (d) is limited by various provisions in § 5.13 that make it clear that the Act does not proscribe partnerships for the practice of optometry, or the employment of optometrists by other optometrists. Regarding partnerships, counsel for the defendant Board members indicated at oral argument that § 5.13 (d) does not require that the names of all partners be included in the name used to identify the office of an optometrical partnership. Tr. of Oral Arg. 28. With respect to employees, § 5.13 (d) provides that "[o]ptometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed."

[7] No matter which of these business methods an optometrist adopts, the standards for licensing are uniformly high. An optometrist, to qualify for a license, must be a graduate of a university or college of optometry, and must pass an examination in "practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology and pathology of the eye as applied to optometry." Act §§ 3.02, 3.05. The dissenting opinion minimizes the professional character of an optometrist's services, stating that his duties are "confined . . . to measuring the powers of vision of the eye and fitting corrective lenses." *Post*, at 27. But it is clear from the requirements for licensing imposed

mercial practice of optometry and a member of the Board, commenced this action by filing a suit against the other five members of the Board. He sought declaratory and injunctive relief from the enforcement of § 2.02 of the Act, prescribing the composition of the Board, and § 5.13 (d) of the Act, prohibiting the practice of optometry under a trade name.

Section 2.02 of the Act requires that four of the six members of the Board must be members of a state organization affiliated with the American Optometric Association (AOA). The only such organization is the Texas Optometric Association (TOA), membership in which is restricted to optometrists who comply with the Code of Ethics of the AOA. Rogers and his fellow commercial optometrists are ineligible for membership in TOA because their business methods are at odds with the AOA Code of Ethics. In his complaint, Rogers alleged that he is deprived of equal protection and due process because he is eligible for only two of the six seats on the Board, and because he is subject to regulation by a Board composed primarily of members of the professional faction. Regarding § 5.13 (d), Rogers alleged that while the section prohibits optometrists from practicing under trade names, the prohibition is not extended to ophthalmologists. Rogers claimed that this disparity of treatment denies him the equal protection of the laws, as he is denied the right to conduct his optometrical practice as he has in the past under the name "Texas State Optical."

The three-judge District Court that was convened to consider Rogers' challenge to the constitutionality of the Texas law granted two motions to intervene. The TOA intervened as a defendant, adopting without alteration the position taken by the individual members of the Board whom Rogers originally named as defendants. The Texas Senior Citizens

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by the Act that the Texas Legislature considers optometry to be a professional service requiring in the public interest a high level of knowledge and training.

Association (TSCA) intervened on behalf of Rogers. This intervenor claimed that its members have a Fourteenth Amendment right to representation of the general public on the Board, and that because § 2.02 subjects "commercial" optometrists to regulation by "professional" optometrists, the statute discourages optometrists from communicating truthful commercial information to TSCA members. The TSCA also urged that the prohibition of the practice of optometry under a trade name violates the First Amendment right of its members to receive information about the availability of optometrical services.

The District Court found that § 2.02 is related reasonably to the State's purpose of ensuring enforcement of the Act and therefore constitutional under the Equal Protection Clause. As to the claim that a Board dominated by professional optometrists would treat commercial optometrists unfairly, the District Court held that any claim that non-TOA members did not receive due process when called before the Board could be settled when and if the problem arose.[8] Concluding that the proffered justifications for § 5.13 (d) were outweighed by the importance of the commercial speech in question, the District Court held § 5.13 (d) unconstitutional and enjoined its enforcement by the Board.

In No. 77–1164, Rogers and the TSCA appeal from the District Court's decision upholding the constitutionality of § 2.02. In Nos. 77–1163 and 77–1186, the members of the Board other than Rogers, and the TOA, respectively, appeal from the decision striking down § 5.13 (d) as unconstitutional. We noted probable jurisdiction, 435 U. S. 967, and now affirm the decision in No. 77–1164 and reverse in Nos. 77–1163 and 77–1186.

[8] The District Court also held that § 2.02 does not create a constitutionally impermissible irrebuttable presumption against nonmembers of TOA, and that its decision striking down the Act's prohibition of price advertising removed any danger that TOA's domination of the Board could be used to suppress truthful advertising by optometrists.

II

In holding that § 5.13 (d) infringes First Amendment rights, the District Court relied primarily on this Court's decisions in *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), and *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976.) A trade name is a form of advertising, it concluded, because after the name has been used for some time, people "identify the name with a certain quality of service and goods." It found specifically "that the Texas State Optical [TSO] name has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services," and rejected the argument that the TSO name misleads the public as to the identity of the optometrists with whom it deals. Balancing the constitutional interests in the commercial speech in question against the State's interest in regulating it, the District Court held that the prohibition of the use of trade names by § 5.13 (d) is an unconstitutional restriction of the "free flow of commercial information." 438 F. Supp., at 431.

A

A review of *Virginia Pharmacy* and *Bates* shows that the reliance on them by the court below, a reliance reasserted here by Rogers and the TSCA (the plaintiffs), was misplaced. At issue in *Virginia Pharmacy* was the validity of Virginia's law preventing advertising by pharmacists of the prices of prescription drugs. After establishing that the economic nature of the pharmacists' interest in the speech did not preclude First Amendment protection for their advertisements, the Court discussed the other interests in the advertisements that warranted First Amendment protection. To individual consumers, information about prices of prescription drugs at competing pharmacies "could mean the alleviation of physical pain or the enjoyment of basic necessities." 425 U. S., at 764. Society also has a strong interest in the free flow of com-

mercial information, both because the efficient allocation of resources depends upon informed consumer choices and because "even an individual advertisement, though entirely 'commercial,' may be of general public interest." *Ibid.* The Court acknowledged the important interest of the State in maintaining high standards among pharmacists, but concluded that this interest could not justify the ban on truthful price advertising when weighed against the First Amendment interests in the information conveyed.

In the next Term, the Court applied the rationale of *Virginia Pharmacy* to the advertising of certain information by lawyers. After weighing the First Amendment interests identified in *Virginia Pharmacy* against the State's interests in regulating the speech in question, the Court concluded that the truthful advertising of prices at which routine legal services will be performed also is protected by the First Amendment. *Bates* v. *State Bar of Arizona, supra.*

In both *Virginia Pharmacy* and *Bates,* we were careful to emphasize that "[s]ome forms of commercial speech regulation are surely permissible." *Virginia Pharmacy, supra,* at 770; accord, *Bates, supra,* at 383. For example, restrictions on the time, place, or manner of expression are permissible provided that "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Virginia Pharmacy, supra,* at 771. Equally permissible are restrictions on false, deceptive, and misleading commercial speech.

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974); *Konigsberg* v. *State Bar,* 366 U. S. 36, 49, and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no

obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.*, at 771–772 (footnote omitted); accord, *Bates, supra*, at 383.

Regarding the permissible extent of commercial-speech regulation, the Court observed in *Virginia Pharmacy* that certain features of commercial speech differentiate it from other varieties of speech in ways that suggest that "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." 425 U. S., at 772 n. 24. Because it relates to a particular product or service, commercial speech is more objective, hence more verifiable, than other varieties of speech. Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation. These attributes, the Court concluded, indicate that it is "appropriate to require that a commercial message appear in such a form . . . as [is] necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints." *Ibid.*; see *id.*, at 775–781 (STEWART, J., concurring).[9]

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[9] The application of First Amendment protection to speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973), has been recognized generally as a substantial extension of traditional free-speech doctrine which poses special problems not presented by other forms of protected speech. Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979); Note, 57 B. U. L. Rev. 833 (1977). Cf. Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205 (1976). By definition, commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech "a limited measure of protection," it is also true that "the State does

B

Once a trade name has been in use for some time, it may serve to identify an optometrical practice and also to convey information about the type, price, and quality of services offered for sale in that practice. In each role, the trade name is used as part of a proposal of a commercial transaction. Like the pharmacist who desired to advertise his prices in *Virginia Pharmacy,* the optometrist who uses a trade name "does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." *Id.,* at 761. His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.[10]

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not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447, 456 (1978). Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area. See, *e. g., id.,* at 462 n. 20 (overbreadth analysis not applicable to commercial speech). When dealing with restrictions on commercial speech we frame our decisions narrowly, "allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression." *Id.,* at 456.

[10] In *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978), the state law at issue prohibited the bank from publicizing its views on the merits of a proposed state constitutional amendment that was to be submitted to a referendum. In holding that the statute was unconstitutional, the Court stated that free discussion of governmental affairs "is at the heart of the First Amendment's protection." *Id.,* at 776. Similarly in *Bigelow* v. *Virginia,* 421 U. S. 809, 822 (1975), the Court noted explicitly that the constitutionally protected advertisement "did more than simply propose a commercial transaction." Such speech is categorically different from

A trade name is, however, a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates*. In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality.[11] Because these ill-defined associations of trade names

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the mere solicitation of patronage implicit in a trade name. See n. 9, *supra*.

[11] A trade name that has acquired such associations to the extent of establishing a secondary meaning becomes a valuable property of the business, protected from appropriation by others. The value as a business asset of a trade name with secondary meaning has been recognized in the limitations imposed on the Federal Trade Commission's remedial powers under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, which prohibits "unfair methods of competition." Because of the property value of trade names, the Court held in *FTC* v. *Royal Milling Co.*, 288 U. S. 212, 217–218 (1933), and *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608, 611–613 (1946), that before prohibiting the use of a trade name under § 5, the FTC must determine that the deceptive or misleading use of the name cannot be remedied by any means short of its proscription. But a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication. Accordingly, there is no First Amendment rule, comparable to the limitation on § 5, requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication.

There is no claim in this case that Rogers or other optometrists practicing under trade names have been deprived of property without due process of law, or indeed that their property has been taken at all. Accordingly, we do not have occasion to consider whether § 5.13 (k), the limited grandfather clause applicable to § 5.13 (d), would defeat such claims.

with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.

The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. By using different trade names at shops under his common ownership, an optometrist can give the public the false impression of competition among the shops. The use of a trade name also facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct the State rationally may wish to discourage while not prohibiting commercial optometrical practice altogether.

The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar when in 1969 it enacted § 5.13 (d). The forerunner of § 5.13 (d) was adopted as part of a "Professional Responsibility Rule" by the Texas State Board of Examiners in Optometry in 1959.[12] In a deci-

[12] The Rule provided in part that no optometrist should practice under or use an assumed name in connection with his practice. Partners were allowed to practice under their full or last names, however, and optometrists employed by other optometrists could practice under their own names in an office listed in the names of their employers.

When the Texas Legislature enacted the Texas Optometry Act in 1969, it included the Professional Responsibility Rule, with only minor changes, as § 5.13 of the Act. The purpose of the legislature was to continue the

sion upholding the validity of the Rule, the Texas Supreme Court reviewed some of the practices that had prompted its adoption. *Texas State Bd. of Examiners in Optometry* v. *Carp,* 412 S. W. 2d 307, appeal dismissed and cert. denied, 389 U. S. 52 (1967). One of the plaintiffs in that case, Carp, operated 71 optometrical offices in Texas under at least 10 different trade names. From time to time, he changed the trade names of various shops, though the licensed optometrists practicing in each shop remained the same. He purchased the practices of other optometrists and continued to practice under their names, even though they were no longer associated with the practice. In several instances, Carp used different trade names on offices located in close proximity to one another and selling the same optical goods and services. The offices were under common management, and had a common staff of optometrists, but the use of different trade names facilitated advertising that gave the impression of competition among the offices.

The Texas court found that Carp used trade names to give a misleading impression of competitive ownership and management of his shops. It also found that Rogers, a party to this suit and a plaintiff in *Carp,* had used a trade name to convey the impression of standardized optometrical care. All 82 of his shops went under the trade name "Texas State Optical" or "TSO," and he advertised "scientific TSO eye examination[s]" available in every shop. 412 S. W. 2d, at 312. The TSO advertising was calculated as well, the court found, to give "the impression that [Rogers or one of his brothers] is present at a particular office. Actually they have

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protection of the public from false, deceptive, and misleading practices by optometrists, as the preamble to § 5.13 makes clear.

"The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship."

neither been inside nor seen some of their eighty-two offices distributed generally over Texas." *Id.*, at 313. Even if Rogers' use and advertising of the trade name were not in fact misleading, they were an example of the use of a trade name to facilitate the large-scale commercialization which enhances the opportunity for misleading practices.[13]

It is clear that the State's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated.[14] We are convinced that § 5.13 (d) is a constitutionally permissible state regulation in furtherance of this interest. We emphasize, in so holding, that the restriction on the use of trade names has

[13] Although the individual defendants and the TOA (collectively, the defendants) rely primarily on *Carp* to establish the history of false and misleading uses of optometrical trade names, some evidence of such practices also was included in the deposition testimony presented to the District Court. A former associate of Carp's testified to some of the trade-name abuses that had occurred in their business. Shannon Deposition 8. Rogers' testimony showed that the "Texas State Optical" name was used by offices wholly owned by him, partly owned by him, and by offices in which he had no ownership interest. The dissenting opinion states that the "Rogers organization is able to offer and enforce a degree of uniformity in care at all its offices . . . ." *Post*, at 21. This was not Rogers' testimony. He stated that he exercised "no control whatsoever" over "office policy routines" in those TSO offices in which he owned no interest. Rogers Deposition 16. It appears from Rogers' testimony that his primary business relationship with such offices was their participation in the TSO advertising and their purchase of materials and equipment from his supply house. *Id.*, at 16–18, 22–23.

[14] The plaintiffs argue that the fact that the public might be subject to similar deception by optometrists who do not use trade names but practice in partnerships or with numerous employees shows that the State actually was not concerned with misleading and deceptive practices when it enacted § 5.13 (d). The plaintiffs have not attempted to show, however, that any of the demonstrated abuses associated with the use of trade names also has occurred apart from their use. Tr. of Oral Arg. 29. There is no requirement that the State legislate more broadly than required by the problem it seeks to remedy. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

only the most incidental effect on the content of the commercial speech of Texas optometrists. As noted above, a trade name conveys information only because of the associations that grow up over time between the name and a certain level of price and quality of service. Moreover, the information associated with a trade name is largely factual, concerning the kind and price of the services offered for sale. Since the Act does not prohibit or limit the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates*, the factual information associated with trade names may be communicated freely and explicitly to the public. An optometrist may advertise the type of service he offers, the prices he charges,[15] and whether he practices as a partner, associate, or employee with other optometrists.[16] Rather than stifling commercial speech, § 5.13 (d) ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name. In sum, Texas has done no more than require that commercial information about optometrical services "appear in such a form . . . as [is] necessary to prevent its being deceptive." *Virginia Pharmacy*, 425 U. S., at 772 n. 24.[17]

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[15] As adopted, § 5.09 of the Act proscribed price advertising by optometrists. But the court below invalidated that prohibition, and its ruling has not been appealed. See n. 1, *supra*.

[16] As stated *supra*, at 4–5, § 5.13 allows an optometrist to associate his name only with an office in which he practices. § 5.13 (e).

[17] Rogers did not produce any evidence in support of his claim that § 5.13 (d) violates his right to equal protection of the laws because it does not apply to ophthalmologists. Even assuming what Rogers did not demonstrate, that ophthalmologists are in fact free of any regulation comparable to § 5.13 (d), the uncontested evidence of the defendants showed that the regulations contained in that section are a response to the particular history of the business of optometry. *E. g.*, Friedman Deposition 138–142; Tr. of Oral Arg. 5. The plaintiffs did not attempt to show

III

We stated the applicable constitutional rule for reviewing equal protection challenges to local economic regulations such as § 2.02 in *New Orleans* v. *Dukes,* 427 U. S. 297, 303 (1976).

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g., Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

The history of the Act shows that § 2.02 is related reasonably to the State's legitimate purpose of securing a Board that will administer the Act faithfully.

Prior to 1967, the TOA dominated the State Board of Examiners; during that period, the State Board adopted various rules for the regulation of the optometrical profession, including the Professional Responsibility Rule. Between 1967 and 1969, the commercial optometrists secured a majority on the State Board and took steps to repeal the Professional Responsibility Rule. This precipitated a legislative struggle between the commercial and professional optom-

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that there was any comparable history of the use of trade names by ophthalmologists.

Because we conclude that § 5.13 (d) is a constitutionally permissible restriction on deceptive and misleading commercial speech, we need not consider the other justifications for the statute suggested by the defendants. We leave for another day the question whether § 5.13 (d) is affected by recently promulgated regulations of the Federal Trade Commission concerning the advertising of ophthalmic goods and services. 43 Fed. Reg. 23992 (1978).

etrists which ended in the passage of the Act in 1969. At that time the legislature enacted into law, with certain modifications, the Professional Responsibility Rule long supported by the TOA, and created the Board to administer the Act. In view of its experience with the commercial and professional optometrists preceding the passage of the Act,[18] it was reasonable for the legislature to require that a majority of the Board be drawn from a professional organization that had demonstrated consistent support for the rules that the Board would be responsible for enforcing. Nor is there any constitutional basis for TSCA's due process claim that the legislature is required to place a representative of consumers on the Board.[19]

Although Rogers has no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry, he does have a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board. *Gibson* v. *Berryhill*, 411 U. S. 564 (1973); *Wall* v. *American Optometric Assn.*, 379 F. Supp. 175 (ND Ga.), summarily aff'd *sub nom. Wall* v. *Hardwick*, 419 U. S. 888 (1974). In both *Gibson* and *Wall*, however, disciplinary proceedings had been instituted against the plaintiffs, and the courts were able to examine in a particular context the possibility that the members of the regulatory board might have personal interests that precluded a fair and impartial hearing of the charges. Finding the presence of such prejudicial interests, it was appropriate for the courts to enjoin further proceedings against the plaintiffs. *E. g., Gibson, supra,*

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[18] Riley Deposition, App. A–209 to A–236, A–251 to A–252.

[19] The Due Process Clause imposes only broad limits, not exceeded here, on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 164–167 (1973); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955). Cf. *Weinberger* v. *Salfi*, 422 U. S. 749, 767–774 (1975).

at 570, 578–579 In contrast, Rogers' challenge to the fairness of the Board does not arise from any disciplinary proceeding against him.[20]

IV

The portion of the District Court's judgment appealed from in No. 77–1164, sustaining the constitutionality of § 2.02, is affirmed. That part of the District Court's judgment appealed from in Nos. 77–1163 and 77–1186, declaring § 5.13 (d) unconstitutional insofar as it proscribes the use of trade names by optometrists, is reversed. The case is remanded with instructions to dissolve the injunction against the enforcement of § 5.13 (d).

So ordered.

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

I join Part III of the Court's opinion and its judgment of affirmance with respect to No. 77–1164 (the § 2.02, or Texas Optometry Board composition, issue). I dissent, however, from Part II of the Court's opinion and from its judgment of reversal with respect to Nos. 77–1163 and 77–1186 (the § 5.13 (d), or trade-name, issue).

I do not agree with the Court's holding that the Texas Optometry Act's § 5.13 (d), which bans the use of a trade name "in connection with" the practice of optometry in the State, is constitutional. In my view, the Court's restricted

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[20] Since there is no support in the record for TSCA's speculation that the TOA members on the Board will act in excess of their authority by discouraging lawful advertising by optometrists, there is no merit in TSCA's claim that § 2.02 violates its members' First Amendment rights by creating a Board with a majority drawn from the TOA. The claim of the plaintiffs that § 2.02 is inconsistent with § 1 of the Sherman Antitrust Act, 15 U. S. C. § 1, was neither alleged in the District Court nor mentioned in the jurisdictional statement in this Court. The plaintiffs' attempt to raise the issue in their brief in No. 77–1164 does not put the question properly before us.

analysis of the nature of a trade name overestimates the potential for deception and underestimates the harmful impact of the broad sweep of § 5.13 (d). The Court also ignores the fact that in Texas the practice of "commercial" optometry is *legal*. It has never been outlawed or made illegal. This inescapable conclusion is one of profound importance in the measure of the First Amendment rights that are asserted here. It follows, it seems to me, that Texas has abridged the First Amendment rights not only of Doctor Rogers but also of the members of the intervenor-plaintiff Texas Senior Citizens Association by absolutely prohibiting, without reasonable justification, the dissemination of truthful information about wholly legal commercial conduct.

I

The First Amendment protects the "free flow of commercial information." *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 764 (1976). It prohibits a State from banning residential "For Sale" signs, *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977), or from disciplining lawyers who advertise the availability of routine professional services, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), or from preventing pharmacists from disseminating the prices at which they will sell prescription drugs, *Virginia Pharmacy Board, supra*. In each of these cases, the Court has balanced the public and private interests that the First Amendment protects against the justifications proffered by the State. Without engaging in any rigid categorization of the degree of scrutiny required, the Court has distinguished between permissible and impermissible forms of state regulation.[1]

In 1976, Texas had 934 resident licensed optometrists divided almost evenly between "professional" and "commer-

[1] See Canby & Gellhorn, Physician Advertising: The First Amendment and the Sherman Act, 1978 Duke L. J. 543, 552–554.

cial" factions. Rogers is the leader of the commercial forces. He and his associates operate more than 100 optometry offices. Before the enactment of § 5.13 (d) in 1969, their offices used, and where still allowed by a grandfather provision, § 5.13 (k) (which, but for the decision of the District Court, would have expired on January 1, 1979), continue to use, the name Texas State Optical, or TSO. An optometrist who agrees to participate with Rogers in his organization must obey an elaborate set of restrictions on pain of termination. He must purchase all inventory and supplies from Rogers Brothers; do all laboratory work at their laboratory; abide by their policies concerning the examination of patients; take patients on a first-come-first-served basis rather than by appointment; and retain Rogers Brothers at 4% of net cash to do all accounting and advertising. App. A–71 to A–98. As a result of these and other rules, the Rogers organization is able to offer and enforce a degree of uniformity in care at all its offices along with other consumer benefits, namely, sales on credit, adjustment of frames and lenses without cost, one-stop care, and transferability of patient records among Texas State Optical offices.[2] The TSO chain typifies commercial optometry, with its emphasis on advertising, volume, and speed of service.

The Court today glosses over the important private and public interests that support Rogers' use of his trade name.

[2] Rogers owns some Texas State Optical offices; in others he is merely a partner; and in still others he has no financial interest other than licensing the TSO trade name and selling optical supplies and services to the "associated" optometrist. The Court, *ante,* at 15 n. 13, relies on Rogers' deposition testimony to suggest that he exerts no control at all over associated offices. The representative contract introduced into evidence, however, requires that, as a condition of using the TSO trade name, the licensee must operate the office in accord with TSO policy and purchase all optical material from Rogers Brothers Laboratory. App. A–82 to A–83. See Brief for Appellee Texas Optometric Association, Inc., in No. 77–1164, pp. 16–18. The parties do not question the District Court's factual finding that the TSO trade name is associated with certain standards of quality. See *infra,* at 23.

For those who need them, eyeglasses are one of the "basic necessities" of life in which a consumer's interest "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Pharmacy Board,* 425 U. S., at 763–764. For the mobile consumer, the Rogers trade name provides a valuable service.[3] Lee Kenneth Benham, a professor and economist whose studies in this area have been relied upon by the Federal Trade Commission,[4] testified in a deposition which is part of the record here:

> "One of the most valuable assets which individuals have in this large mobile country is their knowledge about trade names. Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services, and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case. This can perhaps be illustrated by pointing out the information provided by such names as Sears, Neiman Marcus or Volkswagen. This also means that firms have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name: the entire

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[3] Trade names are a vital form of commercial speech. It has even been suggested that commercial speech can be defined as "speech referring to a brand name product or service that is not itself protected by the first amendment, issued by a speaker with a financial interest in the sale of the product or service or in the distribution of the speech." Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 254 (1976).

[4] The Federal Trade Commission has promulgated a rule pre-empting certain state laws that restrict advertising of ophthalmic goods and services. 43 Fed. Reg. 24006 (1978). The Commission's statement of basis and purpose characterizes the Benham studies as "reliable." *Id.,* at 23995. See Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972); Benham & Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J. Law & Econ. 421 (1975).

package they offer is being judged continuously by consumers on the basis of the samples they purchase." App. A–336.

And the District Court found in this case that "the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services." 438 F. Supp. 428, 431 (ED Tex. 1977).

The Rogers trade name also serves a distinctly public interest. To that part of the general public that is not then in the market for eye care, a trade name is the distinguishing characteristic of the commercial optometrist. The professional faction does not use trade names. Without trade names, an entirely legal but regulated mode of organizing optometrical practice would be banished from that public's view. The appellants in Nos. 77–1163 and 77–1186 do not argue that the Rogers partnership contracts run afoul of any statute other than § 5.13 (d). The Act, indeed, explicitly approves other incidents of commercial optometry, including the leasing of space on a percentage basis, § 5.13 (b); the hiring of professional employees without regard to supervision, § 5.13 (c); and the leasing of space in mercantile establishments, § 5.14. The Texas Optometry Act, with limited exceptions in § 5.09 (a), does not prohibit advertising. Yet § 5.13 (d) will bar Rogers from telling both consumers and the rest of the public that the TSO organization even exists. It totally forbids the use of a trade name "in connection with his practice of optometry." [5]

The political impact of forcing TSO out of the public view cannot be ignored. Under the Texas Sunset Act, the Texas Optometry Act will expire September 1, 1981. Tex. Rev. Civ. Stat. Ann., Art. 4552–2.01a (Vernon Supp. 1978–1979). By

[5] Rogers may not even inform the public that he is associated with any 1 of the more than 100 offices his organization controls, unless he spends a specified amount of his practice time at that office. See § 5.13 (e).

preventing TSO from advertising its existence, the State has struck a direct blow at Rogers' ability to campaign for the re-enactment of the portions of the statute he favors, and for the demise of those, such as § 2.02, that he finds objectionable. The citizen is more likely to pay attention to the head of a statewide organization whose reputation is known than to an optometrist whose influence is obscurely perceived.

II

The Court characterizes as "substantial and well demonstrated" the state interests offered to support suppression of this valuable information. *Ante,* at 15. It first contends that because a trade name has no intrinsic meaning, it can cause deception. The name may remain unchanged, it is pointed out, despite a change in the identities of the optometrists who employ it. Secondly, the Court says that the State may ban trade names to discourage commercial optometry while stopping short of prohibiting it altogether. Neither of these interests justifies a statute so sweeping as § 5.13 (d).

A

Because a trade name has no intrinsic meaning, it cannot by itself be deceptive. A trade name will deceive only if it is used in a misleading context. The hypotheticals posed by the Court, and the facts of *Texas State Bd. of Examiners in Optometry* v. *Carp,* 412 S. W. 2d 307 (Tex.), appeal dismissed and cert. denied, 389 U. S. 52 (1967), concern the use of optometric trade names in situations where the name of the practicing optometrist is kept concealed. The deception lies not in the use of the trade name, but in the failure simultaneously to disclose the name of the optometrist. In the present case, counsel for the State conceded at oral argument that § 5.13 (d) prohibits the use of a trade name even when the optometrist's name is also prominently displayed. Tr. of Oral Arg. 39. It thus prohibits wholly truthful speech that

is entirely removed from the justification on which the Court most heavily relies to support the statute.

The Court suggests that a State may prohibit "misleading commercial speech" even though it is "offset" by the publication of clarifying information. *Ante,* at 12 n. 11. Corrected falsehood, however, is truth, and, absent some other regulatory justification, a State may not prohibit the dissemination of truthful commercial information. By disclosing his individual name along with his trade name, the commercial optometrist acts in the spirit of our First Amendment jurisprudence, where traditionally "the remedy to be applied is more speech, not enforced silence." *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S., at 97, quoting *Whitney* v. *California,* 274 U. S. 357, 377 (1927) (Brandeis, J., concurring).[6] The ultimate irony of the Court's analysis is that § 5.13 (d), because of its broad sweep, actually encourages deception. That statute, in conjunction with § 5.13 (e),[7] prevents the consumer from ever

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[6] The Court's prior cases reviewing orders of the Federal Trade Commission have recognized that, when a trade name is alleged to be deceptive, the deception can be cured by "requiring proper qualifying words to be used in immediate connection with the names." *FTC* v. *Royal Milling Co.,* 288 U. S. 212, 217 (1933); see *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 611–613 (1946). The Court would distinguish these cases, *ante,* at 12 n. 11, on the ground that the corporate interest protected there arose under the Fifth Amendment rather than the First. No justification for that distinction is offered.

[7] Section 5.13 in pertinent part reads:

"(e) No optometrist shall use, cause or allow to be used, his name or professional identification, as authorized by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

. . . . .

"(g) The requirement of Subsections (e) and (f) of this section that an optometrist be 'actually present' in an office, location or place of

discovering that Rogers controls and in some cases employs the optometrist upon whom the patient has relied for care. In effect, the statute conceals the fact that a particular practitioner is engaged in commercial rather than professional optometry, and so deprives consumers of information that may well be thought relevant to the selection of an optometrist.

B

The second justification proffered by the Court is that a State, while not prohibiting commercial optometry practice altogether, could ban the use of trade names in order to discourage commercial optometry. Just last Term, however, the Court rejected the argument that the States' power to create, regulate, or wind up a corporation by itself could justify a restriction on that corporation's speech. See *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 780 n. 16 (1978). Moreover, this justification ignores the substantial First Amendment interest in the dissemination of truthful information about legally available professional services. See *Bigelow* v. *Virginia,* 421 U. S. 809, 822–825 (1975). It is not without

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practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

"(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

"(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

"(h) Nothing in this section shall be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily."

As indicated by the Court's opinion, *ante,* at 16, and n. 16, an optometrist may not advertise that he is the employee of another optometrist unless the employer is "actually present and practicing" at the same location with the employee. Conversely, when the employer's name can be advertised, the employee's name need not be mentioned.

significance that most of the persons influenced by a trade name are those who, by experience or by reputation, know the quality of service for which the trade name stands. The determination that banning trade names would discourage commercial optometry, therefore, necessarily relies on an assumption that persons previously served thought that the trade-name practitioner had performed an acceptable service. If the prior experience had been bad, the consumer would want to know the trade name in order to avoid those who practice under it. The first and second stated purposes of § 5.13 are "to protect the public in the practice of optometry," and to "better enable members of the public to fix professional responsibility." These purposes are ill-served by a statute that hinders consumers from enlisting the services of an organization they have found helpful, and so, in effect, prevents consumers from protecting themselves.

The Court repeatedly has rejected the "highly paternalistic" approach implicit in this justification. See *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S., at 791 n. 31. There is nothing about the nature of an optometrist's services that justifies adopting an approach of this kind here. An optometrist's duties are confined by the statute, § 1.02 (1), to measuring the powers of vision of the eye and fitting corrective lenses. See *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 486 (1955) (defining terms). The optometrist does not treat disease. His service is highly standardized. Each step is controlled by statute. § 5.12. Many of his functions are so mechanical that they can be duplicated by machines that would enable a patient to measure his own vision.[8] Patients participate in the refraction process, and they frequently can easily assess

[8] See Bannon, A New Automated Subjective Optometer, 54 Am. J. Optometry & Phys. Optics 433 (1977); Guyton, Automated refraction, 13 Invest. Ophthalmology 814 (1974); Marg, Anderson, Chung, & Neroth, Computer-Assisted Eye Examination VI. Identification and Correction of Errors in the Refractor III System for Subjective Examination, 55 Am. J. Optometry & Phys. Optics 249 (1978).

the quality of service rendered. The cost per visit is low enough—$15 to $35—that comparison shopping is sometimes possible See App. A–420. Because more than half the Nation's population uses eyeglasses, 43 Fed. Reg. 23992 (1978), reputation information is readily available. In this context, the First Amendment forbids the choice which Texas has made to shut off entirely the flow of commercial information to consumers who, we have assumed, "will perceive their own best interests if only they are well enough informed." *Virginia Pharmacy Board,* 425 U. S., at 770.

Because § 5.13 (d) absolutely prohibits the dissemination of truthful information about Rogers' wholly legal commercial conduct to consumers and a public who have a strong interest in hearing it, I would affirm the District Court's judgment holding that § 5.13 (d) is unconstitutional.

Syllabus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* RASMUSSEN ET AL.

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

No. 77–1465. Argued November 28, 1978—Decided February 21, 1979*

The Longshoremen's and Harbor Workers' Compensation Act (Act) Amendments of 1972, to combat inflation, replaced the Act's $70 maximum limitation on weekly disability benefits with a four-step limitation scheme tied to specified percentages of the "applicable national average weekly wage" determined annually by the Secretary of Labor. § 6 (b) (1). At the same time, death benefits to surviving spouses and children were increased, respectively, from 35% to 50% and from 15% to 16⅔% of the deceased's average weekly wages. Total weekly death benefits were still limited to 66⅔% of the deceased's average weekly wages, but the former specific dollar minimum and maximum limitations on average weekly wages were replaced by a provision dealing only with a minimum limitation tied to the applicable national average weekly wage. Thus, as amended, § 9 (e) provides that "[i]n computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6 (b) but the total weekly benefits shall not exceed the average weekly wages of the deceased." Respondents, the widow and son of a covered employee, claimed combined death benefits ($532 per week) equal to 66⅔% of the deceased's average weekly wages. The employer, its insurance carrier, and the Director of the Department of Labor's Office of Workers' Compensation Programs (petitioners) contended that § 6 (b)(1)'s limitation on disability payments (then $167 per week), was meant to apply to death benefits as well as disability benefits and that Congress' failure to place a maximum on death benefits when it amended § 9 (e) was inadvertent. An administrative decision in respondents' favor was affirmed by the Court of Appeals. *Held:* Death benefits payable under the Act are not subject to the maximum limitations placed on disability payments

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*Together with No. 77–1491, *Geo Control, Inc., et al.*, v. *Rasmussen et al.*, also on certiorari to the same court.

by § 6 (b) (1). This conclusion is supported by both the language and legislative history of the 1972 Amendments. Pp. 35–47.

(a) That the omission of a maximum limitation on death benefits was inadvertent is disproved by the legislative history of the 1972 Amendments, especially the pertinent Committee Reports, which clearly reflect the Committees' understanding that the minimum and maximum limitations on death benefits of former § 9 (e) were being eliminated and that only a minimum benefits provision tied to the applicable national average weekly wage was being substituted in their place. Pp. 37–41.

(b) Section 6 (d), which provides that "determinations" under § 6 "with respect to a period" shall apply to employees currently receiving disability benefits or survivors currently receiving death benefits during such period, does not render the maximum limitations contained in § 6 (b) (1) applicable to death benefits. Congress' use of the word "determinations" in § 6 (d) and of its verb form elsewhere in § 6 strongly suggests that it intended the term to refer only to the Secretary of Labor's annual *determination* under § 6 (b) (3) of the national average weekly wage, not to the mathematical *computation* of disability benefit maximums contemplated under § 6 (b) (1). This view is confirmed by § 6 (d)'s legislative history. Pp. 41–44.

(c) Since both the language and legislative history of the 1972 Amendments show that Congress' omission of a ceiling on death benefits was intentional, this Court must reject petitioners' suggested interpretation of the Act. Pp. 45–47.

567 F. 2d 1385, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except POWELL, J., who took no part in the consideration or decision of the cases.

Kent L. Jones argued *pro hac vice* for petitioner in No. 77–1465. On the brief were *Solicitor General McCree, Louis F. Claiborne, Laurie M. Streeter,* and *Joshua T. Gillelan II. Albert H. Sennett* argued the cause for petitioners in No. 77–1491. With him on the brief was *Frank B. Hugg.*

James Buckley Ostmann argued the cause for respondents in both cases. With him on the brief was *John R. Coyle.*†

† *David Bonderman* filed a brief for the American Insurance Assn. et al. as *amici curiae* urging reversal in both cases.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In May 1973 William Rasmussen was employed as a hydrologist by Geo Control, Inc., which was under contract with the United States to perform work in South Vietnam. Rasmussen was fatally injured during the course of his employment when the vehicle in which he was riding was blown up by a land mine. His employment was within the coverage of the Defense Base Act, 42 U. S. C. § 1651 *et seq.*, which incorporates the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (Act). It is undisputed that Rasmussen's surviving widow and son,[1] respondents here, are entitled to death benefits under § 9 of the Act, 33 U. S. C. § 909; the issue dividing the parties and the Courts of Appeals[2] is whether *death* benefits payable under the Act are subject to the maximum limits expressly placed on *disability* payments by § 6 (b)(1). The Act's language and legislative history persuade us that they are not.

I

Prior to passage of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, both disability and death benefits payable under the Act were subject to the same minimum and maximum limitations. Former § 6 (b) limited disability benefits to no more than $70 per week and no less than $18 per week. Death benefits were limited under § 9 (b) to 66⅔% of the deceased's "average weekly wages," which were "considered to have been not more than $105 nor less than $27 . . . ." 33 U. S. C. § 909 (e) (1970

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[1] Rasmussen's surviving son is entitled to benefits until his 18th birthday, or, if he qualifies under the Act as a student, until his 23d birthday. See 33 U. S. C. §§ 902 (14), (18), and 909 (b).

[2] Compare 567 F. 2d 1385 (case below), with *Director, Office of Workers' Comp.* v. *O'Keefe*, 545 F. 2d 337 (CA3 1976), and *Director, Office of Workers' Comp.* v. *Boughman*, 178 U. S. App. D. C. 132, 545 F. 2d 210 (1976).

ed.). Accordingly, weekly death benefits, like disability benefits, could not exceed $70 nor be less than $18.[3] The $70 maximum on death and disability benefits, established in 1961, gradually lost real value as inflation exacted its annual toll,[4] and in 1972 Congress moved to give covered workers added protection.

The basic formula for determining compensation for permanent total disability—66⅔% of the employee's average weekly wages—was left unchanged by the 1972 Amendments. The Amendments, however, replaced the $70 maximum limitation on disability benefits with an entirely new limitation scheme tied to the "applicable national average weekly wage." New § 6 (b)(1) provides in pertinent part:

"[C]ompensation for disability shall not exceed the

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[3] Under former § 9 (b) a surviving widow was entitled to 35% of her deceased husband's average wages and an additional 15% of the deceased's wages for each surviving child, subject to a limit of 66⅔% of the deceased's wages. Thus, a widow without children, although nominally entitled by former § 9 (b) to 35% of her deceased husband's average weekly wages was actually entitled only to 35% of $105. A widow with three or more children, however, was entitled to the maximum aggregate percentage of weekly wages (66⅔), which would result in an award of $70 in weekly death benefits. The 1972 Amendments increased the percentage shares of surviving widows and children to 50 and 16⅔, respectively, although the maximum aggregate percentage limitation of 66⅔ was retained.

[4] According to 1972 congressional reports, the average weekly wage for private, nonagricultural employees was $135 a week, while longshoremen averaged over $200 per week in some ports. H. R. Rep. No. 92–1441, p. 1 (1972), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 207 (1972) (hereinafter Leg. Hist.); S. Rep. No. 92–1125, p. 4 (1972), Leg. Hist. 66. The $70 limitation on death and disability benefits precluded most employees and their survivors from receiving 66⅔% of the employee's average weekly wages, and in some cases the $70 maximum constituted as little as 30% of the employee's average weekly wages. S. Rep. No. 92–1125, p. 5, Leg. Hist. 67.

following percentages of the applicable national average weekly wage as determined by the Secretary . . .

"(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

"(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

"(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

"(D) 200 per centum beginning October 1, 1975." 33 U. S. C. § 906 (b)(1).

The "applicable national average weekly wage" is determined annually by the Secretary of Labor. 33 U. S. C. § 906 (b)(3). The Senate Committee on Labor and Public Welfare estimated that approximately 90% of the disabled workers covered under the amended Act would receive benefits equal to a full 66⅔% of their average weekly wages. S. Rep. No. 92–1125, p. 5 (1972), Legislative History of the Longshoremen's and Harbor Workers' Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 67 (1972) (hereinafter Leg. Hist.). The four-step phase-in of the section's maximum limitation from 125% to 200% of the applicable national average weekly wage was designed to ease the impact on covered employers of the increase in compensation payments, which Congress expected to at least double for most covered workers. *Ibid.*

Section 9 (b) was amended in 1972 to increase death benefits to surviving spouses from 35% to 50% of the deceased's average weekly wages. Death benefits to surviving children were increased from 15% to 16⅔% of the deceased's average weekly wages. Total weekly death benefits payable to survivors, however, are still limited to 66⅔% of the deceased's average weekly wage. 33 U. S. C. § 909 (b). The 1972 Amendments deleted the specific dollar minimum and maximum limitations on average weekly wages and substi-

tuted in their place a provision dealing only with a minimum limitation, which was tied to the applicable national average weekly wage. Section 9 (e) now provides:

> "In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6 (b) but the total weekly benefits shall not exceed the average weekly wages of the deceased." 33 U. S. C. § 909 (e).

Pursuant to § 9, respondents claimed combined death benefits of $532 per week, two-thirds of Rasmussen's average weekly wages of $798. Geo Control, its insurance carrier, and the Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), petitioners here, contended that the limitations on disability payments contained in § 6 (b)(1) of the Act—initially $167 per week and now $396.50 per week [5]—apply to death benefits in the same manner as to benefits for permanent total disability.[6] The

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[5] The national average weekly wages determined by the Secretary of Labor since 1972, along with corresponding maximum benefit levels under § 6 (b)(1), are as follows:

Effective Date	National Average Weekly Wage	Section 6 (b)(1) Maximum
11/26/72	$131.80	$167.00
10/1/73	140.36	210.54
10/1/74	149.14	261.00
10/1/75	159.19	318.38
10/1/76	171.27	342.54
10/1/77	183.61	367.22
10/1/78*	198.25	396.50

*Based on preliminary figures.

[6] The dispute was initially litigated before the Deputy Commissioner for the Fifteenth Compensation District of the Department of Labor's Office of Workers' Compensation Programs (OWCP), who ruled that § 6 (b)(1)'s limitations on compensation apply to death benefits as well

dispute was submitted to an Administrative Law Judge, who sustained respondents' position. Petitioners appealed the adverse ruling to the Benefits Review Board, which affirmed. The legislative history of the 1972 Amendments convinced the Board that "elimination of the maximum benefit provision from Section 9 (e) of the Act . . . was done consciously and intentionally" and that "failure to substitute a new maximum was . . . a deliberate action." App. to Pet. for Cert. in No. 77–1465, pp. 22A–23A. Petitioners appealed the Board's order directly to the United States Court of Appeals for the Ninth Circuit. 33 U. S. C. § 921 (c). The Court of Appeals affirmed, largely adopting the reasoning of the Review Board. We granted certiorari to resolve a conflict among the Courts of Appeals on this issue,[7] 436 U. S. 955 (1978), and we now affirm the judgment of the Court of Appeals for the Ninth Circuit.

II

Petitioners' case for incorporating the maximum limitations on disability benefits of § 6 (b)(1) into the death benefit provisions of § 9 rests entirely on § 6 (d), which in pertinent part provides that "determinations" made under the section "shall apply to employees or survivors . . . receiving compensation for permanent total disability or death benefits . . . ." 33 U. S. C. § 906 (d). This subsection's references to "survivors" and "death benefits" demonstrate, according to petitioners, that Congress intended death benefits to be limited by the compensation maximums contained in § 6 (b)(1). Anticipating the obvious question—why did not Congress, either expressly or by reference to § 6 (b)(1), put the ceiling on death benefits back into the section of the Act dealing with

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as to benefits for permanent total disability. On appeal the Benefits Review Board vacated the decision on the ground that the Deputy Commissioner lacked authority to resolve the issue.

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

death benefits—the Director of OWCP concedes that § 9 (e) was "[u]ndeniably, the most obvious place to stipulate a maximum on death benefits," but suggests that Congress merely "overlooked" this fact when amending the death benefits provisions. Brief for Petitioner in No. 77–1465, pp. 28–29.

One need only state petitioners' argument to recognize its flaws. They suggest, on the one hand, that Congress forgot to stipulate a maximum on death benefits when it amended § 9 (e), although that section had contained a fixed ceiling on death benefits since the Act's initial passage in 1927.[8] On the other hand, petitioners urge that Congress remembered the question of death benefit maximums while considering § 6, and rather than incorporate a death benefits ceiling in the section of the Act dealing with death benefits, Congress consciously decided to limit death benefits in the section dealing with disability compensation.

The logic of petitioners' position is further weakened by the structure of § 6 itself, for if Congress had chosen that section as the vehicle for limiting death benefits, it would have been a simple matter to add the words "and death" after the word "disability" in the opening sentence of § 6 (b)(1). Nor does petitioners' contention deal with the fact that Congress had the collective presence of mind to include a *minimum* limitation on death benefits in § 9 (e). The Director maintains that the path petitioners urge us to follow, while admittedly "tortuous," ultimately leads to "what

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[8] The original Act provided that compensation benefits for disability were not to exceed $25 per week. Act of Mar. 4, 1927, § 6 (b), 44 Stat. 1426. The maximum compensation benefit for death was 66⅔% of the employee's average weekly wages, considered to be not more than $37.50 per week. § 9 (c), 44 Stat. 1430. Thus, the maximum weekly benefit for both disability and death was $25. Subsequent amendments raised benefit levels, but did not disturb the relationship between disability and death compensation maximums. See Act of June 24, 1948, ch. 623, §§ 1, 3, 62 Stat. 602; Act of July 26, 1956, ch. 735, §§ 1, 4, 70 Stat. 654, 655; Act of July 14, 1961, Pub. L. 87–87, §§ 1, 2, 75 Stat. 203.

may be assumed to have been the congressional intent to avoid disparate treatment" of disability and death beneficiaries. Brief for Petitioner in No 77–1465, pp. 11, 32. We agree that petitioners' suggested interpretation of the Act is tortuous, and believe that it is refuted by the plain language and legislative history of the pertinent provisions of the 1972 Amendments.

A

The language of § 9 (e) is unambiguous: the average weekly wages on which death benefits are calculated can be no less than the applicable national average weekly wage. In amending § 9 (e), Congress replaced specific minimum and maximum limitations on average weekly wages, and hence on death benefits, with a minimum limitation governed by the applicable national average weekly wage. That the omission of a maximum limitation on death benefits was inadvertent is disproved by the legislative history of the 1972 Amendments.

In 1971 two pairs of identical bills were introduced in the 92d Congress and considered by the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor. S. 525 and H. R. 3505 would have retained fixed dollar maximums for both disability and death benefits.[9] In contrast, S. 2318 and H. R. 12006, which ultimately formed the nucleus of the 1972 Amendments, proposed

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[9] S. 525, 92d Cong., 1st Sess., §§ 4 (a), 8 (c) (1971), Leg. Hist. 395, 399; H. R. 3505, 92d Cong., 1st Sess., §§ 4 (a), 8 (c) (1971), Leg. Hist. 417, 421.

Section 4 (a) of both the House and Senate bills provided in pertinent part: "Section 6 (b) of such Act is amended to read as follows:

" 'Compensation for disability shall not exceed $119 a week and compensation for total disability shall not be less than $35 per week . . . .' "

Section 8 (c) of both bills would have amended § 9 (e) of the Act to read: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $178.50, nor less than $52.50, but the total weekly compensation shall not exceed the weekly wages of the deceased."

the elimination of fixed dollar ceilings on both disability and death benefits.[10]

The difference in treatment of benefit maximums between the competing bills could hardly have gone unnoticed. Senator Eagleton opened hearings on S. 2318 and S. 525 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, summarizing the intent of the competing bills as follows:

> "S. 2318, which I cosponsored with Senator Williams, would eliminate the maximum payment limitations. . . .
>
> "The second bill, S. 525, introduced by the late Senator Prouty at the request of the administration, would also increase the benefits although retaining a maximum limitation." Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 2 (1972) (hereinafter Hearings).

Supporters of both measures vigorously debated the virtues and vices of fixed ceilings on disability and death benefit payments.[11] The provisions of S. 2318 and H. R. 12006 as

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[10] S. 2318, 92d Cong., 2d Sess., §§ 4 (a), 10 (b) (1971), Leg. Hist. 6, 10; H. R. 12006, 92d Cong., 1st Sess., §§ 4 (a), 10 (b) (1971), Leg. Hist. 146, 149–150.

As originally introduced, § 10 (b) of both the House and Senate bills would have amended § 9 (e) of the Act to read: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased." Original § 4 (a) of both bills contained a similar provision for disability benefits: "Section 6 (b) of such Act is amended to read as follows: '(b) Compensation for total disability shall not be less than $54 per week: *Provided, however,* That, if the employee's average weekly wages as computed under section 10 are less than $54 per week, he shall receive as compensation for total disability his average weekly wages.'"

[11] Witnesses representing workers covered by the Act generally supported removal of fixed ceilings on compensation payments. Witness

reported by their respective Committees were identical and were ultimately enacted as the Longshoremen's and Harbor

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Thomas W. Gleason, President of the International Longshoremen's Association, AFL–CIO, testified:

"We strongly support the enactment of S. 2318 as the most effective proposal to accomplish the long overdue increase in the benefit levels of injured longshoremen. First and foremost, that bill would eliminate the artificial and totally unrealistic restrictions on benefit amounts. This would enable compensation awards, for the first time, to reflect realistically the loss of earnings suffered by injured employees. . . .

"The administration bill, S. 525, would also raise benefit levels. The proposed increase in maximum weekly compensation from $70.00 to $119.00 represents a substantial improvement, but one that is already obsolete. . . .

. . . . . .

"We urge that the Congress not adopt a benefit level grounded on built-in obsolescence. Far more equitable is the approach manifested in S. 2318." Hearings 156–158.

See *id.*, at 63 (testimony of Howard McGuigan, Legislative Representative, AFL–CIO), 133 (testimony of Patrick Tobin, Washington Representative, International Longshoremen's and Warehousemen's Union), 700 (testimony of Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America).

Not surprisingly, representatives of employers subject to the Act's provisions were generally opposed to elimination of benefit maximums. Edward D. Vickery, representing the National Maritime Compensation Committee, opposed S. 2318, stating: "[W]e respectfully submit that it is not advisable to remove the monetary maximum benefits payable per week under the Longshoremen's Act and therefore recommend that the provisions of Section 8 of S. 525 be retained in this regard." Hearings 334.

Witness Ralph Hartman, an assistant manager in the Safety and Workmen's Compensation Division of Bethlehem Steel Corporation, proposed a compromise position:

"[W]e endorse the basic concepts of S. 2318, and propose innovations or variations which we consider urgent and demanding, yet equitable to all concerned.

. . . . . .

"Of major impact and importance to the industry are the proposals to

Workers' Act Amendments of 1972.[12] The Committee Reports accompanying the House and Senate bills clearly reflect the Committees' understanding that the minimum and maximum limitations on death benefits of former § 9 (e) were being eliminated and that only a minimum benefit provision tied to the applicable national average weekly wage was being substituted in their place.[13] In light of this evidence of

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increase weekly benefits. One such proposal would amend section 6 (b) of the act by increasing the minimum weekly rate from $18 to $54 and eliminating the present maximum weekly benefit rate of $70.

"We agreed that the minimum rate should be increased. However, this proposal leaves us with a weekly benefit rate of two-thirds of the employee's average weekly earnings without limitation.

. . . . . .

"We recognize the intent of the proposal, and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66 and two-thirds percent of the injured employee's average weekly wage computed under section 10, subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry." *Id.*, at 171–172.

It is inconceivable that Congress, with this debate on benefit maximums raging all about it, unwittingly omitted a death benefit ceiling in amended § 9 (b).

[12] S. 2318 was passed by the Senate on September 14, 1972. 118 Cong. Rec. 30670, 30674. H. R. 12006 was passed by the House on October 14, 1972, 118 Cong. Rec. 36376, 36389, and returned to the Senate, which concurred in the identical House version. 118 Cong. Rec. 36265, 36274 (1972).

[13] Precisely this understanding is expressed in the House Report which accompanied H. R. 12006:

"Subsection (d) of this section amends section 9 (e) of the Act, eliminating the dollar minimum and maximum set out under persent [*sic*] law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6 (b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased." H. R. Rep. No. 92–1441, p. 19 (1972), Leg. Hist. 225.

Both the House and Senate Reports, in discussing the major provisions

congressional intent, we find it impossible to conclude that the absence of a fixed maximum limitation on death benefits in § 9 (e) was the result of inadvertence.

B

The benefit maximums contained in § 6 (b)(1) are plainly restricted to "compensation for disability." Petitioners argue, however, that Congress made § 6 (b)(1)'s disability benefit maximums applicable to death benefits through § 6 (d). Close examination of the wording used by Congress in the latter provision persuades us otherwise.

Section 6 (d) provides:

> "Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period."

Since there are no "determinations" made under § 6 (d), its reference to "this subsection" is plainly in error. The parties agree, and we conclude, that the words "this subsection" should read "this section." [14] The question thus becomes what "determinations . . . with respect to a period" did Congress have in mind when it enacted § 6 (d).

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of the respective bills, deal expressly with the subject of minimum and maximum death benefits, noting that such benefits are "subject to a maximum of 66⅔ percent of the [deceased's] average weekly wages" and to "[a] minimum . . . tied to the applicable national average weekly wage . . . ." S. Rep. No. 92–1125, p. 6 (1972), Leg. Hist. 68; H. R. Rep. No. 92–1441, p. 4 (1972), Leg. Hist. 210.

[14] Section 6 (d)'s reference to "this subsection" apparently refers to subsection (a) of § 5 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1252, and hence to §§ 6 (b)–(d) of the Act. See *Director, Office of Workers' Comp. Programs* v. *O'Keefe,* 545 F. 2d, at 344; *Director, Office of Workers' Comp. Programs* v. *Boughman,* 178 App. D. C., at 137, 545 F. 2d, at 215.

The operative words of the subsection, "determinations" and "period," appear together in § 6 in only one other place. Paragraph (3) of § 6 (b) provides:

> "As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall *determine* the national average weekly wage for the three consecutive calendar quarters ending June 30. Such *determination* shall be the applicable national average wage for the *period* beginning with October 1 of that year and ending with September 30 of the next year. The initial *determination* under this paragraph shall be made as soon as practicable after [October 27, 1972]." 33 U. S. C. § 906 (b)(3). (Emphasis added.)

Elsewhere in § 6, both minimum and maximum limits on total disability benefits are tied to the "applicable national average weekly wage as *determined* by the Secretary under paragraph (3) . . . ." 33 U. S. C. § 906 (b)(1); see § 906 (b)(2). Congress' careful use of the word "determination" and its verb form strongly suggests that it intended the term to refer only to the Secretary of Labor's annual *determination* under § 6 (b)(3) of the national average weekly wage, not to the mathematical *computation* of disability benefit maximums contemplated under § 6 (b)(1). This view of § 6 (d) is confirmed by the provision's legislative history. The Senate Committee on Labor and Public Welfare, in its section-by-section analysis of S. 2318, stated:

> "Subsection (d) states that *determinations* of *national average weekly wage* made with respect to a period apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as those who begin receiving compensation

for the first time during the period." S. Rep. No. 92–1125, p. 18 (1972), Leg. Hist. 80.[15]

Because determinations of the national average weekly wage govern minimum death benefits as well as both minimum and maximum total disability benefits, § 6 (d)'s reference to "survivors . . . receiving . . . death benefits" is not surprising. Congress intended increases in the national average weekly wage to be reflected by corresponding increases in minimum death benefits and both minimum and maximum total disability benefits.[16] See S. Rep. No. 92–

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[15] Petitioners place heavy reliance on the following passage from the Senate Report accompanying S. 2318:

"To the extent that employees receiving compensation for total permanment [*sic*] disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase in, their compensation is to be increased as the ceiling moves to 200 percent." S. Rep. No. 92–1125, p. 5 (1972), Leg. Hist. 67.

This language does indeed suggest that the gradual annual increase in maximum benefits from 125% to 200% of the national average provided in § 6 (b)(1) applies to survivors as well as to disabled employees. The quoted statement, however, is followed immediately in the Senate Report by a conflicting statement. In apparent reference to the combined effect of § 6 (b)(3) and § 6 (d), the Senate Report states: "The bill also requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act." S. Rep. No. 92–1125, *supra*, at 5–6, Leg. Hist. 67–68; see n. 17, *infra*. This latter statement is consistent with our reading of § 6, and to the extent the earlier statement is an indication of legislative intent, we agree with the Court of Appeals that "it is overwhelmingly outweighed by the contrary purport of the legislative history as a whole." 567 F. 2d, at 1388 n. 5.

[16] Petitioners maintain that interpreting § 6 (d) to refer to determinations of national average weekly wage would render the provision duplicative of § 10 (f). Added by the 1972 Amendments, § 10 (f) provides:

"Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after [October 27, 1972], shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage

1125, *supra*, at 5–6, Leg. Hist. 67–68 We conclude that § 6 (d) does not render the maximum limitations contained in § 6 (b)(1) applicable to death benefits.

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for the period beginning on such October 1, as determined under section 6 (b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1."

This provision makes clear that, in cases of permanent total disability and death, benefits are adjusted upward each year that the national average wage rises. Although § 10 (f) gives the incremental increase in compensation payments to all beneficiaries in death and permanent total disability cases, including those unaffected by a statutory minimum or maximum, the incidental effect is partially to lift any ceiling and, to the same extent, any floor applicable to such benefits.

Although § 6 (d) and § 10 (f) overlap substantially, they are not entirely duplicative. The latter section applies only when benefits of a particular type are received in two consecutive years. If an employee receiving benefits for total and permanent disability in year 1 died in year 2, his survivors must look to § 6 (d) to determine whether the "applicable" national average weekly wage for purposes of computing minimum death benefits under § 9 (e) is the national average wage determined by the Secretary for year 1, when the employee's injury occurred, or that determined for year 2, when the employee died. For example, suppose that a covered worker was permanently and totally disabled in year 1. Suppose further that at the time of the injury his average weekly wages were $90 and that the national average weekly wage was $100. The worker would be entitled under § 8 (a) to disability benefits of $60 per week (66⅔% of $90), significantly more than the minimum payment of $50 per week (50% of $100) provided under § 6 (b)(2). If the worker died during the following year, leaving a widow and one or more children, his survivors would be entitled to death benefits amounting to 66⅔% of the national average weekly wage. Assuming the national average weekly wage had increased 5% in year 2, the question would arise whether the worker's survivors were entitled to death benefits calculated on the higher national average weekly wage. Reference to § 6 (d) reveals that the worker's widow and children, having been "newly awarded" death benefits during year 2, would be entitled to calculate their benefits on the higher national average weekly wage.

Further, the legislative history of the 1972 Amendments indicates that Congress was fully aware of the similarities between §§ 6 (d) and 10 (f).

C

Finally, petitioners urge that, the Act's language and legislative history notwithstanding, Congress could not have intended to place a "premium on death." They cannot and do not dispute, however, that Congress did precisely that in situations in which the employee's average weekly wages are less than the applicable national average weekly wage and he is survived by a spouse and one or more children.[17] Congress

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In its discussion of "maximum and minimum benefit amounts," the Senate Report accompanying S. 2318 states:

"The bill also requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act. *A similar provision* for upgrading benefits in future years for cases of permanent total disability or death benefits is contained in section 10 of the Act (Section 11 of the bill)." S. Rep. No. 92–1125, pp. 5–6 (1972), Leg. Hist. 67–68 (emphasis added).

[17] A totally disabled employee is entitled to 66⅔% of his average weekly wages, 33 U. S. C. § 908 (a), or 50% of the national average weekly wage, 33 U. S. C. § 906 (b)(2), whichever is greater. If the disabled employee dies, however, his surviving spouse and children are entitled to no less than 66⅔% of the national average weekly wage or 100% of the deceased employee's average weekly wages, whichever is lesser. 33 U. S. C. § 909 (e). Thus, the death of a totally disabled employee whose average weekly wages were greater than half the national average weekly wage but less than the national average weekly wage would result in an increase in benefits payable under the Act. The Court of Appeals demonstrated this fact with the following examples:

"If we assume the Secretary has determined that the applicable national average weekly wage is $100, the compensation for an employee whose actual average weekly wage was $60 would be determined as follows:

"1. *Total Disability Benefits*

"Under [33 U. S. C.] § 908 (a) the employee would normally receive 66⅔ percent of his average weekly wage, or $40. However, § 906 (b)(2) states that the minimum compensation shall be 50 percent of the national average weekly wage, or $50. An employee in this situation would receive $50 compensation for total disability.

"2. *Death Benefits*

"Under [33 U. S. C.] § 909 (b), if, for example, the employee is survived by a widow or widower and one or more children, the total amount payable

may well have retained maximum benefit limitations in § 6 (b)(1) to discourage feigned disability, a consideration wholly inapplicable to death benefits. Nor is it inconceivable that the financial needs of the disabled worker's family could increase upon his death. The typical disabled worker, though no longer physically able to ply his trade, might be able to contribute to the family's livelihood by assuming a variety of domestic responsibilities, thus releasing his spouse into the work force. The disabled worker's death would under such circumstances rob the family of an economic asset.

Petitioners entreat us to interpret the 1972 Amendments "to avoid an absurd and discriminatory consequence." Even if we agreed with petitioners' characterization of Congress' failure to put a ceiling on death benefits, we would be required to decline petitioners' invitation, for our examination of the language and legislative history of the 1972 Amendments

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is 66⅔ percent of the average weekly wage of the deceased, or $40. However, § 909 (e) states that where the average weekly wage is less than the national average weekly wage, the national average should be used in place of the employee's actual average, and here we should take 66⅔ percent of $100, or $66.66. § 909 (e) then limits this minimum compensation to the actual average weekly wage, so the survivors would receive $60 compensation.

"Making these same assumptions, the minimum compensation calculations for employees with average weekly wages greater than half the national average weekly wage and less than the national average weekly wage result in greater compensation for death than disability, as the following chart indicates:

Nat'l. Avg.	Employee's Avg.	Death Benefits	Total Disability
$100	$100	$66.66	$66.66
100	99	66.66	66.00
100	75	66.66	50.00
100	60	60.00	50.00
100	51	51.00	50.00
100	50	50.00	50.00"

567 F. 2d, at 1390 n. 9.

convinces us that the omission was intentional. Congress has put down its pen, and we can neither rewrite Congress' words nor call it back "to cancel half a Line." Our task is to interpret what Congress has said; so doing, we conclude that death benefits payable under the Act are not subject to the maximum limitations contained in § 6 (b)(1). The judgment of the Court of Appeals is

Affirmed.

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

BUTNER *v.* UNITED STATES ET AL.

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

No. 77–1410. Argued November 27, 1978—Decided February 21, 1979

In Chapter XI arrangement proceedings under the Bankruptcy Act, petitioner acquired a second mortgage on certain North Carolina real estate to secure a $360,000 indebtedness but received no express security interest in the rents earned by the property. The bankruptcy judge thereafter appointed an agent to collect the rents and apply them to the payment of taxes, insurance, interest, and principal payments due on the first and second mortgages. The mortgagor was later adjudicated a bankrupt, at which time the first and second mortgages were in default, and the trustee was ordered to collect and retain all rents. The bankrupt's properties were ultimately sold to petitioner for $174,000, that price being paid by reduction of the estate's indebtedness to petitioner from $360,000 to $186,000. At the sale date the trustee had accumulated almost $163,000 in rents which petitioner unsuccessfully sought to have applied to the balance of the second mortgage indebtedness, the bankruptcy judge ruling that the $186,000 balance due petitioner should be treated as a general unsecured claim. The District Court reversed. Though recognizing that under North Carolina law a mortgagor is deemed the owner of the land subject to the mortgage and during his possession is entitled to rents and profits, even after default, the court viewed the agent's appointment during the arrangement proceedings as tantamount to the appointment of a receiver which satisfied the state-law requirement of a change of possession, giving the mortgagee an interest in the rents which no further action after the bankruptcy adjudication was required to preserve. The Court of Appeals reversed, reinstating the disposition of the bankruptcy judge. The appellate court held that the bankruptcy adjudication had terminated the state-court receivership status arising out of the appointment of the agent to collect rents, and that because petitioner had made no request *during the bankruptcy* for a sequestration of rents or for the appointment of a receiver, petitioner had not taken the kind of action North Carolina law required to give a mortgagee a security interest in the rents collected after the bankruptcy adjudication. *Held:* Apart from certain special provisions, the Bankruptcy Act generally leaves the determination of property rights in the assets of a bankrupt's estate to

state law. The law of the State where the property is located accordingly governs a mortgagee's right to rents during bankruptcy, and a federal bankruptcy court should take whatever steps are necessary to ensure that a mortgagee is afforded in federal bankruptcy court the same protection he would have under state law had no bankruptcy ensued. Though the general principle of the applicability of state law to determine property rights in a bankrupt's assets was applied by both the District Court and the Court of Appeals (and those courts properly did not follow the minority federal equity rule under which a mortgagee is afforded a secured interest in rents even if state law would not recognize any such interest until after foreclosure), those courts disagreed about the requirements of North Carolina law. However, that state-law issue as such will not be reviewed by this Court. Pp. 51–58.

566 F. 2d 1207, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

J. Steven Brackett argued the cause for petitioner. With him on the brief were *J. Richardson Rudisill, Jr.*, and *William E. Butner, pro se.*

Allan A. Ryan, Jr., argued the cause for the United States. On the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith, Crombie J. D. Garrett,* and *Carleton D. Powell. Joe N. Cagle, pro se,* argued the cause for respondents Cagle et al. With him on the brief were *J. Carroll Abernethy, Jr.*, and *James M. Gaither, Jr.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

A dispute between a bankruptcy trustee and a second mortgagee over the right to the rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property gave rise to the question we granted certiorari to decide. 436 U. S. 955. That question is whether the right to such rents is determined by a federal rule of equity or by the law of the State where the property is located.

On May 14, 1973, Golden Enterprises, Inc. (Golden), filed a petition for an arrangement under Chapter XI of the Bank-

ruptcy Act. 11 U. S. C. §§ 701–799. In those proceedings, the bankruptcy judge approved a plan consolidating various liens on North Carolina real estate owned by Golden. As a result, petitioner acquired a second mortgage securing an indebtedness of $360,000.[1] Petitioner did not, however, receive any express security interest in the rents earned by the property.

On April 18, 1974, the bankruptcy judge granted Golden's motion to appoint an agent to collect the rents and to apply them as directed by the court. The order of appointment provided that the money should be applied to tax obligations, payments on the first mortgage, fire insurance premiums, and interest and principal on the second mortgage. There is no dispute about the collections or payments made pursuant to that order.

The arrangement plan was never confirmed. On February 14, 1975, Golden was adjudicated a bankrupt, and the trustee in bankruptcy was appointed. At that time both the first and second mortgages were in default. The trustee was ordered to collect and retain all rents "to the end that the same may be applied under this or different or further orders of [the bankruptcy] [c]ourt." App. 342a–343a.

After various alternatives were considered, and after the District Court refused to confirm a first sale, the properties were ultimately sold to petitioner on November 12, 1975, for $174,000. That price was paid by reducing the estate's indebtedness to petitioner from $360,000 to $186,000.

As of the date of sale, a fund of $162,971.32 had been accumulated by the trustee pursuant to the February 14 court order that he collect and retain all rents. On December 1,

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[1] Originally, the second mortgage was held by petitioner along with Robert L. McKaughn, Jr., and Jack Sipe Construction Co. Subsequently, McKaughn and the Sipe Construction Co. assigned all of their rights in the indebtedness and deeds of trust to petitioner, thus making him the sole second mortgagee.

1975, petitioner filed a motion claiming a security interest in this fund and seeking to have it applied to the balance of the second mortgage indebtedness. The bankruptcy judge denied the motion, holding that the $186,000 balance due to petitioner should be treated as a general unsecured claim.

The District Court reversed. It recognized that under North Carolina law, a mortgagor is deemed the owner of the land subject to the mortgage and is entitled to rents and profits, even after default, so long as he retains possession. But the court viewed the appointment of an agent to collect rents during the arrangement proceedings as tantamount to the appointment of a receiver. This appointment, the court concluded, satisfied the state-law requirement of a change of possession giving the mortgagee an interest in the rents; no further action after the adjudication in bankruptcy was required to secure or preserve this interest.

The Court of Appeals reversed and reinstated the disposition of the bankruptcy judge. *Golden Enterprises, Inc.* v. *United States,* 566 F. 2d 1207. The court acknowledged that the agent appointed to collect rents before the bankruptcy was equivalent to a state-court receivership, but held that the adjudication terminated that relationship. Because petitioner had made no request *during the bankruptcy* for a sequestration of rents or for the appointment of a receiver, petitioner had not, in the court's view, taken the kind of action North Carolina law required to give the mortgagee a security interest in the rents collected after the bankruptcy adjudication. One judge dissented, adopting the position of the District Court. *Id,* at 1211.

I

We did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law. Our concern is with the proper interpretation of the federal statutes governing the administration of bankrupt estates. Specifically, it is our purpose to resolve a conflict between the Third and

Seventh Circuits on the one hand, and the Second, Fourth, Sixth, Eighth, and Ninth Circuits on the other, concerning the proper approach to a dispute of this kind.

The courts in the latter group regard the question whether a security interest in property extends to rents and profits derived from the property as one that should be resolved by reference to state law.[2] In a few States, sometimes referred to as "title States," the mortgagee is automatically entitled to possession of the property, and to a secured interest in the rents.[3] In most States, the mortgagee's right to rents is

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[2] See *In re Brose,* 254 F. 664, 666 (CA2 1918) (" 'The general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver, . . . or until, in proper form, he demands and is refused possession.' This general rule the federal courts will follow, except in cases where it appears that the law of the state where the premises are situated applies a different rule") (quoting *Freedman's Savings & Trust Co.* v. *Shepherd,* 127 U. S. 494, 502–503); *Tower Grove Bank & Trust Co.* v. *Weinstein,* 119 F. 2d 120, 122 (CA8 1941) ("In this circuit the law is settled that the construction of mortgages is governed by local state law"); *In re Hotel St. James Co.,* 65 F. 2d 82 (CA9 1933); *In re American Fuel & Power Co.,* 151 F. 2d 470, 481 (CA6 1945). See also *Fidelity Bankers Life Ins. Co.* v. *Williams,* 506 F. 2d 1242, 1243 (CA4 1974). See generally 4A W. Collier, Bankruptcy ¶ 70.16, pp. 157–165 (14th ed. 1975); Hill, The Erie Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013 (1953).

[3] In some title States, the mortgagee's right to rents and profits may be exercised even prior to default, see Me. Rev. Stat. Ann., Tit. 33, § 502 (1964); in all events, the right at least attaches upon default, see *Uvalda Naval Stores Co.* v. *Cullen,* 165 Ga. 115, 117, 139 S. E. 810, 811 (1927). See generally R. Kratovil, Modern Mortgage Law and Practice § 294, p. 204 (1972); Comment, The Mortgagee's Right to Rents and Profits Following a Petition in Bankruptcy, 60 Iowa L. Rev. 1388, 1390–1391 (1975).

North Carolina has been classified as a "title" State, Comment, The Mortgagee's Right to Rents After Default, 50 Yale L. J. 1424, 1425 n. 6 (1941), although it does not adhere to this theory in its purest form. Under its case law, a mortgagee is entitled to possession of the mortgaged property upon default, and need not await actual foreclosure. Such possession might be secured either with the consent of the mortgagor or by an action in ejectment. But so long as the mortgagor does remain in

dependent upon his taking actual or constructive possession of the property by means of a foreclosure, the appointment of a receiver for his benefit, or some similar legal proceeding.[4] Because the applicable law varies from State to State, the results in federal bankruptcy proceedings will also vary under the approach taken by most of the Circuits.

The Third and Seventh Circuits have adopted a federal rule of equity that affords the mortgagee a secured interest in the rents even if state law would not recognize any such interest until after foreclosure.[5] Those courts reason that since the bankruptcy court has the power to deprive the mortgagee of his state-law remedy, equity requires that the right to rents not be dependent on state-court action that may be precluded by federal law.[6] Under this approach, no affirmative steps

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possession, even after default, he—not the mortgagee—appears to be entitled to the rents and profits. See *Brannock* v. *Fletcher,* 271 N. C. 65, 155 S. E. 2d 532 (1967); *Gregg* v. *Williamson,* 246 N. C. 356, 98 S. E. 2d 481 (1957); *Kistler* v. *Development Co.,* 205 N. C. 755, 757, 172 S. E. 413, 414 (1934) ("In the absence of a stipulation to the contrary a mortgagor of real property who is permitted to retain possession is entitled to the rents and profits. *Credle* v. *Ayers,* 126 N. C., 11. As between the mortgagor and the mortgagee equity makes the mortgage a charge upon the rents and profits when the mortgagor is insolvent and the security is inadequate . . . but the prevailing rule is that a mortgagee is not entitled to rents until entry is made or a suit for foreclosure is begun").

[4] See *Tower Grove Bank & Trust Co.* v. *Weinstein, supra; Central States Life Ins. Co.* v. *Carlson,* 98 F. 2d 102 (CA10 1938); 4A Collier, *supra* n. 2, at 157–158.

[5] See *Bindseil* v. *Liberty Trust Co.,* 248 F. 112 (CA3 1917); *In re Pittsburgh-Duquesne Development Co.,* 482 F. 2d 243 (CA3 1973); *In re Wakey,* 50 F. 2d 869 (CA7 1931).

[6] See, *e. g., Central Hanover Bank & Trust Co.* v. *Philadelphia & Reading Coal & Iron Co.,* 99 F. 2d 642, 645 (CA3 1938):

"It is settled in this circuit that in a bankruptcy proceeding a mortgage creditor is entitled without prior demand to the net income of the mortgaged property from the date of adjudication if it is needed to pay the amount due him. . . . This is because the bankruptcy proceeding has taken from the Debtor the possession of his property and in so doing has

are required by the mortgagee—in state or federal court—to acquire or maintain a right to the rents.

II

We agree with the majority view.

The constitutional authority of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" [7] would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule. The Bankruptcy Act does include provisions invalidating certain security interests as fraudulent, or as improper preferences over general creditors.[8] Apart from these provisions, however, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.[9]

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deprived the mortgage creditor of his ordinary remedy to reach the property mortgaged and its income. It, therefore, follows upon equitable principles, as Judge Woolley pointed out in Bindseil v. Liberty Trust Co., supra, . . . 'that after insolvency has taken the debtor's property out of his hands, its income or product belongs to the lien creditor, who has thus become its virtual owner; and that such income or product issuing from mortgaged property, should not be diverted from the mortgage creditor who has a lien to general creditors who have no lien.' "

[7] U. S. Const., Art. I, § 8, cl. 4.

[8] See 11 U. S. C. §§ 96 (a) and (b) (authorizing trustee to void as preferences certain transfers made by the bankrupt within four months of bankruptcy); §§ 107 (a) and (d) (invalidating certain liens obtained through judicial proceedings within four months of bankruptcy and certain fraudulent transfers made within one year of bankruptcy); § 110 (c) (authorizing trustee to strike down secret liens and transfers); § 110 (e) (invalidating any transfer deemed fraudulent under federal or state law). See generally 3 Collier, *supra* n. 2, ¶ 60.01, pp. 743–746.

[9] "The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional author-

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers National Bank,* 364 U. S. 603, 609. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.[10]

The minority of courts which have rejected state law have not done so because of any congressional command, or because their approach serves any identifiable federal interest. Rather, they have adopted a uniform federal approach to the question of the mortgagee's interest in rents and profits because of their perception of the demands of equity. The equity powers of the bankruptcy court play an important part in the

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ity, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress. *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Ogden* v. *Saunders,* 12 Wheat. 213.

"Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the States." *Stellwagen* v. *Clum,* 245 U. S. 605, 613.

[10] Conversely, the federal statutory basis for voiding fraudulent and preferential transfers in order to protect general creditors applies to both security interests and other interests in property.

administration of bankrupt estates in countless situations in which the judge is required to deal with particular, individualized problems. But undefined considerations of equity provide no basis for adoption of a uniform federal rule affording mortgagees an automatic interest in the rents as soon as the mortgagor is declared bankrupt.

In support of their rule, the Third and Seventh Circuits have emphasized that while the mortgagee may pursue various state-law remedies prior to bankruptcy, the adjudication leaves the mortgagee "only such remedies as may be found in a court of bankruptcy in the equitable administration of the bankrupt's assets." *Bindseil* v. *Liberty Trust Co.*, 248 F. 112, 114 (CA3 1917).[11] It does not follow, however, that "equitable administration" requires that all mortgagees be afforded an automatic security interest in rents and profits when state law would deny such an automatic benefit and require the mortgagee to take some affirmative action before his rights are recognized. What does follow is that the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued. This is the majority view, which we adopt today.

The rule of the Third and Seventh Circuits, at least in some circumstances, affords the mortgagee rights that are not his as a matter of state law. The rule we adopt avoids this inequity because it looks to state law to define the security interest of the mortgagee. At the same time, our decision avoids the opposite inequity of depriving a mortgagee of his state-law security interest when bankruptcy intervenes. For while it is argued that bankruptcy may impair or delay the mortgagee's exercise of his right to foreclosure, and thus his acquisition of a security interest in rents according to the law

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[11] See also *Central Hanover Bank & Trust Co.* v. *Philadelphia & Reading Coal & Iron Co., supra; In re Wakey, supra.*

of many States, a bankruptcy judge familiar with local practice should be able to avoid this potential loss by sequestering rents or authorizing immediate state-law foreclosures. Even though a federal judge may temporarily delay entry of such an order, the loss of rents to the mortgagee normally should be no greater than if he had been proceeding in a state court: for if there is a reason that persuades a federal judge to delay, presumably the same reason would also persuade a state judge to withhold foreclosure temporarily. The essential point is that in a properly administered scheme in which the basic federal rule is that state law governs, the primary reason why any holder of a mortgage may fail to collect rent immediately after default must stem from state law.

III

Recognizing that the bankruptcy frustrated petitioner's right to take possession of the mortgaged property and thereby to establish his right to rents as a matter of North Carolina law, the Court of Appeals assumed that a request to the bankruptcy judge for sequestration of rents, for the appointment of a receiver, or for permission to proceed with a state-court foreclosure would have satisfied the state-law requirement. Since none of these steps was taken during the bankruptcy, the Court of Appeals held that petitioner had no right to the rents.

The dissenting judge in the Court of Appeals, as well as the District Judge, felt that the action taken during the arrangement proceedings, coupled with informal requests for abandonment of the property during the bankruptcy, was sufficient to comply with North Carolina law. Neither of these judges, however, based his analysis on the federal rule followed in the Third and Seventh Circuits. They merely disagreed with the majority about the requirements of North Carolina law.

In this Court the parties have argued the state-law question at great length, each stressing different aspects of the

record. We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.[12]

The judgment is affirmed.

It is so ordered.

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[12] See *The Tungus* v. *Skovgaard*, 358 U. S. 588, 596; *United New York & New Jersey Pilots Assn.* v. *Halecki*, 358 U. S. 613, 615. See also *Bishop* v. *Wood*, 426 U. S. 341, 345–346.

Syllabus

CALIFORNIA *v.* ARIZONA ET AL.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

No. 78, Orig. Argued January 9, 1979—Decided February 22, 1979

To resolve a dispute over the ownership of certain lands, California seeks to invoke this Court's original jurisdiction in an action to quiet title against Arizona and the United States, both of which contend that the United States has not consented to be a defendant and that therefore California's motion for leave to file a bill of complaint must be denied. Title 28 U. S. C. § 2409a (a) permits the United States to be named as a defendant in an action to adjudicate a disputed title to real property in which the United States claims an interest other than a security interest or water rights; and 28 U. S. C. § 1346 (f) gives the federal district courts "exclusive original jurisdiction" of actions under § 2409a to quiet title to real property in which an interest is claimed by the United States. *Held:* Under § 2409a (a), the United States has waived its sovereign immunity to suit in this case, and hence there is no bar to the suit. The legislative history of § 1346 (f) shows no intent by Congress to divest this Court of jurisdiction over such actions in cases otherwise within its original jurisdiction, an attempt that would raise grave constitutional questions. The section did no more than assure that such jurisdiction was not conferred upon the courts of any State. Pp. 65–68.

STEWART, J., delivered the opinion for a unanimous Court.

Allan J. Goodman, Deputy Attorney General of California, argued the cause for plaintiff. On the motion for leave to file a complaint were *Evelle J. Younger,* Attorney General, *N. Gregory Taylor,* Assistant Attorney General, and *Russell Iungerich,* Deputy Attorney General, and on the reply to the brief in opposition and response to the motion were *Messrs. Younger, Taylor,* and *Goodman.*

Russell A. Kolsrud, Assistant Attorney General, argued the cause for defendant State of Arizona. With him on the briefs were *John A. LaSota, Jr.,* Attorney General, and *Anthony B. Ching,* Assistant Attorney General.

Louis F. Claiborne argued the cause for the United States. On the response to the motion was *Solicitor General McCree.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Since the admission of California to the Union in 1850, the southeastern boundary of the State has been the middle of the channel of the Colorado River. Act of Sept. 9, 1850, 9 Stat 452. Neither the Gadsden Purchase in 1853 nor the admission of Arizona to statehood in 1912 changed the location of this 229-mile border. The location of the river did change, however, from causes both natural and artificial. These shifts created confusion about the location of the political boundary between California and Arizona. This problem was resolved through an interstate compact, ratified by the Congress in 1966.[1] The Compact fixed the boundary by stations of longitude and latitude, divorced from the continuing shifts of the Colorado River.

California has taken the position, however, that the Compact settled only questions of political jurisdiction, not questions of ownership of real property, since, under the "equal-footing doctrine," California holds title to all lands beneath the navigable waters within its boundaries at the time of its admission to the Union. *Pollard's Lessee* v. *Hagan,* 3 How. 212, 219. See *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.,* 429 U. S. 363. In the early 1970's the California State Lands Commission made a study of a stretch of 11.3 miles along the river to determine what land California owns. Both Arizona and the United States have a direct interest in such a determination. Arizona, of course, has the same rights under the equal-footing doctrine as does California. The United States is the principal riparian owner in this region, and determination of the width and location of the old riverbed thus will necessarily affect its

[1] Interstate Compact Defining the Boundary Between the States of Arizona and California, 80 Stat. 340.

property interests. California has presented the determinations of its Lands Commission to both Arizona and the United States; neither has acquiesced in the Commission's conclusions.

California seeks to invoke the Court's original jurisdiction in this suit to quiet title to the lands it claims, and thus resolve its dispute with Arizona and the United States.[2] To sue Arizona, it relies on 28 U. S. C. § 1251 (a), which confers on this Court "original and exclusive jurisdiction of . . . [a]ll controversies between two or more States." To sue the United States, it relies on 28 U. S. C. § 1251 (b), which confers on this Court "original but not exclusive jurisdiction of . . . [a]ll controversies between the United States and a State." Both these heads of original jurisdiction find their source in Art. III, § 2, of the Constitution: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."

It is undisputed that both Arizona and the United States are indispensable parties to this litigation, and it is California's need to sue both Arizona and the United States that creates the problem before us. Specifically, Arizona and the United States contend that the United States has not agreed to be a defendant in a quiet-title action in this Court Yet this is the only federal court in which California can sue Arizona, because Congress has conferred upon it "original and *exclusive* jurisdiction" (emphasis added) over controversies between States. 28 U. S. C. § 1251 (a)(1).

It is settled that the United States must give its consent to be sued even when one of the States invokes this Court's original jurisdiction:

> "It does not follow that because a State may be sued by the United States without its consent, therefore the

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[2] California points out that other title questions may arise along the entire stretch of the California-Arizona border. It urges the Court to retain jurisdiction of this case for adjudication of these potential additional controversies. We leave that suggestion for a later date.

United States may be sued by a State without its consent. Public policy forbids that conclusion." *Kansas* v. *United States,* 204 U. S. 331, 342.

See *Oregon* v. *Hitchcock,* 202 U. S. 60; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387 (dicta). But cf. *United States* v. *Texas,* 143 U. S. 621. Yet the Court has recognized that an action in equity cannot be maintained without the joinder of indispensable parties.[3] *Shields* v. *Barrow,* 17 How. 130; *Mallow* v. *Hinde,* 12 Wheat. 193. Thus, if the United States has not consented to be sued in an action such as this, California's motion for leave to file a complaint must be denied. "A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party." *Arizona* v. *California,* 298 U. S.

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[3] Federal Rule Civ. Proc. 19 (a) provides that a person is to be joined in an action if

"(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

Rule 19 (b) provides that when a person described by Rule 19 (a) cannot be joined, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."

Rule 9 (2) of this Court provides:

"The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

This Court has dismissed cases in its original jurisdiction for want of an indispensable party, *Arizona* v. *California,* 298 U. S. 558, 572; *California* v. *Southern Pacific Co.,* 157 U. S. 229, 256. Here, all three parties have agreed that their interests in the land in question are inextricably linked.

558, 572. See *Texas* v. *New Mexico,* 352 U. S. 991; but see *Florida* v. *Georgia,* 17 How. 478, 494–496 (Taney, C. J.).

The suit, then, could not be maintained in any court. This Court could not hear the claims against the United States because it has not waived its sovereign immunity, and a district court could not hear the claims against Arizona, because this Court has exclusive jurisdiction over such claims. To resolve this asserted dilemma, the Solicitor General has made an undertaking on behalf of the United States. He has agreed that, if California is granted leave to file its complaint in this Court against Arizona, the United States will intervene with respect to the controversy over part of the area in question.[4] Because, however, we have concluded that the United States has already waived its sovereign immunity to suit in this case, we need not assess the wisdom or validity of the Solicitor General's suggestion.

In 1972 Congress passed Pub. L. 92–562, 86 Stat. 1176. The Act made two relevant changes in Title 28 of the United States Code.[5] First, it created a new § 2409a.[6] Subsection (a) of this new section provides:

"The United States may be named as a party defendant

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[4] The Solicitor General maintains that the Government has a valid statute of limitations defense as to that part of this controversy that concerns the northern 2.7 miles of the 11.3-mile stretch of original riverbed in controversy. He has undertaken to intervene, therefore, only with respect to the remainder of the tract.

[5] The Act also included a venue provision, codified at 28 U. S. C. § 1402 (d).

[6] Title 28 U. S. C. § 2409a reads:

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections

> in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. . . ."

The remainder of the section defines the procedures to be followed in such suits. Second, the Congress amended 28 U. S. C. § 1346 to add a new subsection (f). That subsection provides:

"The district courts shall have exclusive original juris-

7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended . . . or section 208 of the Act of July 10, 1952 . . . .

"(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

"(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346 (f) of this title.

"(e) A civil action against the United States under this section shall be tried by the court without a jury.

"(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

"(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession."

> diction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

It is thus clear that the United States has waived its immunity to suit in actions brought against it to quiet title to land. The question is whether suits brought under that waiver may be heard in this Court. The Solicitor General argues that they may not, that § 1346 (f) operates both to confer original jurisdiction over such a case on the federal district courts and simultaneously to withdraw the original jurisdiction of this Court. If this contention were accepted, a grave constitutional question would immediately arise. That question, quite simply, is whether Congress can deprive this Court of original jurisdiction conferred upon it by the Constitution.

The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation. *Kentucky* v. *Dennison,* 24 How. 66, 96; *Florida* v. *Georgia,* 17 How., at 492; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 332. It is clear, of course, that Congress could refuse to waive the Nation's sovereign immunity in all cases or only in some cases but in all courts. Either action would bind this Court even in the exercise of its original jurisdiction. It is similarly clear that the original jurisdiction of this Court is not constitutionally exclusive—that other courts can be awarded concurrent jurisdiction by statute. *Börs* v. *Preston,* 111 U. S. 252; *Ames* v. *Kansas ex rel. Johnston,* 111 U. S. 449. But once Congress has waived the Nation's sovereign immunity, it is far from clear that it can withdraw the constitutional jurisdiction of this Court over such suits.

The constitutional grant to this Court of original jurisdiction is limited to cases involving the States and the envoys of foreign nations. The Framers seem to have been concerned

with matching the dignity of the parties to the status of the court:

> "The evident purpose [of the grant of original jurisdiction] was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made . . . ." *Id.*, at 464.

See The Federalist No. 81, pp. 507–509 (H. Lodge ed. 1888) (A. Hamilton). Elimination of this Court's original jurisdiction would require those sovereign parties to go to another court, in derogation of this constitutional purpose. Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.

Happily, we need not decide this constitutional question, for the statute in question can readily be construed in such a way as to obviate it. In so construing the statute, we no more than follow the long practice of the Court to forgo the resolution of constitutional issues except when absolutely necessary. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U. S. 22, 62.

The legislative history of § 1346 (f) is sparse, but the intent of Congress seems reasonably clear. The congressional purpose was simply to confine jurisdiction to the federal courts and to exclude the courts of the States, which otherwise might be presumed to have jurisdiction over quiet-title suits against the United States, once its sovereign immunity had been

waived. *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502; *Claflin* v. *Houseman,* 93 U. S. 130, 136.[7] The legislative history shows no intention to divest this Court of jurisdiction over quiet-title actions against the United States in cases otherwise within our original jurisdiction. We find, therefore,

[7] This legislation resulted from a title dispute between the United States and landowners along the Snake River in Idaho. In 1971 the Senators from Idaho introduced three bills in response to this dispute. One of the bills, S. 216, waived the Government's immunity to suit in quiet-title actions. As originally drafted, the bill would have created a new section, 28 U. S. C. § 2408a, providing:

"The United States may be named a party in any civil action brought by any person to quiet title to lands claimed by the United States."

Hearing before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs on S. 216, 92d Cong., 1st Sess., 1 (1971).

At the hearing the administration opposed S. 216 but offered to propose an acceptable substitute. The promised changes were set forth in a letter from the Attorney General to the Senate Committee in October 1971. S. Rep. No. 92–575, pp. 5–7 (1971). Most of the changes were concerned with the waiver section and now make up subsections (b) through (g) of § 2409a. The administration also suggested a change in the bill's jurisdictional section. Rather than simply confer "original jurisdiction" on the federal district courts to hear quiet-title actions against the United States, as the original bill had provided, the administration suggested that the bill confer upon the district courts "*exclusive* original jurisdiction" (emphasis added). The Attorney General's letter explained the requested change as follows:

"Since we believe it is the better policy to litigate questions of the Government's title in the Federal courts, the draft bill provides for exclusive jurisdiction of suits under the statute in the U. S. district courts." S. Rep. No. 92–575, *supra,* at 7.

The administration's suggestions were, for the most part, accepted. There was no discussion of the jurisdictional section in the Report of either the House Committee, H. R. Rep. No. 92–1559 (1972), or the Senate Committee, *supra.* Nor was that provision the subject of any debate on the floor of either House. 117 Cong. Rec. 46380–46381 (1971) (passage by the Senate); 118 Cong. Rec. 35530–35531 (1972) (passage by the House of Representatives); *id.,* at 35993 (concurrence by the Senate in the amendments made by the House).

that § 1346 (f), by vesting "exclusive original jurisdiction" of quiet-title actions against the United States in the federal district courts, did no more than assure that such jurisdiction was not conferred upon the courts of any State.

For these reasons we conclude that there is no bar to this original suit in the Supreme Court between California as plaintiff, and Arizona and the United States as defendants.[8] Accordingly, the motion of California for leave to file its complaint is granted, and the defendants are allowed 45 days in which to answer or otherwise respond.

It is so ordered.

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[8] Arizona argues that this is not an appropriate case for this Court's original jurisdiction, both because of its factual complexity and because it involves only title to land rather than the location of a political boundary. Such considerations are hardly relevant to the exercise of this Court's original and exclusive jurisdiction, and the fact is that several cases decided by the Court under its original jurisdiction have involved complicated questions of title to land. In *Massachusetts* v. *New York,* 271 U. S. 65, for example, the Court decided that Massachusetts did not have title to lands within New York along and within Lake Ontario. In *Minnesota* v. *Hitchcock,* 185 U. S. 373, and *Wisconsin* v. *Lane,* 245 U. S. 427, the Court decided bills brought by States to quiet title against the United States. The Congress had expressly waived sovereign immunity for those suits. Cases in which the Court has entertained actions by the United States to quiet title to lands claimed by the States include *United States* v. *Utah,* 279 U. S. 816; *United States* v. *Oregon,* 282 U. S. 804; *United States* v. *Alabama,* 313 U. S. 274; *United States* v. *Wyoming,* 333 U. S. 834; *United States* v. *California,* 332 U. S. 19; *United States* v. *Louisiana,* 339 U. S. 699; and *United States* v. *Texas,* 339 U. S. 707.

Syllabus

GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* FEDERAL TRADE COMMISSION

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

No. 77-654. Argued December 4, 1978—Decided February 22, 1979

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination by sellers, but under § 2 (b) the seller may rebut a prima facie case of price discrimination by showing that his lower price was made in good faith to meet a competitor's equally low price. Section 2 (f) makes it unlawful "for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." Petitioner, in an effort to achieve cost savings, entered into an agreement with its longtime supplier, Borden Co., under which Borden would supply "private label" (as opposed to "brand label") milk to petitioner's stores in the Chicago area. Petitioner refused Borden's initial offer in implementation of the agreement and solicited offers from other companies, resulting in a lower offer from one of Borden's competitors. At this point petitioner's buyer informed Borden that its offer was "not even in the ball park" and that a $50,000 improvement in the offer "would not be a drop in the bucket." Borden then submitted a new offer that was substantially better than its competitor's and petitioner accepted it. Based on these facts, the Federal Trade Commission charged petitioner with violating § 5 of the Federal Trade Commission Act for allegedly misleading Borden during contract negotiations by failing to inform it that its second offer was better than its competitor's, and with violating § 2 (f) by knowingly inducing or receiving price discrimination from Borden. The FTC dismissed the § 5 charge on the ground that the issue was what amount of disclosure is required of the buyer during contract negotiations and that to impose a duty of affirmative disclosure would be "contrary to normal business practice" and "contrary to the public interest," but held that petitioner had violated § 2 (f), the FTC rejecting, *inter alia*, petitioner's defense that the Borden offer had been made to meet competition. The Court of Appeals affirmed. *Held:* A buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2 (f) provided the seller has a meeting-competition defense, and here where Borden had such a defense and thus could not be liable under

§ 2 (b) petitioner, who did no more than accept Borden's offer, cannot be liable under § 2 (f). Pp. 75–85.

(a) Since liability under § 2 (f) is limited to price discrimination "prohibited by this section," and since only §§ 2 (a) and (b) deal with seller liability for price discrimination, a buyer, under § 2 (f)'s plain meaning, cannot be liable if a prima facie case cannot be established against a seller or if the seller has an affirmative defense. *Automatic Canteen Co. of America* v. *FTC*, 346 U. S. 61. In either situation, there is no price discrimination "prohibited by this section." And the legislative history of § 2 (f) confirms the conclusion that buyer liability under § 2 (f) is dependent on seller liability under § 2 (a). Pp. 75–78.

(b) To rewrite § 2 (f) to hold a buyer liable even though there is no price discrimination "prohibited by this section" would contravene the rule that this Court "cannot supply what Congress has studiously omitted," *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55, 67. Pp. 78–79.

(c) Imposition of § 2 (f) liability on petitioner would lead to price uniformity and rigidity contrary to the purposes of other antitrust legislation. P. 80.

(d) A duty of affirmative disclosure requiring a buyer to inform a seller that his bid has beaten competition would frustrate competitive bidding and, by reducing uncertainty, would lead to price matching and anticompetitive cooperation among sellers. P. 80.

(e) The effect of the finding that petitioner's same conduct violated § 2 (f) as violated § 5 of the Federal Trade Commission Act is to impose the same duty of affirmative disclosure that the FTC condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the § 5 charge. Pp. 80–81.

(f) The test for determining when a seller has a valid meeting-competition defense is whether he can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746. Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid, since, in light of its established business relationship with petitioner, it could justifiably conclude that petitioner's statements about the first offer were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with petitioner. Pp. 82–84.

557 F. 2d 971, reversed.

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

Parts I, II, and III of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 85. MARSHALL, J., filed an opinion dissenting in part, *post*, p. 85. STEVENS, J., took no part in the consideration or decision of the case.

Denis McInerney argued the cause for petitioner. With him on the briefs were *Raymond L. Falls, Jr.*, and *William T. Lifland.*

Deputy Solicitor General Easterbrook argued the cause for respondent. With him on the brief were *Solicitor General McCree, Michael N. Sohn, Gerald P. Norton, W. Dennis Cross,* and *Jerold D. Cummins.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the petitioner, the Great Atlantic & Pacific Tea Co. (A&P), violated § 2 (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (f),[1] by knowingly inducing or receiving illegal price discriminations from the Borden Co. (Borden).

**Thomas A. Rothwell* and *Arthur H. Brendtson* filed a brief for the Small Business Legislative Council as *amicus curiae*.

[1] Title 15 U. S. C. § 13 (f) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Title 15 U. S. C. §§ 13 (a) and (b) provide in pertinent part:

"(a) . . . It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a

The alleged violation was reflected in a 1965 agreement between A&P and Borden under which Borden undertook to supply "private label" milk to more than 200 A&P stores in a Chicago area that included portions of Illinois and Indiana. This agreement resulted from an effort by A&P to achieve cost savings by switching from the sale of "brand label" milk (milk sold under the brand name of the supplying dairy) to the sale of "private label" milk (milk sold under the A&P label).

To implement this plan, A&P asked Borden, its longtime supplier, to submit an offer to supply under private label certain of A&P's milk and other dairy product requirements. After prolonged negotiations, Borden offered to grant A&P a discount for switching to private-label milk provided A&P would accept limited delivery service. Borden claimed that this offer would save A&P $410,000 a year compared to what it had been paying for its dairy products. A&P, however, was not satisfied with this offer and solicited offers from other

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monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

"(b) . . . Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

dairies. A competitor of Borden, Bowman Dairy, then submitted an offer which was lower than Borden's.[2]

At this point, A&P's Chicago buyer contacted Borden's chain store sales manager and stated: "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." When the Borden representative asked for more details, he was told nothing except that a $50,000 improvement in Borden's bid "would not be a drop in the bucket."

Borden was thus faced with the problem of deciding whether to rebid. A&P at the time was one of Borden's largest customers in the Chicago area. Moreover, Borden had just invested more than $5 million in a new dairy facility in Illinois. The loss of the A&P account would result in underutilization of this new plant. Under these circumstances, Borden decided to submit a new bid which doubled the estimated annual savings to A&P, from $410,000 to $820,000. In presenting its offer, Borden emphasized to A&P that it needed to keep A&P's business and was making the new offer in order to meet Bowman's bid. A&P then accepted Borden's bid after concluding that it was substantially better than Bowman's.

I

Based on these facts, the Federal Trade Commission filed a three-count complaint against A&P. Count I charged that A&P had violated § 5 of the Federal Trade Commission Act by misleading Borden in the course of negotiations for the private-label contract, in that A&P had failed to inform Borden that its second offer was better than the Bowman bid.[3]

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[2] The Bowman bid would have produced estimated annual savings of approximately $737,000 for A&P as compared with the first Borden bid, which would have produced estimated annual savings of $410,000.

[3] Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (a), provides in relevant part:

"(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Count II, involving the same conduct, charged that A&P had violated § 2 (f) of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing or receiving price discriminations from Borden. Count III charged that Borden and A&P had violated § 5 of the Federal Trade Commission Act by combining to stabilize and maintain the retail and wholesale prices of milk and other dairy products.

An Administrative Law Judge found, after extended discovery and a hearing that lasted over 110 days, that A&P had acted unfairly and deceptively in accepting the second offer from Borden and had therefore violated § 5 of the Federal Trade Commission Act as charged in Count I. The Administrative Law Judge similarly found that this same conduct had violated § 2 (f). Finally, he dismissed Count III on the ground that the Commission had not satisfied its burden of proof.

On review, the Commission reversed the Administrative Law Judge's finding as to Count I. Pointing out that the question at issue was what amount of disclosure is required of the buyer during contract negotiations, the Commission held that the imposition of a duty of affirmative disclosure would be "contrary to normal business practice and, we think, contrary to the public interest." Despite this ruling, however, the Commission held as to Count II that the identical conduct on the part of A&P had violated § 2 (f), finding that Borden had discriminated in price between A&P and its competitors, that the discrimination had been injurious to competition, and that A&P had known or should have known that it was the beneficiary of unlawful price discrimination.[4] The Commission rejected A&P's defenses that the Borden bid had been made to meet competition and was cost justified.[5]

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[4] The Commission also found that the interstate commerce requirement of § 2 (f) was satisfied.

[5] Under §§ 2 (a) and (b) of the Act, a seller who can establish either that a price differential was cost justified or offered in good faith to meet

A&P filed a petition for review of the Commission's order in the Court of Appeals for the Second Circuit. The court held that substantial evidence supported the findings of the Commission and that as a matter of law A&P could not successfully assert a meeting-competition defense because it, unlike Borden, had known that Borden's offer was better than Bowman's.[6] Finally, the court held that the Commission had correctly determined that A&P had no cost-justification defense. 557 F. 2d 971. Because the judgment of the Court of Appeals raises important issues of federal law, we granted certiorari. 435 U. S. 922.

II

The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened

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competition has a complete defense to a charge of price discrimination under the Act. *Standard Oil Co.* v. *FTC,* 340 U. S. 231. See n. 1, *supra.*

With respect to the meeting-competition defense, the Commission stated that even though Borden as the seller might have had a meeting-competition defense, A&P as the buyer did not have such a defense because it knew that the bid offered was, in fact, better than the Bowman bid. With respect to the cost-justification defense, the Commission found that Commission counsel had met the initial burden of going forward as required by this Court's decision in *Automatic Canteen Co. of America* v. *FTC,* 346 U. S. 61, and that A&P had not then satisfied its burden of showing that the prices were cost justified, or that it did not know that they were not.

The Commission upheld the Administrative Law Judge's dismissal of Count III of the complaint.

[6] The Court of Appeals, like the Commission, relied on *Kroger Co.* v. *FTC,* 438 F. 2d 1372 (CA6), for the proposition that a buyer can be liable under § 2 (f) of the Act even if the seller has a meeting-competition defense. The *Kroger* case involved a buyer who had made deliberate misrepresentations to a seller in order to induce price concessions. While the Court of Appeals in this case did not find that A&P had made any affirmative misrepresentations, it viewed the distinction between a "lying buyer" and a buyer who knowingly accepts the lower of two bids as without legal significance. See n. 15, *infra.*

the existence of small independent retailers. Notwithstanding this concern with buyers, however, the emphasis of the Act is in § 2 (a), which prohibits price discriminations by sellers. Indeed, the original Patman bill as reported by Committees of both Houses prohibited only seller activity, with no mention of buyer liability.[7] Section 2 (f), making buyers liable for inducing or receiving price discriminations by sellers, was the product of a belated floor amendment near the conclusion of the Senate debates.[8]

As finally enacted, § 2 (f) provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.)

Liability under § 2 (f) thus is limited to situations where the price discrimination is one "which is prohibited by this section." While the phrase "this section" refers to the entire § 2 of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of § 2 (f), therefore, a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination "prohibited by this section." [9]

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[7] H. R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935).

[8] F. Rowe, Price Discrimination Under the Robinson-Patman Act 423 (1962). Section 2 (f) has been described by commentators as an "afterthought." *Id.*, at 421; J. McCord, Commentaries on the Robinson-Patman Act 96 (1969).

[9] Commentators have recognized that a finding of buyer liability under § 2 (f) is dependent on a finding of seller liability under § 2 (a). McCord, *supra*, at 96 ("[Section] 2 (f) cannot be enforced if a prima facie case could not be established against the seller on the basis of the transaction in question under Section 2 (a) or if he could sustain an affirmative defense thereto"); Rowe, *supra*, at 421 ("the legal status of the buyer is derivative from the seller's pricing legality under the Act"); H. Shniderman, Price

The legislative history of § 2 (f) fully confirms the conclusion that buyer liability under § 2 (f) is dependent on seller liability under § 2 (a).[10]

The derivative nature of liability under § 2 (f) was recognized by this Court in *Automatic Canteen Co. of America* v. *FTC,* 346 U. S. 61. In that case, the Court stated that even if the Commission has established a prima facie case of price discrimination, a buyer does not violate § 2 (f) if the lower prices received are either within one of the seller's defenses or not known by the buyer not to be within one of those defenses. The Court stated:

> "Thus, at the least, we can be confident in reading the words in § 2 (f), 'a discrimination in price which is prohibited by this section,' as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act. It is therefore apparent that the discriminatory price that buyers are forbidden by § 2 (f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act . . . . For we are not dealing simply with a 'discrimination in price'; the 'discrimination in price' in § 2 (f) must be one 'which is prohibited by this section.' Even if any price differential were to be comprehended within the term 'discrimination in price,' § 2 (f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials

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Discrimination in Perspective 136 (1977) (a buyer can be liable under § 2 (f) only if the price received "cannot be excused by any defenses provided to the seller").

[10] In presenting the Conference Report to the House, Representative Utterback summarized the meaning of § 2 (f) by stating: "This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph [§ 2 (a)] of the amendment." 80 Cong. Rec. 9419 (1936).

reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2 (a) and 2 (b)." 346 U. S., at 70–71 (footnotes omitted).

The Court thus explicitly recognized that a buyer cannot be held liable under § 2 (f) if the lower prices received are justified by reason of one of the seller's affirmative defenses.

III

The petitioner, relying on this plain meaning of § 2 (f) and the teaching of the *Automatic Canteen* case, argues that it cannot be liable under § 2 (f) if Borden had a valid meeting-competition defense. The respondent, on the other hand, argues that the petitioner may be liable even assuming that Borden had such a defense. The meeting-competition defense, the respondent contends, must in these circumstances be judged from the point of view of the buyer. Since A&P knew for a fact that the final Borden bid beat the Bowman bid, it was not entitled to assert the meeting-competition defense even though Borden may have honestly believed that it was simply meeting competition. Recognition of a meeting-competition defense for the buyer in this situation, the respondent argues, would be contrary to the basic purpose of the Robinson-Patman Act to curtail abuses by large buyers.

A

The short answer to these contentions of the respondent is that Congress did not provide in § 2 (f) that a buyer can be liable even if the seller has a valid defense. The clear language of § 2 (f) states that a buyer can be liable only if he receives a price discrimination "prohibited by this section." If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

A similar attempt to amend the Robinson-Patman Act judicially was rejected by this Court in *FTC* v. *Simplicity Pattern*

Co., 360 U. S. 55. There the Federal Trade Commission had found that a manufacturer of dress patterns had violated § 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, by providing its larger customers services and facilities not offered its smaller customers.[11] The manufacturer attempted to defend against this charge by asserting that there had been no injury to competition and that its discriminations in services were cost justified. Since liability under § 2 (e), unlike § 2 (a), does not depend upon competitive injury or the absence of a cost-justification defense, the manufacturer's primary argument was that "it would be 'bad law and bad economics' to make discriminations unlawful even where they may be accounted for by cost differentials or where there is no competitive injury." 360 U. S., at 67 (footnote omitted). The Court rejected this argument. Recognizing that "this Court is not in a position to review the economic wisdom of Congress," the Court stated that "[w]e cannot supply what Congress has studiously omitted." *Ibid.* (footnote omitted). The respondent's attempt in the present case to rewrite § 2 (f) to hold a buyer liable even though there is no discrimination in price "prohibited by this section" must be rejected for the same reason.[12]

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[11] Section 2 (e) provides:

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 15 U. S. C. § 13 (e).

[12] Contrary to the respondent's suggestion, this interpretation of § 2 (f) is in no way inconsistent with congressional intent. "[T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." *Automatic Canteen Co. of America* v. *FTC*, 346 U. S., at 79. Here, by contrast, we conclude that a buyer is not liable if the seller *does* have a defense under § 2 (b).

B

In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U. S., at 63. Imposition of § 2 (f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.[13]

In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act. *United States* v. *Container Corp.*, 393 U. S. 333. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.[14]

Ironically, the Commission itself, in dismissing the charge under § 5 of the Federal Trade Commission Act in this case, recognized the dangers inherent in a duty of affirmative disclosure:

> "The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is

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[13] More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States* v. *United States Gypsum Co.*, 438 U. S. 422; *Automatic Canteen Co. of America* v. *FTC*, *supra*, at 74.

[14] A duty of affirmative disclosure might also be difficult to enforce. In cases where a seller offers differing quantities or a different quality product, or offers to serve the buyer in a different manner, it might be difficult for the buyer to determine when disclosure is required.

> intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest.
>
> . . . . . .
>
> "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." 87 F. T. C. 1047, 1050–1051.

The effect of the finding that the same conduct of the petitioner violated § 2 (f), however, is to impose the same duty of affirmative disclosure which the Commission condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the charge under § 5 of the Federal Trade Commission Act. Neither the Commission nor the Court of Appeals offered any explanation for this apparent anomaly.

As in the *Automatic Canteen* case, we decline to adopt a construction of § 2 (f) that is contrary to its plain meaning and would lead to anticompetitive results. Accordingly, we hold that a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2 (f) provided the seller has a meeting-competition defense.[15]

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[15] In *Kroger Co.* v. *FTC*, 438 F. 2d 1372, the Court of Appeals for the Sixth Circuit held that a buyer who induced price concessions by a seller by making deliberate misrepresentations could be liable under § 2 (f) even if the seller has a meeting-competition defense.

This case does not involve a "lying buyer" situation. The complaint issued by the FTC alleged that "A&P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact." The complaint did not allege that Borden's second bid was induced by any misrepresentation. The Court of Appeals recognized that the *Kroger* case involved a "lying buyer," but stated that there

IV

Because both the Commission and the Court of Appeals proceeded on the assumption that a buyer who accepts the lower of two competitive bids can be liable under § 2 (f) even if the seller has a meeting-competition defense, there was not a specific finding that Borden did in fact have such a defense. But it quite clearly did.

A

The test for determining when a seller has a valid meeting-competition defense is whether a seller can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759–760. "A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2 (b) defense." *United*

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was no meaningful distinction between the situation where "the buyer lies or merely keeps quiet about the nature of the competing bid." 557 F. 2d 971, 983.

Despite this background, the respondent argues that A&P did engage in misrepresentations and therefore can be found liable as a "lying buyer" under the rationale of the *Kroger* case. The misrepresentation relied upon by the respondent is a statement allegedly made by a representative of A&P to Borden after Borden made its second bid which would have resulted in annual savings to A&P of $820,000. The A&P representative allegedly told Borden to "sharpen your pencil a little bit because you are not quite there." But the Commission itself referred to this comment only to note its irrelevance, and neither the Commission nor the Court of Appeals mentioned it in considering the § 2 (f) charge against A&P. This is quite understandable, since the comment was allegedly made *after* Borden made its second bid and therefore cannot be said to have induced the bid as in the *Kroger* case.

Because A&P was not a "lying buyer," we need not decide whether such a buyer could be liable under § 2 (f) even if the seller has a meeting-competition defense.

States v. *United States Gypsum Co.*, 438 U. S. 422, 453.[16] Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition. *Id.*, at 454.

B

Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid. The petitioner, despite its longstanding relationship with Borden, was dissatisfied with Borden's first bid and solicited offers from other dairies. The subsequent events are aptly described in the opinion of the Commission:

> "Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy that was lower than Borden's August 13 offer. On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, 'I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park.' Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid 'would not be a drop in the [bucket].' Contrary to its usual practice, A&P then offered Borden the oppor-

[16] Recognition of the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers. As the Court stated in *Standard Oil Co.* v. *FTC*, 340 U. S., at 249:

"We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."

tunity to submit another bid." 87 F. T. C., at 1048 (Footnotes and record citations omitted.)

Thus, Borden was informed by the petitioner that it was in danger of losing its A&P business in the Chicago area unless it came up with a better offer. It was told that its first offer was "not even in the ball park" and that a $50,000 improvement "would not be a drop in the bucket." In light of Borden's established business relationship with the petitioner, Borden could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with the petitioner.

Borden was unable to ascertain the details of the Bowman bid. It requested more information about the bid from the petitioner, but this request was refused. It could not then attempt to verify the existence and terms of the competing offer from Bowman without risking Sherman Act liability. *United States* v. *United States Gypsum Co., supra.* Faced with a substantial loss of business and unable to find out the precise details of the competing bid, Borden made another offer stating that it was doing so in order to meet competition. Under these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet its competition, and therefore was entitled to a meeting-competition defense.[17]

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[17] The facts of this case are thus readily distinguishable from *Corn Products Co.* v. *FTC,* 324 U. S. 726, and *FTC* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746, in both of which the Court held that a seller had failed to establish a meeting-competition defense. In the *Corn Products* case, the only evidence to rebut the prima facie case of price discrimination was testimony by witnesses who had no personal knowledge of the transactions in question. Similarly, in the *Staley Mfg. Co.* case, unsupported testimony from informants of uncertain character and reliability was insufficient to establish the defense. In the present case, by contrast, the source of the information was a person whose reliability was not questioned and who had personal knowledge of the competing bid. Moreover, Borden at-

Since Borden had a meeting-competition defense and thus could not be liable under § 2 (b), the petitioner who did no more than accept that offer cannot be liable under § 2 (f).[18]

Accordingly, the judgment is reversed.

It is so ordered.

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

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

I concur in Parts I, II, and III of the Court's opinion, but dissent from Part IV. Because it was thought the issue was irrelevant where the buyer knows that the price offered is lower than necessary to meet competition, neither the Commission nor the Court of Appeals decided whether Borden itself would have had a valid meeting-competition defense. The Court should not decide this question here, but should remand to the Commission, whose job it is initially to consider such matters.

For the reason stated by the Commission and the Court of Appeals, I am also convinced that the United States made a sufficient, unrebutted showing that Borden would not have a cost-justification defense to a Robinson-Patman Act charge.

MR. JUSTICE MARSHALL, dissenting in part.

I agree with the Court that the Federal Trade Commission and the Court of Appeals applied the wrong legal standard in

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tempted to investigate by asking A&P for more information about the competing bid. Finally, Borden was faced with a credible threat of a termination of purchases by A&P if it did not make a second offer. All of these factors serve to show that Borden did have a valid meeting-competition defense. See *United States* v. *United States Gypsum Co.*, 438 U. S., at 454.

[18] Because we hold that the petitioner is not liable under § 2 (f), we do not reach the question whether Borden might also have had a cost-justification defense under § 2 (a).

assessing A&P's liability under the Robinson-Patman Act. However, I cannot join the Court's interpretation of § 2 (f) as precluding buyer liability under this Act unless the seller could also be found liable for price discrimination. Neither the language nor the sparse legislative history of § 2 (f) justifies this enervating standard for the determination of buyer liability. To the contrary, the Court's construction disregards the congressional purpose to curtail the coercive practices of chainstores and other large buyers. Having formulated a new legal standard, the Court then applies it here in the first instance rather than remanding the case to the Commission. Given the numerous ambiguities in the record, I believe the Court thereby improperly arrogates to itself the role of the trier of fact.

I

Section 2 (f) provides that "[i]t shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.) The Court interprets the italicized language as "plainly meaning" that a buyer can be found liable for knowingly inducing price discrimination only if his seller is first proved liable under §§ 2 (a) and 2 (b). *Ante,* at 76, 81. Under this construction, proceedings involving only the Commission and a buyer will turn upon proof of a seller's liability, and whenever a seller could successfully claim the meeting-competition defense, the buyer must be exonerated.

In my view, the language of § 2 (f) does not compel this circuitous method of establishing buyer liability. Sections 2 (a) and 2 (b) of the Act define the elements of price discrimination and the affirmative defenses available to sellers. When Congress extended liability to buyers who encourage price discrimination, a ready means of defining the prohibition was to rely on the elements and defenses already delineated in §§ 2 (a) and 2 (b). Thus, the phrase "which is prohibited by this section" in § 2 (f) incorporates these elements and

defenses by reference, making them applicable to buyers. So construed, § 2 (f) simply means that the same elements of a prima facie case must be established and the same basic affirmative defenses available, whether buyer or seller liability is in issue. The section does not require that another party actually satisfy all of the conditions of §§ 2 (a) and 2 (b) before buyer liability can even be considered. Determining buyer and seller liability independently, I believe, places less strain on the "plain meaning" of the language of § 2 (f) than does the absolutely derivative standard the majority announces today.

In construing § 2 (f), the Court relies on Congress' delay in adding the section to the final bill and on a remark by Representative Utterback during the legislative debates. *Ante,* at 75–77, and n. 10. The delay provides little logical justification for the Court's interpretation; rather, it more likely reflects Congress' late realization that halting the abusive practices of buyers [1] could not be accomplished solely through imposition of liability on sellers. Representative Utterback's statement, 80 Cong. Rec. 9419 (1936), amounts to a slight paraphrase of § 2 (f) and in no way supports the Court's derivative standard.

I agree with the Court's suggestion, *ante,* at 80, that we must resolve the dilemma confronting a buyer who properly invites a seller to meet a competitor's price and then fortui-

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[1] See S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3–7, 17 (1936); H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936); FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); *FTC* v. *Henry Broch & Co.,* 363 U. S. 166, 168–169 (1960); W. Patman, Complete Guide to the Robinson-Patman Act 7–10 (1963); F. Rowe, Price Discrimination Under the Robinson-Patman Act 8–14 (1962). See generally Hearings on Price Discrimination (S. 4171) before a Subcommittee of the Senate Committee on the Judiciary, 74th Cong., 2d Sess. (1936); Hearings on H. R. 8442, H. R. 4995, and H. R. 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess. (1935).

tously obtains a lower bid. Congress could not have expected the buyer to choose between asking the seller to increase the bid to a specific price or accepting the lower bid and facing liability under § 2 (f). Rather, it must have intended some accommodation for buyers who act in good faith yet receive bids that beat competition. This does not mean, however, that a buyer should be liable under § 2 (f) only if his seller also would be liable. That solution to the buyer's dilemma would enable him to manufacture his own defense by misrepresenting to a seller the response needed to meet a competitor's bid and then allowing the seller to rely in good faith on incorrect information. The Court purports to reserve this "lying buyer" issue, *ante,* at 81–82, n. 15, but the derivative standard it adopts today belies the reservation. If "prohibited by this section" means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad faith are necessarily irrelevant.

I would hold that under § 2 (f), the Robinson-Patman Act defenses must be available to buyers on the same basic terms as they are to sellers. To be sure, some differences in the nature of the defenses would obtain because of the different bargaining positions of sellers and buyers. With respect to the meeting-competition defense at issue here, a seller can justify a price discrimination by showing that his lower price was offered in "good faith" to meet that of a competitor. *Ante,* at 82–83; *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 450–455 (1978). In my view, a buyer should be able to claim that defense—independently of the seller—if he acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's. But a buyer who induces the lower bid by misrepresentation should not escape Robinson-Patman Act liability. See *Kroger Co.* v. *FTC,* 438 F. 2d 1372 (CA6) (Clark, J.), cert. denied, 404 U. S. 871 (1971). This definition of the meeting-competition defense both extricates buyers from an impossible dilemma and respects the congressional

intent to prevent buyers from abusing their market power to gain competitive advantage.[2]

Automatic Canteen Co. of America v. *FTC,* 346 U. S. 61 (1953), is entirely consistent with this interpretation of § 2 (f). The issue there concerned the allocation of "the burden of coming forward with evidence under § 2 (f) of the Act," 346 U. S., at 65, not the precise contours of the elements and defenses that determine the scope of buyer liability. *Automatic Canteen*'s general discussion of § 2 (f)'s substantive requirements, quoted *ante,* at 77–78, merely explains that the affirmative defenses "available to sellers" must also be available to buyers. Far from pronouncing that buyer liability is derivative, *Automatic Canteen* began with the observation that § 2 (f) is *"roughly the counterpart,* as to buyers, of sections of the Act dealing with discrimination by sellers." 346 U.S., at 63 (emphasis added).[3]

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[2] See S. Rep. No. 1502, 74th Cong., 2d Sess., 3–4, 7 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3–7, 14–17 (1936); Patman, *supra,* at 7–10, 148–151; Rowe, *supra,* at 8–23.

The Court recently noted in *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 455 n. 30 (1978), that "[i]t may also turn out that sustained enforcement of § 2 (f) . . . will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2 (b)." (Citation omitted.) But if neither a buyer nor a seller can be liable when the seller relies in good faith on the buyer's misrepresentations, then enforcement of § 2 (f) will not "bolster the credibility" of buyers. Thus, the derivative standard of liability adopted by the Court today is inconsistent with the premise underlying the Court's suggestion in *United States Gypsum,* see Note, The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 288, 291–294 (1978), and it eliminates one means of reassuring sellers that they may rely on buyer representations.

[3] Given this preface to *Automatic Canteen,* language in that opinion provides little support for the Court's adoption today of a derivative standard with respect to the buyer's meeting-competition defense. Moreover, to the extent the majority believes its resort to literal construction of § 2 (f) forecloses further inquiry, it ignores the broader teaching of *Automatic Canteen.* That case adopted a common-sense approach for inter-

II

In my judgment, the numerous ambiguities in the record dictate that this case be remanded to the Commission. The Court, however, avoids a remand by concluding in the first instance that A&P's seller necessarily had a meeting-competition defense.[4] In so doing, the Court usurps the factfinding function best performed by the Commission.[5] Neither the Administrative Law Judge, the Commission, nor the Court of Appeals determined that Borden would have been entitled to claim the meeting-competition defense. Indeed, the Administrative Law Judge suggested the opposite, 87 F. T. C. 962, 1021 (1976), and the Commission stated:

"We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition

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preting the often ambiguous Robinson-Patman Act, tempering a "merely literal reading of the language" with considerations of "fairness and convenience" when necessary to achieve Congress' purpose. 346 U. S., at 79, and n. 23. On that basis, *Automatic Canteen* allocated to the Commission the burden of production regarding a buyer's cost-justification defense, even though the Commission does not bear that burden in a proceeding against a seller. *Id.*, at 75–76; *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948). Indeed, the Court's interpretation of § 2 (f) today, which places buyers in the litigating position of their sellers, may also be incompatible with *Automatic Canteen*'s specific holding on the burden of production.

[4] Because the Court reverses the judgment without remanding for further consideration and does not expressly reach the merits of the cost-justification issue raised by A&P, *ante,* at 85 n. 18, I need not address that issue either.

[5] Considering the recent admonition in *United States Gypsum, supra,* at 456 n. 31, that "[t]he case-by-case interpretation and elaboration of the § 2 (b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations," the Court's action is particularly inappropriate.

While I question the Court's decision to undertake resolution of this factual question, without even determining which party bore the burden of persuasion, I do not understand Part IV of its opinion as purporting to modify in any sense what was said last Term in *United States Gypsum* about the scope of the meeting-competition defense for sellers.

> defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs. It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs." 87 F. T. C. 1047, 1057 n. 19 (1976) (citations omitted; emphasis in original).

Furthermore, if the Court truly intends to avoid deciding the "lying buyer" issue, then it should remand the case for determination of whether the exception applies here. Testimony before the Administrative Law Judge directly raised the possibility that A&P misled Borden to believe a still lower price was necessary than Borden had offered when it first responded to the Bowman bid. App. 117a–118a, 123a–124a, 141a–142a.[6] Both the Administrative Law Judge and the

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[6] The Court's opinion creates the impression that Borden submitted only two proposals, *ante,* at 81–82, n. 15, 83–84. In fact, A&P induced Borden to make a third proposal, even though the second was already more favorable than Bowman's.

When Borden initially responded to Bowman's bid, the A&P representative rejected Borden's offer on the ground that it included milk sold in glass gallon containers, whereas other bidders supposedly had not included that item. Actually, Bowman's bid had included glass gallons and A&P had subsequently decided against using glass containers. 87 F. T. C. 962, 979 (1976); App. 73a–74a, 116a–118a, 257a–260a, 774a–775a. The effect of forcing Borden to delete milk sold in glass gallons from the proposal without raising the overall bid, was to increase the savings to A&P on other products still covered because part of the promised savings had been derived from the sale of the cheaper glass gallons. See 87 F. T. C., at 979–980. In addition, while Borden was preparing a third proposal to reflect the deletion, A&P suggested that Borden make further price

Commission credited that testimony, see 87 F. T. C., at 979, 1021–1022; 87 F. T. C., at 1049 n. 3, but since evidence of misrepresentation was not material under the standard they applied, there were no clear findings of fact on the point. Under these circumstances, this Court should not attempt to elide such testimony by the unsubstantiated conclusion that Borden's final bid was unaffected by any misrepresentation. *Ante,* at 81–82, n. 15; see n. 6, *supra.*

Accordingly, I dissent from the Court's adoption of a derivative standard for determining buyer liability and its resolution of disputed factual issues without a remand.

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reductions, saying " 'sharpen your pencil a little bit because you are not quite there.' " App. 118a. As a result, Borden reduced its prices still further to yield additional savings of approximately $5,000 to $8,000. The bid finally accepted by A&P incorporated these price reductions as well as those attributable to the deletion of glass gallons. See *id.,* at 117a–118a, 123a–124a, 141a–142a.

Syllabus

VANCE, SECRETARY OF STATE, ET AL. *v.* BRADLEY ET AL.

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

No. 77–1254. Argued November 27, 1978—Decided February 22, 1979

Section 632 of the Foreign Service Act of 1946, which requires persons covered by the Foreign Service retirement system to retire at age 60, though no mandatory retirement age is established for Civil Service employees, including those who serve abroad, *held* not to violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 95–112.

(a) The standard of rationality, rather than strict scrutiny, is to be used in determining whether this statute violates equal protection. *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307. Pp. 96–97.

(b) Congress has recognized the distinctive requirements associated with the conduct of the country's foreign relations and has provided personnel policies for the Foreign Service, a relatively small, homogeneous, and particularly able corps, separate and apart from the Civil Service system. One of the differences, the earlier retirement age for Foreign Service officers specified in § 632, operates in conjunction with statutory "selection out" provisions as part of an integral plan to create "a correctly balanced [Foreign] Service that [was] constructed so that the size of the various classes would correspond with the distribution of the work load of the Service," selection out operating primarily at the lower, and compulsory retirement at the higher, Foreign Service levels. Pp. 98–102.

(c) Section 632 also furthers the congressional purpose of removing from the Foreign Service those who are sufficiently old that they may be less dependable than younger persons in facing the rigors of overseas duty. Since Congress attached special importance to the high performance in the conduct of our foreign relations, it was rational to avoid the risks of having older employees in the Foreign Service engaged in such activity, while tolerating those risks involved when older Civil Service employees work abroad. Pp. 103–106.

(d) Another reason for not equating the situation with respect to Civil Service employees serving overseas with that of the Foreign Service is that about 60% of the relatively small group in the latter category serve in overseas posts at any one time, whereas only about 5% of Civil

Service employees are in overseas service at any one time and such service is mainly on a voluntary basis. Pp. 106–108.

(e) Even if the classification at issue here is to some extent both underinclusive and overinclusive, perfection is not required to satisfy equal protection standards, and such imperfection as exists can be rationally related to the secondary objective of legislative convenience. Pp. 108–109.

(f) Appellees have not satisfied the burden of demonstrating that Congress had no reasonable basis for believing that conditions overseas generally are more demanding than those in this country and that at age 60 or before many persons begin to decline. Pp. 109–112.

436 F. Supp. 134, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 112.

Solicitor General McCree argued the cause for appellants. With him on the brief were *Assistant Attorney General Babcock, Leonard Schaitman, Neil H. Koslowe, Herbert J. Hansell,* and *Michael A. Glass.*

Zona F. Hostetler argued the cause for appellees. With her on the brief was *Bruce J. Terris.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue presented is whether Congress violates the equal protection component of the Fifth Amendment's Due Process Clause [1] by requiring retirement at age 60 of federal employees

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**Catherine Waelder* filed a brief for the American Foreign Service Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Alfred Miller* for the American Association of Retired Persons; by *William J. Mahannah* and *L. M. Pellerzi* for the American Federation of Government Employees (AFL–CIO); by *Claude Pepper, pro se,* and *Edward F. Howard* for Claude Pepper et al.; and by *Howard Eglit, Mark Shenfield,* and *David Marlin* for the National Council of Senior Citizens.

[1] Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most

covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system. A three-judge District Court was convened to hear this challenge to the constitutionality of a federal statute by appellees, a group of former and present participants in the Foreign Service retirement system. Treating the case as submitted on cross motions for summary judgment, the District Court examined the affidavits and allegations presented by both sides, held the distinction invalid, and gave judgment for appellees. 436 F. Supp. 134 (DC 1977).[2] We noted probable jurisdiction, 436 U. S. 903 (1978), and now reverse.

I

The statutory provision under attack, § 632 of the Foreign Service Act of 1946, 60 Stat. 1015, as amended, 22 U. S. C. § 1002, mandates the retirement at age 60 of participants in the Foreign Service retirement system.[3] That system orig-

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directly in applying it to the States. See Cong. Globe, 39th Cong., 1st Sess., 2510 (1866) (Rep. Miller) (all of § 1 of the Fourteenth Amendment is already within the spirit of the Declaration of Independence); *id.*, at 2459 (Rep. Stevens) (requirement of equal protection is part of Constitution but is not applicable to the States); *id.*, at 1034 (Rep. Bingham, speaking of his original proposal for an equal protection clause) ("[e]very word of the proposed amendment is to-day in the Constitution"). Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *E. g., Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100 (1976); *Buckley* v. *Valeo,* 424 U. S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 638 n. 2 (1975); *Bolling* v. *Sharpe,* 347 U. S. 497, 500 (1954).

[2] Appellees also urged in the District Court that the mandatory retirement age violated the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 633a, an Executive Order, and Civil Service regulations. A single District Judge rejected these nonconstitutional claims, *Bradley* v. *Kissinger,* 418 F. Supp. 64 (DC 1976), and no appeal was taken. Appellees abandoned their other nonconstitutional claims. See 436 F. Supp., at 135 n. 1.

[3] Participation in the system is defined by 22 U. S. C. § 1063. Recently, an average of 44 employees per year have been mandatorily retired.

inally covered only Foreign Service officers in the State Department, but it has been expanded to include Foreign Service Reserve officers with unlimited tenure,[4] career Foreign Service Staff officers and employees,[5] Foreign Service Information officers and career staff in the International Communication Agency,[6] and certain employees of the Agency for International Development.[7] Unlike these employees, personnel covered by the Civil Service retirement system presently face no mandatory retirement age [8] and, when this suit was brought, were not required to retire until age 70.[9]

Appellees have not suggested that the statutory distinction between Foreign Service personnel over age 60 and other federal employees over that age [10] burdens a suspect group or

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[4] § 16, 82 Stat. 814.

[5] §§ 501 (a), 522 (a)–(c), 90 Stat. 834, 846–847. See also, § 31 (b), 74 Stat. 838 (including those with 10 years of continuous service).

[6] 82 Stat. 812.

[7] § 16, 87 Stat. 722–723.

[8] Age Discrimination in Employment Act Amendments of 1978, § 5 (c), 92 Stat. 191.

[9] 5 U. S. C. § 8335, which was repealed by the Age Discrimination in Employment Act Amendments of 1978, § 5 (c), 92 Stat. 191.

[10] Since the age factor is present in both groups, the gravamen of appellees' claim, as it developed, was that § 632 discriminates on the basis of job classification. The District Court originally stated in a footnote that, besides the distinction between Foreign Service and Civil Service personnel, appellees "also claim section 632 discriminates between those who have reached age sixty and those who are younger." In response to appellants' complaint that no such issue was in the case, appellees "stressed that [they were] eschewing any such claim in this case and claiming only that Foreign Service employees were being forced to retire without a rational basis at an earlier age than government employees generally." Plaintiffs' Memorandum of Points and Authorities in Response to Defendants' Motion for Reconsideration 4 (July 21, 1977). The District Court accepted appellees' invitation to remove from its opinion the sentence and accompanying discussion, expressly finding that the contention had been abandoned. Order of July 28, 1977. See also Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss

a fundamental interest; and in cases where these considerations are absent, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.[11] The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process[12] and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. The District Court and the parties are in agreement that whether § 632 violates equal protection should be determined under the standard stated in *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S. 307 (1976), and similar cases; and thus that the section is valid if it is "rationally related to furthering a legitimate state interest." *Id.,* at 312.

In arguing that § 632 easily satisfies this standard, the appellants submit that one of their legitimate and substantial goals is to recruit and train and to assure the professional competence, as well as the mental and physical reliability, of the corps of public servants who hold positions critical to our foreign relations, who more often than not serve overseas, frequently under difficult and demanding conditions, and who must be ready for such assignments at any time. Neither the District Court nor appellees dispute the validity of this goal.

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or, in the Alternative, for Summary Judgment 4 (Nov. 24, 1976); Brief for Appellees 77; Tr. of Oral Arg. 20–22, 24.

[11] *E. g., San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 40 (1973).

[12] Congress' recent action with respect to mandatory retirement ages shows that the political system is working. See n. 8, *supra,* and accompanying text. Indeed, the House preserved the Foreign Service provision, at least for the time being, to allow the appropriate international relations committee to study the issue. 123 Cong. Rec. 30556 (1977).

The appellants also submit that compulsory retirement at age 60 furthers this end in two principal ways: first, as an integral part of the personnel policies of the Service designed to create predictable promotion opportunities and thus spur morale and stimulate superior performance in the ranks; second, by removing from the Service those who are sufficiently old that they may be less equipped or less ready than younger persons to face the rigors of overseas duty in the Foreign Service. The District Court rejected each of these latter submissions and in our view erred in each instance.

II

At least since the enactment of the Rogers Act in 1924, which created the Foreign Service by reorganizing the diplomatic and consular services into a single entity, Congress has recognized the distinctive requirements associated with the conduct of the country's foreign relations and has provided personnel policies for the Foreign Service separate and apart from the general Civil Service system. Among other differences, Foreign Service officers have been subject to an earlier retirement age than is true in the Civil Service.

Congress continued to give special attention to the Foreign Service when it passed the Foreign Service Act of 1946, 60 Stat. 999, which, with amendments, is still in effect. That Act reorganized the Foreign Service, provided it with a new personnel structure, and revised its retirement system. The intention was to produce a "disciplined and mobile corps of trained men . . . through entry at the bottom on the basis of competitive examination and advancement by merit to positions of command." H. R. Rep. No. 2508, 79th Cong., 2d Sess., 1 (1946).[13] In furtherance of "the fundamental career

[13] The Senate Report's general discussion of the Act is identical to that of the House Report. Cf. S. Rep. No. 1731, 79th Cong., 2d Sess., 1–10 (1946).

principle" [14] that had earlier been established for the Service, *id.*, at 5, Congress found that "[t]he promotion system must insure the rapid advancement of men of ability to positions of responsibility and the elimination of men who have reached their ceilings of performance." *Id.*, at 2–3. Thus, not only was initial selection to be on the basis of merit but Foreign Service officers were also to be classified based on their individual abilities and to be regularly examined for promotion by selection boards. Those officers failing to measure up to the performance expected for their class or who had failed to win promotion within an allotted time were "selected out." The aim was to stimulate superior performance and to retain only those capable of conducting themselves in this manner in widely different assignments around the world.

It was also in 1946 that the compulsory retirement age for most classes of Foreign Service officers was lowered from 65 to 60. This provision, § 632, was grouped with the selection-out sections of the Act.[15] Together these sections "prescribe the

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[14] Accord, H. R. Rep. No. 229, 84th Cong., 1st Sess., 2 (1955) (emphasizing the career concept); 101 Cong. Rec. 3554 (1955) (Rep. Richards) ("The Foreign Service is a career service that a man enters at the bottom and works his way up. When the Committee on Foreign Affairs wrote the Foreign Service Act of 1946 which the Congress adopted, that principle was stressed"). Even when it occasionally found it necessary to make lateral entry easier, Congress emphasized that it still preferred to have "expansion take place over a period of years by the admission to the Foreign Service of applicants in the lower classifications." S. Rep. No. 127, 84th Cong., 1st Sess., 8 (1955); accord, *id.*, at 10 (statement of Deputy Under Secretary of State Henderson) (State Department would also prefer to have entrance be through the junior level); Hearings before the House Committee on Foreign Affairs on H. R. 4941, 84th Cong., 1st Sess., 45 (1955) (Rep. Williams) (recognizing policy of "entry at the bottom and working up on the merit basis").

[15] Of those now subject to § 632, only Foreign Service Staff officers and employees are not also subject to selection out. Staff personnel covered by § 632, however, are expected to be career employees, and thus it is rational to presume for them as well that mandatory retirement would

criteria as to length of service in classes which will determine whether officers are selected out or retired," H. R. Rep. No. 2508, *supra,* at 90, and were designed "to assure a reasonable pyramid of promotion." *Ibid.* The retirement and selection-out provisions are part of an integral plan to create "a correctly balanced Service that [was] constructed so that the size of the various classes would correspond with the distribution of the work load of the Service." *Ibid.* Selection out operates primarily at the lower levels of the Service; compulsory retirement operates at the top of the pyramid. Congress in 1946 required officers in the then-highest category,[16] career ministers, and in the next-highest, class 1, to retire at ages 65 and 60, respectively. These officers were not subject to selection out by the 1946 Act,[17] but as Congress expressly noted with respect to class 1, "the mandatory provisions of the retirement for age . . . accomplish the desired result of insuring turn-over in this class." *Id.,* at 91.[18]

The District Court nevertheless rejected this justification for § 632, stating in conclusory fashion that "recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme." 436 F. Supp., at 136. Whether or not this is a sound legal proposition, we think that the

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create room at the top and have the resulting ripple effect down through the ranks.

[16] Congress later created an even higher category of "career ambassadors." Pub. L. 250, §§ 4–9, 69 Stat. 537.

[17] Congress in 1955 made class 1 officers subject to the selection-out process as well, § 7, 69 Stat. 25–26, but nothing in the legislative history of that amendment indicates any reversal of the position that most of the involuntary vacancies in the higher ranks would have to be through mandatory retirement.

[18] As Congress described the system, "[m]ost separations should occur near the top (for age or through voluntary retirement) or at the bottom, while the number of men selected out in the middle classes and at middle ages would be limited." H. R. Rep. No. 2508, 79th Cong., 2d Sess., 90 (1946).

District Court mischaracterized the purpose of § 632 and the manner in which it operates. Congress was intent not on rewarding youth *qua* youth, but on stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service. Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process. As this Court has previously observed with respect to the selection-out structure provided by Congress for naval officers, which was the model for the Foreign Service Act of 1946, the scheme "results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command." *Schlesinger* v. *Ballard,* 419 U. S. 498, 510 (1975).

The District Court also rejected this justification for § 632 because "there is no obvious reason why [it] would not equally apply to the Civil Service." 436 F. Supp., at 136. But this criticism ignores the evident congressional conviction that the country should be at great pains to assure the high quality of those occupying positions critical to the conduct of our foreign relations in the post-war world.[19] Congress plainly intended

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[19] See 65 Cong. Rec. 7564–7565 (1924) (remarks of Rep. Rogers quoted in text, *infra,* at 104) (Foreign Service positions are often "of prime importance to the United States"); 101 Cong. Rec. 3562 (1955) (Rep. Judd) ("The first responsibility of a good government is to safeguard the security of the nation. The first line of defense in achieving this first objective . . . is our diplomatic corps and those who direct and back it up in the Department of State"); *id.,* at 3560 (Rep. Bentley) ("Because of the duties and responsibilities they undertake, because of the services they render to American individuals and American business interests, because of their vital role in the conduct of our foreign policy, we in the Congress

to create a relatively small, homogeneous, and particularly able corps of Foreign Service officers. It was thought that the tasks performed by this corps were sufficiently demanding and important to the Nation that it was necessary to pursue more rigorous policies to ensure excellence than those generally applicable in the Government. There is no selection-out system in the Civil Service, for example; the competitive examination process is not generally as rigorous; and there are far wider variations in the nature of the various Civil Service positions and personnel. Perhaps Congress will someday attempt to devise a regime such as this one for all federal employees, but for now it has determined to employ it only in connection with what it deems to be a few distinctive groups such as the Foreign Service. See also Civil Service Reform Act of 1978, Pub. L. 95–454, §§ 3 (6), 401–415, 92 Stat. 1113, 1154–1179 (creating Senior Executive Service). The judgment that the Foreign Service needs such a system more than do many other departments is one of policy, and this kind of policy, under our constitutional system, ordinarily is to be "fixed only by the people acting through their elected representatives." *Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129, 138 (1968). Since the congressional judgment to place a high value on the proper conduct of our foreign affairs can hardly be said to be constitutionally impermissible, it was not for the District Court to refuse to accept it.[20]

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should demand that the service be attractive enough to get the highest type of American men and women into its ranks"); *id.*, at 3559 (Rep. Vorys) (Foreign Service must compete successfully with other Government agencies and private businesses to get the best persons to serve overseas). When Congress added to the Foreign Service retirement system certain personnel in what is now the International Communication Agency, it found that those employees are involved in a "vital activity" and should be subject "to the same stringent judgment of performance as Foreign Service officers." 22 U. S. C. §§ 1223 (a) and (e).

[20] Appellees also argue that however desirable it is to create promotion opportunities it is arbitrary to impose the burden only on those over

III

The appellants also submit that the Foreign Service involves extended overseas duty under difficult and often hazardous conditions and that the wear and tear on members of this corps is such that there comes a time when these posts should be filled by younger persons. Mandatory retirement, it is said, minimizes the risk of less than superior performance

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age 60. It would be better, they say, to make the selection-out standards more demanding or in some other way to avoid the retirement of those who are over 60 but quite able to perform. Even were it not irrelevant to the equal protection analysis appropriate here that other alternatives might achieve approximately the same results, the compulsory retirement age assures room at the top at a predictable time; those in the ranks know that it will not be an intolerable time before they will have the opportunity to compete for maximum responsibility.

In designing this unified personnel scheme in 1946, Congress presumed that those in the highest classes would be close to or over age 60, H. R. Rep. No. 2508, *supra* n. 18, at 91, that those in the next two highest categories would be between 45 and 55, *id.*, at 92, and that those in the next two ranks down would be quite young. *Id.*, at 93. These presumptions are hardly irrational in a system designed with the intention that most personnel would begin their professional careers at the bottom of the Service and move upward with time. See *id.*, at 5; n. 14, *supra*. Thus, those who have reached age 60 are likely to have achieved the top ranks of the Service, and their departures usually will have a domino effect creating opportunities at each lower level.

Moreover, appellees have not shown that their alternative would be any less arbitrary than they think the present system is. As Congress recognized, selection out works best at the lower ranks where differences in merit are the greatest. See H. R. Rep. No. 229, *supra* n. 14, at 12. At the top ranks, where the officers have all been selected up a number of times, it is increasingly difficult to try to draw fine distinctions between persons who may all be extremely competent. And because Congress decided to grant annuities to those in the upper categories who are selected out after having dedicated much of their lives to the service, it found that "the system should be administered to reduce to a minimum the number of separations of middle-aged men, not only because of the hardship on them, but because of the expense to the Government." H. R. Rep. No. 2508, *supra* n. 18, at 92.

by reason of poor health or loss of vitality. In this respect, the appellants accurately reflect the legislative record, which without doubt articulates both the purpose of maintaining a competent Foreign Service and the relationship of required retirement to that goal.

As we have indicated, under the Rogers Act retirement of Foreign Service officers was required at 65, whereas under the relevant statute the retirement age for most Civil Service employees with sufficient length of service was 70 years of age. Choosing the lower age for the Foreign Service was a considered choice.[21] The principal sponsor of the legislation identified the reason for retiring Foreign Service and military officers earlier than Civil Service employees:

> "I think the analogy of the foreign service officer to the Army officer and to the naval officer is much more complete than to the civil-service employee in Washington.
>
> "The foreign-service officer is going hither and yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States.
>
> . . . . . .
>
> "I call to the attention of the gentleman the fact that the kind of service which these men must render involves going to the Tropics; it involves very difficult and unsettling changes in the mode of life. The consensus of opinion was that the country was better off to retire them, as a general rule, at 65." 65 Cong. Rec. 7564–7565 (1924) (Rep. Rogers).

In the intervening years, the Federal Government has often repeated the concern first raised in 1924.[22] Congress not only

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[21] Congress expressly rejected setting the Foreign Service retirement age at the same level as for Civil Service personnel. 65 Cong. Rec. 7586 (1924).

[22] *E. g.*, S. Rep. No. 168, 77th Cong., 1st Sess., 2 (1941), and H. R. Rep. No. 389, 77th Cong., 1st Sess., 3 (1941) (reprinting letter from

retained the lower retirement age for Foreign Service officers when it reorganized the Foreign Service in 1946, but it also lowered the age to 60. In expanding the coverage of the Foreign Service retirement system to reach others than Foreign Service officers, Congress obviously reaffirmed its own judgment that the system should provide a lower retirement age than in the Civil Service system, just as it did in 1978 when it repealed the mandatory age for the retirement of Civil Service employees but left intact the rule for those under the Foreign Service system.[23]

The District Court did not deny the legitimacy of the

Secretary of State Hull) ("experience has shown that the continued strain of 30 years or more of service representing this Government in foreign countries in widely different climates and environments makes it desirable both from the standpoint of the Government and of officers that retirements should be authorized by law, commencing at a minimum of 50 years of age"); Fifth Report of the Committee on Retirement Policy for Federal Personnel, S. Doc. No. 89, 83d Cong., 2d Sess., pt. 5, pp. 280–281 (1954) (employees consider that "Foreign Service as compared with service in the United States has many disadvantages"); Appendix to the Report to the President by the Cabinet Committee on Federal Staff Retirement Systems, S. Doc. No. 14, 90th Cong., 1st Sess., 112 (1967) ("The mandatory retirement age of 60 is set in recognition of the need to maintain the Foreign Service as a corps of highly qualified individuals with the necessary physical stamina and intellectual vitality to perform effectively at any of some 300 posts throughout the world including those in isolated, primitive, or dangerous areas").

When Congress included career staff in the retirement system, it found that the same concern applies to them:

"The Foreign Service retirement system is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend the majority of their working years outside the United States adjusting to new working and living conditions every few years. Staff personnel who serve for any length of time are subject to the same conditions." H. R. Rep. No. 2104, 86th Cong., 2d Sess., 31 (1960).

[23] Of course, nothing in the Constitution, or in this opinion, limits Congress in reversing its judgment on this score or in determining that other competing policies are more important.

legislative purpose to assure a vigorous and competent Foreign Service, nor did it reject the proposition that the mandatory retirement provision could rationally be deemed to serve that end. It thus assumed that overseas duty is more demanding than stateside duty and that those over age 60 often are less able to face the rigors of the Foreign Service. The District Court nevertheless invalidated § 632 because it was deemed to discriminate against older Foreign Service employees vis-à-vis those older employees in the Civil Service who serve overseas in comparable positions for nearly as long as do Foreign Service personnel and yet are not forced to retire at age 60. Only a small percentage of all United States civilians working in foreign countries for this Government are within the scope of § 632, and, according to the District Court, it is "patently arbitrary and irrational" to impose the disadvantage of early retirement upon only those relatively few. 436 F. Supp., at 138.

Our first difficulty with this conclusion is that it ignores what we have already pointed out—namely, that Congress has legislated separately for the Foreign Service and has gone to great lengths to assure that those conducting our foreign relations will be sufficiently competent and reliable in all respects. If Congress attached special importance to high performance in these positions, which it seems to us that it did, it was quite rational to avoid the risks connected with having older employees in the Foreign Service but to tolerate those risks in the Civil Service. Whether or not individual judges may agree with this assessment, it is not for the courts to reject it.

Putting aside this rational basis for sustaining § 632, however, the District Court was in error for other reasons in invalidating the statute on the ground that Civil Service employees serving overseas under similar conditions and facing comparable hardships were not also subject to the burden of early retirement. Those subject to § 632 compose a rela-

tively small group of public servants furnishing the required professionalism in the Foreign Service. Approximately 60% of them are serving in overseas posts at any one time. Almost all of them are subject to assignment to such posts at any time as a condition of their employment.[24] Each such person is assigned and reassigned with some regularity and each spends a substantial portion of his career overseas. Even accepting the District Court's judgment that some Civil Service employees serve in foreign posts under conditions as trying as those faced by Foreign Service officers, the latter are trained for and experienced at performing tasks in the Foreign Service; they are not freely interchangeable with Civil Service employees. It would thus appear sensible that the Government would take steps to assure itself that not just some, but *all,* members of the Service have the capability of rendering superior performance and satisfying all of the conditions of the Service.

The same is not true of the Civil Service. Only approximately 5% of these employees serve overseas at any one time, and foreign duty is in the main a voluntary matter.[25] We

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[24] Not only must these employees constantly be available for foreign duty, but also Foreign Service officers are required by law to spend most of their careers overseas. 22 U. S. C. § 961 (a). Most but not all of the employees subject to mandatory retirement at age 60 are subject to this latter requirement. The reason for the incomplete correlation is that not all those who are participants in the Foreign Service retirement system, 22 U. S. C. § 1063, are also defined as "officer[s] or employee[s] of the Service" by § 961 (a). See also 22 U. S. C. § 937 (assignment of staff officers and employees). When Congress first provided for the integration of certain Civil Service employees of the State Department into the Foreign Service, it did so specifically to increase "the number of officers available for assignment overseas . . . ." S. Rep. No. 127, *supra* n. 14, at 2.

[25] The District Court was able to state with assurance only that a relative handful of these Civil Service personnel—employees of the Foreign Agricultural Service—remain overseas for nearly as long as do Foreign Service officers. 436 F. Supp., at 137. Many of the overseas Civil Serv-

are unwilling to hold that if Congress deems early retirement a useful device to maintain the quality of the Foreign Service it may nevertheless not adopt it without insisting on the same retirement age for all Civil Service employees or at least for those Civil Service employees who choose to seek a career in overseas service. In order to staff the overseas Civil Service positions with sufficiently competent persons Congress obviously has not thought it useful to provide for retirement at age 60. At least to date, its judgment has been otherwise with respect to the Foreign Service, and that judgment is not invalid as a denial of equal protection.

Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this "perfection is by no means required." *Phillips Chemical Co.* v. *Dumas School Dist.*, 361 U. S. 376, 385 (1960); accord, *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 51 (1973). The provision "does not offend the Constitution simply because the classification 'is not made with mathematical nicety . . . .'" *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).[26] If increasing age brings with it increasing susceptibility to physical difficulties, as the District Court was apparently willing to assume, the fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate § 632 any more than did the similar truth undercut compulsory retirement at age 50 for uniformed state police in *Murgia*. Because Congress desired to maintain the competence of the Foreign Service, the mandatory retirement age of 60 rationally furthers

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ice employees work for the military and have a statutorily guaranteed right of return to posts in the United States. 10 U. S. C. § 1586.

[26] "[T]he demand for perfection must inevitably compromise with the hard facts of political life." Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 350 (1949).

its legitimate objective, and it makes no difference that some Foreign Service personnel may not be subject to the rigors of overseas service or that some Civil Service employees serve in various hardship positions in foreign lands.

We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience. The Foreign Service retirement system and the Civil Service retirement system are packages of benefits, requirements, and restrictions serving many different purposes. When Congress decided to include groups of employees within one system or the other, it made its judgments in light of those amalgamations of factors. Congress was entitled to conclude that certain groups of employees share more characteristics with Foreign Service officers than with Civil Service personnel even though not serving for as long in as important overseas posts, and that other employees share more characteristics with Civil Service personnel than with Foreign Service officers even though serving some time in some overseas positions. Congress chose not to examine exactly which individual employees are likely to serve long enough in important enough positions in demanding enough locales to warrant mandatory early retirement. Rather than abandoning its primary end completely, or unnecessarily including all federal employees within the means, it drew a line around those groups of employees it thought most generally pertinent to its objective. Whether we, or the District Court, think Congress was unwise in not choosing a means more precisely related to its primary purpose is irrelevant. *Califano* v. *Jobst,* 434 U. S. 47, 56–58 (1977); *New Orleans* v. *Dukes,* 427 U. S. 297, 303 (1976).

IV

Despite all this, appellees urge us to affirm the judgment on a basis not relied upon by the District Court: that the mandatory retirement age of 60 has no relation to the objective of reliable service in important foreign posts because

overseas conditions often are not in fact more taxing than those in the United States and because arriving at 60 has an insufficient relationship to reduced physical and mental potential.[27]

Appellees rely in particular on the posture of the case—cross motions for summary judgment. They point out that their affidavits state that many overseas posts are as comfortable and safe as any in the United States; that many Foreign Service personnel under 60 have health problems; that employees just under the mandatory retirement age fill their fair share of hardship posts; and that age is not related to susceptibility to certain diseases and ailments commonly linked to life overseas.

Appellees seem to believe that appellants had to have current empirical proof that health and energy tend to decline somewhat by age 60 and had to offer such proof for the District Court's perusal before the statute could be sustained.[28] Such evidence of course would argue powerfully for sustaining the statute, see *Murgia,* 427 U. S., at 314–315, n. 7. But this case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has

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[27] This latter ground amounts to a contention that there is no justification for discriminating between Foreign Service employees over 60 and those under that age. Indeed, when pressed in oral argument, appellees stated that as an entirely separate theory. Tr. of Oral Arg. 27–29. But as noted earlier, n. 10, *supra,* the District Court found that appellees had abandoned any claim of this kind. Appellees have not informed us of any reason to believe that the District Court erred in that regard, and we are unable to discern one. In any event, as indicated in the text, we find no merit in the contention that Congress could not conclude that age involves increased risks of less than superior performance in overseas assignments. We note also that the argument is unresponsive to the justification for § 632 canvassed in Part II of this opinion.

[28] "The State is not compelled to verify logical assumptions with statistical evidence." *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794, 812 (1976).

shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S., at 78–79; accord, *Schilb* v. *Kuebel*, 404 U. S. 357, 364 (1971); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6 (1970); see *McGinnis* v. *Royster*, 410 U. S. 263, 274 (1973) (finding that the legislature "could have concluded rationally that" certain facts were true); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487 (1955). As we have said in a slightly different context:

> "The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'" *Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S., at 138–139.

Consequently, appellees were required to demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability. Appellees have not satisfied these requirements. They say that many overseas posts are as pleasant as those in the United States and that many people over age 60 are healthy and many younger people are not.[29] But they admit that age

[29] Congress allows appellants to retain individual employees for up to five years beyond retirement age, if that is determined "to be in the public interest," 22 U. S. C. § 1002, thus eliminating some of the over-

does in fact take its toll, and that Congress could perhaps have rationally chosen age 70 as the cutoff. Brief for Appellees 76–77; see Tr. of Oral Arg. 21–24, 27. And we have noted the common-sense proposition that aging—almost by definition—inevitably wears us all down.[30] *Murgia, supra,* at 315. All appellees can say to this is that "[i]t can be reasonably argued that, given modern societal facts," those between age 60 and 70 are as reliable as those under age 60. Brief for Appellees 76. But it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute:

> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357 (1916).

For these reasons, the judgment appealed from must be reversed.

So ordered.

MR. JUSTICE MARSHALL, dissenting.

The Court today finds a rational basis for the forced retirement of Foreign Service personnel at age 60, on a record devoid of evidence that persons of that age or older are less capable of performing their jobs than younger employees. I adhere to my view in *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 317–327 (1976) (MARSHALL, J., dissenting), that mandatory retirement provisions warrant more than this minimal level of equal protection review. Because

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inclusiveness. It also has provided for mandatory early retirement due to medical disability, which mitigates underinclusiveness.

[30] The biennial physical examinations relied upon by the dissent, *post,* at 122, do not remove the risk of unexpected health problems undercutting reliability in the interim.

I believe that the statute at issue here cannot withstand closer scrutiny, I respectfully dissent.

I

A person's interest in continued Government employment, although not "fundamental" as the law now stands, certainly ranks among the most important of his personal concerns that Government action would be likely to affect. *Id.*, at 322–323; cf. *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Board of Regents* v. *Roth*, 408 U. S. 564, 572 (1972); *Smith* v. *Texas*, 233 U. S. 630, 636, 641 (1914). This interest is of special significance to older employees, because

> "[o]nce terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person . . . ." *Massachusetts Bd. of Retirement* v. *Murgia, supra*, at 323 (footnote omitted).

When legislative action affects individual interests of such dimension, a heightened level of judicial scrutiny is appropriate.

In addition, mandatory retirement provisions warrant careful judicial attention because of the class on which the deprivation is imposed. To be sure, the elderly are not a "discrete and insular minorit[y]," *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153 n. 4 (1938),[1] in need of

[1] The class is not "discrete and insular" because all of us may someday belong to it, and voters may be reluctant to impose deprivations that they

"extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973). But they have suffered from discrimination based upon generalizations that are inaccurate for many, if not most, of the age group affected. See Report of the Secretary of Labor to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964, The Older American Worker 8 (1965) (hereinafter Labor Report); 113 Cong. Rec. 34742 (1967) (remarks of Rep. Burke); H. R. Rep. No. 95–527, pt. 1, p. 2 (1977); Note, The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act, 88 Yale L. J. 565, 576–577 (1979), and sources cited therein. Such generalizations stigmatize the aged as physically and mentally deficient, regardless of their individual capabilities. Cf. House Select Committee on Aging, Mandatory Retirement: The Social and Human Cost of Enforced Idleness, 95th Cong., 1st Sess., 35, 37 (Comm. Print 1977) (hereafter House Select Committee on Aging); C. Edelman & I. Siegler, Federal Age Discrimination in Employment Law 15–17 (1978) (hereafter Edelman & Siegler). Particularly in the area of employment, significant deprivations have been imposed on the basis of these stereotypes, see 29 U. S. C. § 621 (a); Labor Report 18–19; Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 380–381, 383 (1976).[2]

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themselves could eventually have to bear. However, the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard. See L. Tribe, American Constitutional Law 1077 n. 3 (1978). The safeguard is also inadequate where, as here, the deprivation affects only a small and distinct segment of the work force, of which few legislators or voters will ever be a part. Thus, the elderly should receive an extra measure of judicial protection from majoritarian political processes in circumstances such as those presented here.

[2] In its statement of findings and purpose for the Age Discrimination in

Considering the importance of the interests at stake and the prevalence of discrimination against the aged, I cannot agree that the glancing oversight of the rational-basis test fulfills our obligation to ensure that all persons receive the equal protection of the laws. I would require proof that the Foreign Service's mandatory retirement scheme "serves important governmental objectives and [is] substantially related to achievement of those objectives." *Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren,* 429 U. S. 190, 197 (1976); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S., at 325 (MARSHALL, J., dissenting). Measured by this standard, the Foreign Service's mandatory retirement provisions must fall.

II

Before applying this intermediate standard, it is first necessary to determine the nature of the classifications that the statute delimits. In this case, there are two. The statutory scheme distinguishes between civil servants and Foreign Service personnel and between Foreign Service employees under 60 and those 60 or over. Appellees unequivocally claimed in this Court that the latter distinction was unconstitutional, see Brief for Appellees 76–78; Tr. of Oral Arg. 26–28, as the Court seems to concede, *ante,* at 109–110, and n. 27. Nonetheless the Court summarily dismisses this claim, finding that ap-

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Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 621 (a), Congress noted that:

"(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

"(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

"(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . ."

pellees abandoned it below after the judgment of the District Court had issued.

By limiting its consideration of the classifications at issue, the majority has evaded the more difficult question in this case. This Court has repeatedly held that a "prevailing party may . . . assert in a reviewing court any ground in support of his 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); accord, *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 71 (1974); *Langnes* v. *Green*, 282 U. S. 531, 538–539 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924).[3] The judgment of the District Court was that § 632 of the Foreign Service Act of 1946, 22 U. S. C. § 1002, "violates the equal protection guarantees embodied in the Fifth Amendment." App. to Juris. Statement 9A. Appellees' contention that the statute discriminates against persons aged 60 and over patently is a ground for affirming that judgment. Whether appellees previously abandoned the issue is irrelevant since the purported abandonment came after the District Court had granted summary judgment. Because the Government had the opportunity to present evidence on the issue, it could in no way be prejudiced by its resurrection here. Thus, the claim is properly before us.

III

Undoubtedly, an important objective of the Foreign Service retirement system is to assure the "professional competence"

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[3] This rule does not apply where accepting the ground advanced for affirmance would result in greater relief than was granted below. See *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976); *United States* v. *Raines*, 362 U. S. 17, 27 n. 7 (1960). The Court quite correctly does not rely on such a possibility here, as appellees claim only that their evidence establishes the impermissibility of mandatory retirement before age 70, and seek no greater relief than was granted below. Brief for Appellees 76; Tr. of Oral Arg. 23–24.

of the Foreign Service corps. See *ante,* at 97. The Court finds that mandatory retirement at age 60 is rationally related to this objective in two ways. In the Court's view, the physical and psychological difficulties that Foreign Service personnel face as a result of frequent overseas assignments impair their performance at an earlier age than most persons including, it seems, civil servants exposed to much the same conditions. Hence, the majority concludes, Congress could reasonably have determined that 60-year-olds would lack the vitality necessary to perform their jobs competently. The Court also finds that the early retirement age creates "room at the top," thereby ensuring a predictable supply of promotion opportunities for younger employees. Such opportunities, it is said, are necessary to "spur morale and stimulate superior performance in the ranks." *Ante,* at 98. A fair reading of the record before us, however, reveals no substantial relationship between the mandatory retirement system and the articulated objective of the statutory scheme.

A

In my judgment, appellees have successfully challenged the Government's central premise that the pressures of transient Foreign Service life diminish the capacity of older employees to perform their jobs. There is nothing inherent in any of the positions that appellees hold to indicate that early retirement is necessary to ensure excellence. Foreign Service officers in the State Department engage in economic and political research, visa or other consular work, negotiations with representatives of foreign governments, personnel recruitment and management, and other administrative functions. See United States Dept. of State and International Communication Agency, Foreign Service Officer Careers 4–8 (1978). Officers in the International Communication Agency lecture and perform cultural and other informational duties, as well as administrative and personnel management functions. *Id.,*

at 8–10. The Agency for International Development (AID) employs economists, financial analysts, staff attorneys, auditors, and accountants in providing economic and technical assistance to other countries. U. S. Civil Service Comm'n, Federal Jobs Overseas 10–11 (1975). The mandatory retirement provisions in addition cover Foreign Service staff personnel who perform technical, administrative, clerical, or custodial work. See H. R. Rep. No. 2104, 86th Cong., 2d Sess., 15 (1960).[4]

That older workers could effectively perform such Foreign Service jobs is also suggested by the lack of an early mandatory retirement provision for civil servants who spend much of their careers abroad doing work similar to that of Foreign Service personnel. Of the over 58,000 American civilians in Government positions overseas in 1976, only the 4,787 Foreign Service personnel faced mandatory retirement at age 60. 436 F. Supp. 134, 136 (DC 1977). Moreover, discrete segments of this work force, such as the Agriculture Department's Foreign Service, spend almost as much of their tenure overseas as do members of the State Department's Foreign Service. *Id.*, at 137. The Court discounts these figures because it finds that the need for excellence in the Foreign Service may be more compelling than in the Civil Service. *Ante,* at 106. However, almost 40% of the Americans working overseas for Foreign Service agencies are civil servants who are not subject to forced retirement, and AID often has its work performed on a contract basis by other agencies that do not have mandatory retirement provisions. 436 F. Supp., at 136–137; see § 5, 92 Stat. 191. Despite this broad experience with older workers in

[4] The jobs at issue in this case certainly involve nothing equivalent to the "stress functions" performed by the police officers in *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 311 (1976). The officers there were required, *inter alia,* to control prison and civil disorders, respond to emergencies and natural disasters, and apprehend criminal suspects. *Id.*, at 310.

analogous situations, the Government submitted no evidence that it has encountered age-related problems in connection with these or other civil servants aged 60 and over.

Appellees, on the other hand, introduced a substantial amount of medical testimony dispelling any adverse correlation between job performance and advancing age, and offered to introduce more. For example, the former chief psychiatrist for the Peace Corps stated flatly that "inability to perform work satisfactorily under stressful conditions in overseas cultures has no relationship to advancing age." Affidavit of Dr. J. English 2. See also Affidavit of Dr. D. Kessler; Affidavit of T. Fox.[5] Similarly, appellees have pointed to a variety of studies indicating that older workers may be *more* competent than younger ones in the types of jobs involved in this case. The House Report accompanying the recent amendments to the Age Discrimination in Employment Act, H. R. Rep. No. 95–527, pt. 1, p. 4 (1977), noted:

> "Testimony to the committee cited the results of various research findings which indicate that older workers were as good or better than their younger coworkers with regard to dependability, judgment, work quality, work volume, human relations, and absenteeism; and older workers were shown to have fewer accidents on the job. As Congressman Pepper stated before our committee: 'The Labor Department's finding that there is more variation in work ability within the same age group than between age groups justifies judging workers on competency, not age.'" (Footnote omitted.)

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[5] In addition, a pulmonary specialist testified for appellees:

"While some loss of pulmonary function occurs with age, such loss does not ordinarily advance to the pathological stage where it interferes with the ability to work and otherwise function. Certainly, such normal loss would not impair the ability of an individual to work effectively between the ages of sixty and seventy." Affidavit of Dr. A. Munzer 2.

The House Select Committee on Aging 34 also observed:

> "Studies by the Department of Labor, the late Ross McFarland of the Harvard School of Public Health, the National Council on the Aging, and many other experts in the field indicate that older workers can produce a quality and quantity of work equal or superior to younger workers, that they have as good, and usually better, attendance records as younger workers, that they are as capable of learning new skills and adapting to changing circumstances when properly presented as younger workers, and that they are generally more satisfied with their jobs than younger workers."

See also Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964: Research Materials 86 (1965); Edelman & Siegler 27–31; Note, 88 Yale L. J., at 576–577, and sources cited therein.

The Court closes its eyes to appellees' evidence against the mandatory retirement provision and excuses the Government from producing evidence in support of it because Congress determined that the nomadic life of Foreign Service personnel would take its toll by the age of 60. This determination, the Court concludes, rested on the "common-sense proposition that aging—almost by definition—inevitably wears us all down." *Ante*, at 112.[6] The issue, however, is not whether persons

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[6] It may in fact be overstatement to refer to a "[c]ongressional determination" on this issue. The only express evidence that Congress predicated early mandatory retirement on this theory came during the 1924 debates on the Foreign Service Act, when one Congressman noted the hardships of the transient life and of service in the Tropics. 65 Cong. Rec. 7565. The focus of the debate, however, was on the need for better salaries and retirement provisions in order to attract qualified persons into the Service. And since modes of travel as well as conditions in the Tropics and elsewhere overseas obviously have changed considerably since 1924, reliance on this legislative justification is misplaced. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153 (1938).

When Congress extended the Foreign Service retirement system to staff

between age 60 and 70 "wear down," but whether they are competent Foreign Service personnel. Absent any concrete evidence in the record that they are less able, or indeed, any indication that Congress even considered such information when it enacted the statute, see n. 6, *supra,* the Court is remitted to unsubstantiated assumptions concerning the competency of older workers for white-collar jobs.

With respect to sex discrimination, we have refused to accept " 'overbroad' generalizations" about the characteristics of a particular class as substantial support for a legislative classification. See *Califano* v. *Goldfarb,* 430 U. S. 199, 211 (1977) (plurality opinion); *Craig* v. *Boren,* 429 U. S., at 198–199; *Stanton* v. *Stanton,* 421 U. S. 7 (1975); *Frontiero* v. *Richardson,* 411 U. S. 677 (1973). I believe the same rule should apply here. See *supra,* at 113–115. While age, unlike sex, is at some point likely to bear a relationship to ability, I would require a showing that a substantial relationship does in fact exist. Thus, to the extent that Congress in § 632 viewed age as predictive of a decline in competence, this Court should not simply assume the correlation, but should inquire whether age is a sufficiently accurate predictor to justify the significant deprivations imposed by forced retirement. See *Craig* v. *Boren, supra,* at 201–202.[7] Since ap-

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personnel, it cited the frequent adjustments that the jobs required. However, it did so in the context of recommending that staff personnel be able to enjoy the "advantages" of the retirement system, H. R. Rep. No. 2104, 86th Cong., 2d Sess., 31 (1960), that is, that they be *permitted* to retire at an early age if they so desired. Thus, the 1960 legislative history nowhere reflects an assessment of the competence of these personnel to perform their jobs.

Given the staleness of the only express congressional "determination" before us, and Congress' failure subsequently to focus on the issue, one may question the appropriateness of the extraordinary deference the Court here affords to congressional factfinding. See *ante,* at 109–112.

[7] The Court implies that there is a "close fit" here because it appears "sensible that the Government would take steps to assure itself that not just some, but *all,* members of the Service have the capability of rendering

pellees have adduced considerable evidence demonstrating the absence of any correlation, and the Government has presented no evidence to the contrary, the record simply does not support the Court's result.

Not only is mandatory retirement an insufficiently accurate predictor of competence, it is also an unnecessary one. As the Foreign Service personnel system now operates, persons who do not measure up to Service standards are selected out, or terminated, after an annual review. *Ante,* at 99. Further, all Foreign Service employees are given biennial medical examinations, as well as special examinations when necessary, and are subject to medical selection out if they are not fit for duty. See Record 20. Under this scheme, then, the continued competence of appellants' personnel is periodically assessed. With such individualized procedures already in effect, the Government cannot realistically claim that prohibiting resort to age-based generalizations would jeopardize the quality of the Foreign Service. Cf. *United States Dept. of Agriculture* v. *Murry,* 413 U. S. 508, 518–519 (1973) (MARSHALL, J., concurring); *Craig* v. *Boren, supra,* at 199.

B

The other ground on which the Court upholds mandatory retirement is its function of

> "stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the

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superior performance and satisfying all of the conditions of the Service." *Ante,* at 107. Significantly, however, the majority adverts to no evidence suggesting that Congress intended mandatory retirement to serve that objective. In any event, as the Court concedes, *ante,* at 108, the statute is both overinclusive and underinclusive with respect to this goal. And, as demonstrated *infra,* this page, the Government has available other more precise means to assure professional competence and physical ability.

> Service. Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process." *Ante,* at 101.

This justification, it seems to me, would legitimate *any* retirement system in which there are a limited number of high-level positions. Indeed, the Court acknowledges as much when it deems the rationale equally applicable to Foreign Service staff personnel, who were not designated by Congress as an elite cadre but who are nonetheless subject to the mandatory retirement provisions. *Ante,* at 99–100, n. 15. The fundamental flaw in this analysis is that the Court ends rather than begins its inquiry by articulating the legislative goal of a competent Foreign Service. See *Trimble* v. *Gordon,* 430 U. S. 762, 769 (1977). The question that the majority fails to pursue is whether, on balance, mandatory retirement at 60 substantially furthers this goal.

The answer is not readily apparent, for even if mandatory retirement does ensure promotional opportunities for younger employees, it also deprives the Service of the talents of persons who it has admitted are, at least at the time of their retirement, "its best officers." S. Doc. No. 14, 90th Cong., 1st Sess., 118 (1967). In the absence of any evidence that employees aged 60 and over are less able, or that forced retirement does in fact boost productivity by enhancing recruitment and promotional opportunities, this proffered justification does not withstand analysis.

Moreover, appellees note that most Foreign Service officers, prompted by the generous pension benefits offered by the Service, retire well before the age of 60. See Record 20. The experience of the Civil Service and private employers suggests that this pattern would not change significantly were the mandatory retirement age raised. See U. S. Civil Service

Comm'n, Federal Fringe Benefit Facts 16–17, 22 (1977); Retirement Age Policies: Hearing before the House Select Committee on Aging, 95th Cong., 1st Sess., pt. 1, p. 30 (1977).[8] Thus, it cannot be assumed that, absent § 632, many Foreign Service personnel would stay on to "clog the promotional stream" for younger persons, particularly since those who remain would still be subject to selection out for health reasons, poor performance, or nonpromotion.

IV

I do not disagree, of course, that Congress could legitimately take "great pains to assure the high quality of those occupying positions critical to the conduct of our foreign relations in the post-war world." *Ante,* at 101. Nor do I contend that this Court should substitute its judgment for that of the Congress or the Foreign Service on the appropriate retirement system for Foreign Service personnel. I submit, however, that it is the function of this Court to assess constitutional challenges to that system on the record before us. Appellees presented substantial evidence that the mandatory retirement provision has not accomplished the purposes for which it was designed. The Government failed to establish otherwise. Where individuals' livelihood, self-esteem, and dignity are so critically affected, I do not believe the Government should be relieved of that responsibility.

Accordingly, I dissent.

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[8] In fact, the Chairman of the Civil Service Commission testified recently:

"Insofar as the general Federal work force is concerned, the removal of the mandatory age 70 provision should have little effect on recruiting younger people. Our experience in recent years has been one of high turnover at the senior levels due to early retirement." H. R. Rep. No. 95–527, pt. 1, p. 3 (1977).

Syllabus

MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF ILLINOIS, ET AL. *v.* YOUAKIM ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77–742. Argued October 30, 1978—Decided February 22, 1979

In administering its Aid to Families with Dependent Children-Foster Care program (AFDC–FC), Illinois distinguishes between children who reside with relatives and those who do not. Children placed in unrelated foster homes qualify for the AFDC–FC program, which provides greater monthly payments than the basic AFDC program. But children who are placed in relatives' homes may participate only in the basic AFDC program, because the State defines the term "foster family home" as a facility for children unrelated to the operator. Section 408 (a) of the Social Security Act establishes certain conditions of AFDC–FC eligibility, among which is the requirement that the child be placed in "a foster family home." This term is defined in § 408 as "a foster family home for children which is licensed by the State in which it is situated or has been approved . . . as meeting the standards established for such licensing." The Department of Health, Education, and Welfare (HEW) has interpreted the federal statute to require that States provide AFDC–FC benefits "regardless of whether the . . . foster family home in which a child is placed is operated by a relative." Appellees are four foster children who were removed from their mother's home following a judicial determination of neglect, and their older sister and her husband. Two of these children were placed by the State in the home of their sister and her husband, which was approved as meeting the licensing standards for unrelated foster family homes. Illinois nevertheless refused to make AFDC–FC payments on behalf of the children because they were related to their foster parents. Appellees then brought this action challenging the validity of Illinois' distinction between related and unrelated foster parents. The Court of Appeals, affirming the District Court's judgment for appellees, struck down the Illinois statute. *Held:* The AFDC–FC program encompasses foster children who, pursuant to a judicial determination of neglect, have been placed in related homes that meet a State's licensing requirements for

unrelated foster homes. Accordingly, Illinois may not exclude from its AFDC–FC program children who reside with relatives. Pp. 133–146.

(a) Both the language and legislative history of § 408 show that the AFDC–FC program was designed to meet the particular needs of all eligible neglected children, whether they are placed with related or unrelated foster parents. Distinguishing among equally neglected children based on their relationship to their foster parents would conflict with Congress' overriding goal of providing the best available care for all dependent children removed from their homes pursuant to a judicial determination of neglect. Pp. 134–143.

(b) Interpretations by HEW, the agency charged with administering the AFDC–FC program, are entitled to considerable deference. Pp. 143–144.

562 F. 2d 483, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Paul J. Bargiel, Assistant Attorney General of Illinois, argued the cause for appellants. With him on the briefs were *William J. Scott,* Attorney General, and *Imelda R. Terrazino,* Assistant Attorney General.

Robert E. Lehrer argued the cause for appellees. With him on the brief were *Patrick A. Keenan, Robert P. Burns,* and *James D. Weill.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this appeal is whether Illinois may exclude from its Aid to Families with Dependent Children-Foster Care program children who reside with relatives.

The Aid to Families with Dependent Children-Foster Care program (AFDC–FC) authorizes federal financial subsidies

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree* for the United States; and by *Michael B. Trister* and *Marian Wright Edelman* for the American Orthopsychiatric Assn. et al.

for the care and support of children removed from their homes and made wards of the State pursuant to a judicial determination that the children's homes were not conducive to their welfare. §§ 408 (a)(1), (2) of the Social Security Act of 1935 (Act), as amended, 42 U. S. C. §§ 608 (a)(1), (2).[1] To

[1] Section 408 of the Act, 42 U. S. C. § 608, sets forth the provisions governing the Foster Care program:

"Payment to States for foster home care of dependent children; definitions

"Effective for the period beginning May 1, 1961—

"(a) the term 'dependent child' shall, notwithstanding section 606 (a) of this title, also include a child (1) who would meet the requirements of such section 606 (a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606 (a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title . . . , (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B) (i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606 (a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

"(b) the term 'aid to families with dependent children' shall, notwithstanding section 606 (b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

"(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

"(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency . . . .

"(c) the number of individuals counted under clause (A) of section 603

qualify for Foster Care assistance, these children must be placed in a "foster family home or child-care institution." § 408 (a)(3), 42 U. S. C. § 608 (a)(3).[2] The basic AFDC program, already in existence when the Foster Care program was enacted in 1961, provides aid to eligible children who live with a parent or with a relative specified in § 406 (a) of the Act.[3] In administering these programs, Illinois distinguishes

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(a)(1) of this title for any month shall include individuals . . . with respect to whom expenditures were made in such month . . . .

. . . . . .

"but only with respect to a State whose State plan approved under section 602 of this title—

"(e) includes aid for any child described in paragraph (a) of this section, and

"(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606 (a) of this title . . . .

"For purposes of this section, the term 'foster family home' means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term 'child-care institution' means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing."

[2] The eligibility requirements of the AFDC–FC program are contained in the statutory definition of "dependent child," § 408 (a). See n. 1, *supra*.

[3] The eligibility criteria for the basic AFDC program are set forth in its statutory definition of "dependent child," § 406 (a) of the Act, 42 U. S. C. § 606 (a):

"When used in this part—

"(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued

between related and unrelated foster parents. Children placed in unrelated foster homes may participate in the AFDC–FC program. But those who are placed in the homes of relatives listed in § 406 (a), and who are entitled to basic AFDC benefits, cannot receive AFDC–FC assistance because the State defines the term "foster family home" as a facility for children unrelated to the operator.[4] Foster children living with relatives may participate only in Illinois' basic AFDC program, which provides lower monthly payments than the Foster Care program.[5] The specific question presented here is whether Illinois has correctly interpreted the federal standards for AFDC–FC eligibility set forth in § 408 (a) of the Act to exclude children who, because of placement with related rather than unrelated foster parents, qualify for assistance under the basic AFDC program.

I

Appellees are four foster children, their older sister (Linda Youakim), and her husband (Marcel Youakim). In 1969, Illinois removed the children from their mother's home and made them wards of the State following a judicial determina-

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absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

[4] Ill. Ann. Stat., ch. 23, § 2212.17 (Supp. 1978). See *infra*, at 130–131.

[5] Illinois, like most other States, has consistently authorized substantially greater AFDC–FC payments than basic AFDC benefits. See 25 Soc. Sec. Bull., No. 2, Tables 10, 14, pp. 28, 30 (Feb. 1962); U. S. Dept. of HEW, Public Assistance Statistics: April 1977, Tables A, B, 4, 6, 7 (Sept. 1977); *infra*, at 130, 131.

tion of neglect. The Department of Children and Family Services (Department), which became responsible for the children,[6] placed them in unrelated foster care facilities until 1972. During this period, they each received full AFDC–FC benefits of $105 a month. In 1972, the Department decided to place two of the children with the Youakims, who were under no legal obligation to accept or support them.[7] The Department investigated the Youakim home and approved it as meeting the licensing standards established for unrelated foster family homes, as required by state law.[8] Despite this approval, the State refused to make Foster Care payments on behalf of the children because they were related to Linda Youakim.

The exclusion of foster children living with related caretakers from Illinois' AFDC–FC program reflects the State's view that the home of a relative covered under basic AFDC is not a "foster family home" within the meaning of § 408 (a)(3), the federal AFDC–FC eligibility provision at issue here. Interpreting that provision, Illinois defines a "foster family home" as

> "a facility for child care in residences of families who receive no more than 8 children *unrelated to them* . . . for the purpose of providing family care and training for

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[6] See Ill. Rev. Stat., ch. 37, § 705–7 (1)(f) (1975); Ill. Ann. Stat, ch. 23, § 5005 (Supp. 1978), as amended, Pub. Act 80–1124, 1977 Ill. Laws 3367; Pub. Act 80–1364, Ill. Legis. Serv. 713 (West 1978).

[7] See Ill. Ann. Stat., ch. 23, § 10–2 (Supp. 1978).

[8] Ch. 23, §§ 4–1.2 and 2217 (Supp. 1978); Illinois Department of Children and Family Services, Child Welfare Manual 2.8.2 (1976) (hereinafter DCFS Welfare Manual). The DCFS Welfare Manual recently has been revised to conform to the decisions below.

The Agency documented its approval in two "Relative Home Placement Agreements" which were identical, both in form and in obligations imposed, to those used for unrelated foster care placements, except that the term "foster" was sometimes crossed out, two references were made to the familial relationship among appellees, and the usual promise of AFDC–FC benefits was deleted. See 431 F. Supp. 40, 43–44, and nn. 4, 5 (ND Ill. 1976); App. 20–23.

the children on a full-time basis. . . ." Ill. Ann. Stat., ch. 23, § 2212.17 (Supp. 1978) (emphasis added).[9]

Homes that do not meet the definition may not be licensed,[10] and under state law, only licensed facilities are entitled to Foster Care payments.[11]

Although Illinois refused to make Foster Care payments, it did provide each child basic AFDC benefits of approximately $63 a month, substantially less than the applicable $105 AFDC–FC rate.[12] The Youakims, however, believed that these payments were insufficient to provide proper support, and declined to accept the other two children. These children remain in unrelated foster care facilities and continue to receive AFDC–FC benefits.

In 1973, the Youakims and the four foster children brought a class action under 42 U. S. C. § 1983 for themselves and persons similarly situated, challenging Illinois' distinction between related and unrelated foster parents as violative of the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court certified the class, but granted

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[9] Similarly, the phrase "facility for child care," which is used to define "foster family home," includes

"any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, *unrelated to the operator of the facility* . . . ." Ill. Ann. Stat., ch. 23, § 2212.05 (Supp. 1978) (emphasis added).

[10] See §§ 2213–2215; DCFS Welfare Manual 2.8.2.

[11] See Ill. Ann. Stat., ch. 23, § 5005 (Supp. 1978).

[12] As an exception to this benefit differential, the State has authorized special supplemental payments, upon an adequate showing of need by related foster parents, to bring basic AFDC related foster care assistance up to $105 per month. Brief for Appellants 5; 374 F. Supp. 1204, 1206 (ND Ill. 1974). Since September 1, 1974, the Youakims have received these need-based payments for their foster children. This Court previously held that receipt of the supplemental benefits does not render the case moot. *Youakim* v. *Miller,* 425 U. S. 231, 236 n. 2 (1976) (*per curiam*).

summary judgment for the state officials on the constitutional claim. 374 F. Supp. 1204 (ND Ill. 1974).

While the direct appeal from the summary judgment was pending in this Court, the Department of Health, Education, and Welfare (HEW) issued a formal interpretation of the scope of the federal AFDC–FC program, providing in pertinent part:

> "When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative." HEW Program Instruction APA–PI–75–9 (Oct. 25, 1974).

In light of this administrative interpretation, we vacated the judgment and directed the District Court to consider whether the Illinois foster care scheme is inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause, U. S. Const., Art. VI, cl. 2. *Youakim* v. *Miller,* 425 U. S. 231 (1976) (*per curiam*).

On remand, the District Court granted summary judgment for appellees, holding that the State's denial of AFDC–FC benefits and services to otherwise eligible foster children who live with relatives conflicts with §§ 401 and 408 of the Social Security Act. 431 F. Supp. 40, 45 (ND Ill. 1976).[13] It found that under the "plain words" of § 408, dependent children adjudged to be wards of the State, removed from their homes, and placed in approved foster homes are entitled to AFDC–FC benefits, regardless of whether their foster parent is a relative. 431 F. Supp., at 44–45. In so ruling, the court relied on HEW's interpretive ruling and on the national policy em-

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[13] The District Court had pendent jurisdiction under 28 U. S. C. § 1343 (3) to consider this statutory issue. See *Youakim* v. *Miller, supra,* at 236; *Hagans* v. *Lavine,* 415 U. S. 528 (1974).

bodied in § 401 of the Act to "encourag[e] the care of dependent children in their own homes or in the homes of relatives." 431 F. Supp., at 44. Since the State had approved the Youakim home as meeting the licensing standards for unrelated foster homes, the District Court concluded that the requirements of § 408 had been satisfied. 431 F. Supp., at 43–44.

The Court of Appeals unanimously affirmed the judgment of the District Court. 562 F. 2d 483 (CA7 1977).[14] It held that the statutory definition of "foster family home" in the last sentence of § 408 does not exclude relatives' homes, and found no "implied legislative intent" to create such an exclusion. 562 F. 2d, at 487; see *id.*, at 486 n. 4. Accordingly, the Court of Appeals concluded that any home approved as meeting the State's licensing standards is a "foster family home" within the meaning of § 408. 562 F. 2d, at 486, 490.

We noted probable jurisdiction, 434 U. S. 1060 (1978), and now affirm.

II

A participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the stand-

[14] It appears that every other court to consider the issue has also concluded that dependent children who have been removed from their homes by judicial order and placed by a State in relatives' homes are entitled to AFDC–FC benefits. See *Jones* v. *Davis,* Civ. No. 76–805 (Ore., Apr. 8, 1977), appeal docketed, CA9, No. 77–2254; *Alston* v. *Department of Health and Social Services,* [1974–1976 Transfer Binder] CCH Poverty L. Rep. ¶ 22,336 (Wis. Cir. Ct., Jan. 21, 1976); *Thompson* v. *Department of Health and Social Services,* [1974–1976 Transfer Binder] CCH Poverty L. Rep. ¶ 22,303 (Wis. Cir. Ct., Jan. 9, 1976); *Taylor* v. *Dumpson,* 79 Misc. 2d 379, 362 N. Y. S. 2d 888 (Sup. Ct. 1974), vacated as moot, 37 N. Y. 2d 765, 337 N. E. 2d 600 (1975); *Clampett* v. *Madigan,* [1972–1974 Transfer Binder] CCH Poverty L. Rep. ¶ 17,979 (SD, May 24, 1973); *Jackson* v. *Ohio Dept. of Public Welfare,* Civ. No. C72–182 (ND Ohio, Apr. 17, 1972); *Sockwell* v. *Maloney,* 431 F. Supp. 1006, 1008, and n. 3 (Conn. 1976) (dicta), aff'd, 554 F. 2d 1236 (CA2 1977) (*per curiam*).

ards are permissive. See, *e. g., Burns* v. *Alcala,* 420 U. S. 575, 580 (1975); *Carleson* v. *Remillard,* 406 U. S. 598 (1972); *Townsend* v. *Swank,* 404 U. S. 282, 286 (1971); *King* v. *Smith,* 392 U. S. 309 (1968). Congress has specified that programs, like AFDC–FC, which employ the term "dependent child" to define eligibility must be available for "all eligible individuals." § 402 (a)(10), 42 U. S. C. § 602 (a)(10); see *Quern* v. *Mandley,* 436 U. S. 725, 740–743, and n. 18 (1978). Section 408 (e) reinforces this general rule by requiring States to provide Foster Care benefits to "any" child who satisfies the federal eligibility criteria of § 408 (a). Thus, if foster care in related homes is encompassed within § 408, Illinois may not deny AFDC–FC benefits when it places an eligible child in the care of a relative.

In arguing that related foster care does not fall within § 408's definition of "foster family home," appellants submit that Congress enacted the Foster Care program solely for the benefit of children not otherwise eligible for categorical assistance. We disagree. The purpose of the AFDC–FC program was not simply to duplicate the AFDC program for a different class of beneficiaries. As the language and legislative history of § 408 demonstrate, the Foster Care program was designed to meet the particular needs of all eligible neglected children, whether they are placed with related or unrelated foster parents.

A

Section 408 (a), in defining "dependent child," establishes four conditions of AFDC–FC eligibility. First, the child must have been removed from the home of a parent or other relative specified in § 406 (a), the basic AFDC eligibility provision, "as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child." § 408 (a)(1), 42 U. S. C. § 608 (a)(1). Second, the State must remain responsible for the placement and care of the child. § 408 (a)(2), 42 U. S. C. § 608 (a)(2). Third, the

child must be placed in "a foster family home or child-care institution." § 408 (a)(3), 42 U. S. C. § 608 (a)(3). Fourth, the child must have been eligible for categorical assistance under the State's plan prior to initiation of the removal proceedings. § 408 (a)(4), 42 U. S. C. § 608 (a)(4).

The dispute in this case centers on the meaning of "foster family home" as used in the third eligibility requirement, § 408 (a)(3) of the Act. The statute itself defines this phrase in sweeping language:

> "[T]he term 'foster family home' means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing." § 408, 42 U. S. C. § 608 (last sentence).

Congress manifestly did not limit the term to encompass only the homes of nonrelated caretakers. Rather, any home that a State approves as meeting its licensing standards falls within the ambit of this definitional provision. That Congress intended no distinction between related and unrelated foster homes is further demonstrated by the AFDC–FC definition of "aid to families with dependent children," which includes foster care for eligible children who live "in the foster family home *of any individual.*" § 408 (b)(1), 42 U. S. C. § 608 (b)(1) (emphasis added). Far from excluding related caretakers, the statute uses the broadest possible language when it refers to the homes of foster parents.

Appellants concede that these provisions do not explicitly bar from the Foster Care program children living with related foster parents. Juris. Statement 11; Brief for Appellants 22; Reply Brief for Appellants 5; 562 F. 2d, at 486, and n. 4. Nevertheless, they infer from two isolated passages of § 408 a congressional intent to except relatives' homes from the definition of "foster family home."

Appellants first rely on the definition of dependent children in §§ 408 (a)(1) and (3). These provisions state in relevant part:

> "(a) the term 'dependent child' shall, notwithstanding section [406 (a)—the basic AFDC eligibility provision], *also* include a child (1) who would meet the requirements of such section [406 (a)] except for his removal . . . from the home of a relative (specified in such section [406 (a)]) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child . . . , [and] (3) who has been placed in a foster family home." (Emphasis added.)

Appellants construe the "notwithstanding" language of § 408 (a)(1) in conjunction with § 408 (a)(3) as creating a class of AFDC–FC beneficiaries distinct from the dependent children covered under basic AFDC. In their view, "notwithstanding § 406 (a)" means that the Foster Care definition of "dependent child" both suspends the basic AFDC requirement that the child reside with a parent or close relative, and precludes a foster child who meets that requirement from participating in the AFDC–FC program. Under appellants' construction, §§ 408 (a)(1) and (3) would read: For the purpose of Foster Care aid, a "dependent child" shall *only* include a child who would meet the requirements of § 406 (a) except that he has been both removed from the home of a parent or relative specified in § 406 (a) and placed in a nonrelative's home.

The difficulty with this strained interpretation is that § 408 (a)(1) does not use the word "only." It states that a dependent child shall *"also"* include a child removed from the home of a parent or relative. Thus, there is no basis for construing language that unquestionably expands the scope of the term "dependent child" as implicitly contracting the definition to exclude a child who meets the eligibility criteria of § 406 (a). Because § 408 (a)(1) does not have the preclusive meaning

urged by appellants, it cannot implicitly modify the phrase "foster family home" in § 408 (a)(3) to denote solely unrelated homes. We think it clear that neither § 408 (a)(1) nor § 408 (a)(3) embodies a congressional intent to constrict the broad statutory definition of "foster family home."

Appellants next maintain that interpreting AFDC–FC to encompass foster care by relatives would render meaningless another provision of the program. Section 408 (f)(1) of the Act obligates States to ensure that

> "services are provided which are designed to improve the conditions in the home from which [the foster child] was removed *or* to otherwise make possible his being placed in the home of a relative specified in section [406 (a)]." 42 U. S. C. § 608 (f)(1) (emphasis added).

According to appellants, if related homes were "foster family homes," it would be unnecessary to require States to make the home of a relative suitable for placement when the foster child already lives in a relative's home.

By ignoring the critical word "or," appellants misconstrue the import of this provision. To be sure, § 408 (f) expresses a preference for the return of children to their original home or their transfer to the care of a relative. Congress, however, expressed this preference in the alternative. When a child is placed in related foster care, the State obviously can satisfy § 408 (f)(1) by working toward his ultimate return to the home from which he was removed, in this case the mother's home. Thus, § 408 (f)(1) is fully consonant with including in the AFDC–FC program foster children placed with relatives.

Had Congress intended to exclude related foster parents from the definition of "foster family home," it presumably would have done so explicitly, just as it restricted the definition of "child-care institution." [15] Instead, the statute plainly

[15] In contrast to the broad definition of "foster family home," the term "child-care institution" is explicitly qualified to exempt private institutions

states that a foster family home is the home of any individual licensed or approved by the State as meeting its licensing requirements, and we are unpersuaded that the provisions on which appellants rely implicitly limit that expansive definition.

B

The legislative history and structure of the Act fortify our conclusion that the language of § 408 should be given its full scope. The Foster Care program was enacted in the aftermath of HEW's declaration that States could no longer discontinue basic AFDC assistance due to unsuitable home conditions "while the child continues to reside in the home." State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare (Jan. 17, 1961) (hereinafter Flemming Ruling). In directing States "either to improve the home conditions" or "make arrangements for the child elsewhere," *ibid.*, the Ruling prompted Congress to encourage state protection of neglected children.[16] Accordingly, Congress designed a program carefully tailored to the needs of children whose "home environments . . . are clearly contrary to the[ir] best interests," [17] and it offered the States financial subsidies to implement the plan. Neither the legislative history nor the structure of the Act indicates that Congress intended to differentiate among neglected children based on their relationship to their

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operated for profit and public institutions. § 408, 42 U. S. C. § 608 (last sentence).

[16] See S. Rep. No. 165, 87th Cong., 1st Sess., 6–7 (1961) (hereinafter S. Rep. No. 165); S. Rep. No. 1589, 87th Cong., 2d Sess., 12–13 (1962); Hearings on the Public Assistance Act of 1962 before the Senate Committee on Finance, 87th Cong., 2d Sess., 65 (1962) (memorandum from HEW Secretary Ribicoff to Sen. Byrd); Hearings on the Public Welfare Amendments of 1962 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 294–297, 305–307 (1962).

[17] S. Rep. No. 165, pp. 6–7.

foster parents. Indeed, such a distinction would conflict in several respects with the overriding goal of providing the best available care for all dependent children removed from their homes because they were neglected. See S. Rep. No. 165, p. 6; 107 Cong. Rec. 6388 (1961) (remarks of Sen. Byrd).

Although a fundamental purpose of the Foster Care program was to facilitate removal of children from their homes, Congress also took steps to "safeguard" intact family units from unnecessary upheaval. See S. Rep. No. 165, p. 7; 107 Cong. Rec. 6388 (1961) (remarks of Sen. Byrd).[18] To ensure that children would be removed only from homes demonstrably inimical to their welfare, Congress required participating States to obtain "a judicial determination . . . that continuation in the home was contrary to the welfare of the child." S. Rep. No. 165, p. 7; see 108 Cong. Rec. 12693 (1962) (remarks of Sen. Eugene McCarthy); § 408 (a)(1). Protecting the integrity of established family units by mandating judicial approval of a State's decision to remove a child obviously is a goal that embraces all neglected children, regardless of who the ultimate caretaker may be. Yet under appellants' construction of § 408, the State would have no obligation to justify its removal of a dependent child if he were placed with relatives, since the child could not be eligible for Foster Care benefits. But the same child, placed in unrelated facilities, would be entitled under the Foster Care program to a judicial

[18] This precaution reflected Congress' awareness of the events that had culminated in the Flemming Ruling. In the years preceding the Ruling, there was considerable concern that States were using suitability rules intrusively to impose various moral and social standards on parents of dependent children. See *King* v. *Smith*, 392 U. S. 309, 321–327 (1968). For example, by threatening to discontinue basic AFDC aid or to initiate neglect proceedings, States had coerced many welfare mothers into "voluntarily" placing their children with relatives, although a court might not have ordered removal had formal proceedings been initiated. See *ibid.*; W. Bell, Aid to Dependent Children 124–136 (1965).

determination of neglect. The rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed, which is normally determined after a court has found removal necessary. We are reluctant to attribute such an anomalous intent to Congress, particularly in the absence of any indication that it meant to protect from unnecessary removal only those dependent children placed with strangers.

Congress was also concerned with assuring that States place neglected children in substitute homes determined appropriate for foster care. See S. Rep. No. 165, pp. 6–7. To deter indiscriminate foster placements, Congress required that States establish licensing standards for every foster home, § 408 (definition of "foster family home"), and supervise the placement of foster children. § 408 (a)(2); see 45 CFR §§ 220.19 (a), 233.110 (a)(2)(i) (1977). The legislative materials at no point suggest that Congress intended to subject some foster homes, but not others, to minimum standards of quality, as could result if § 408 excluded relatives' homes from the definition of "foster family home." Indeed, in authorizing an approval procedure as an alternative to actual licensing of "foster family homes," [19] Congress evinced its understanding that children placed in related foster homes are entitled to Foster Care benefits. At the time the AFDC–FC program was enacted in 1961, many States exempted relatives' homes from the licensing requirements imposed on all other types of settings in which foster children could be placed.[20] It is

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[19] § 408, 42 U. S. C. § 608 (last sentence).

[20] Colo. Rev. Stat. §§ 22–12–2, 22–12–3 (1953); Fla. Stat. § 409.05 (1961); Idaho Code §§ 39–1201, 39–1202 (1961); Ill. Rev. Stat., ch. 23, §§ 2304, 2310, 2314 (1961); Iowa Code Ann. §§ 237.2, 237.3, 237.8 (1949); Md. Ann. Code, Art. 88A, §§ 20, 21 (1957); Mo. Ann. Stat. § 210.211 (1952 and Supp. 1961); Mont. Rev. Codes Ann. §§ 10–520, 10–521 (1957); N. H. Rev. Stat. Ann. §§ 170:1–170:3 (1964); Pa. Stat. Ann., Tit. 11, §§ 801, 802 (Purdon 1939 and Supp. 1964); R. I. Gen. Laws §§ 40–14–2,

therefore likely that Congress, by including an approval procedure, meant to encompass foster homes not subject to State licensing requirements, in particular, related foster homes.

The specific services offered by the AFDC–FC program further indicate that Congress did not intend to distinguish between related and unrelated foster caretakers. Congress attached considerable significance to the unique needs and special problems of abused children who are removed from their homes by court order, distinguishing them as a class from other dependent children:

> "The conditions which make it necessary to remove [neglected] children from unsuitable homes often result in needs for special psychiatric and medical care of the children. . . .
>
> . . . . . .
>
> "These are the most underprivileged children and often have special problems. . . ." 108 Cong. Rec. 12692–12693 (1962) (remarks of Sen. Eugene McCarthy).

Section 408 embodies Congress' recognition of the peculiar status of neglected children in requiring that States continually supervise the care of these children, § 408 (a)(2), develop a plan tailored to the needs of each foster child "to assure that he receives proper care," § 408 (f)(1), and periodically review both the necessity of retaining the child in foster care and the appropriateness of the care being provided. See *ibid.;* 45 CFR §§ 220.19 (b), (c), 233.110 (a)(2)(ii) (1977). Additionally, the States must work to improve the conditions in the foster child's original home or to transfer him to a relative when feasible, § 408 (f)(1); see *supra,* at 137. This procedure comports with Congress' preference for care of dependent children by relatives, a policy underlying the categorical assistance program since its inception in

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40–14–11 (1956); Vt. Stat. Ann., Tit. 33, §§ 501, 502 (1959); Wis. Stat. § 48.62 (1957).

1935. See S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 10–12 (1935); *Burns* v. *Alcala,* 420 U. S., at 581–582; § 401, as amended, 42 U. S. C. § 601, *supra,* at 132–133. We do not believe that Congress, when it extended assistance to foster children, meant to depart from this fundamental principle.[21] Congress envisioned a remedial environment to correct the enduring effects of past neglect and abuse. There is nothing to indicate that it intended to discriminate between potential beneficiaries, equally in need of the program, on the basis of their relationship to their foster parents.

That Congress had no such intent is also evidenced by the 1967 amendments to the Act, which increased the federal match-

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[21] Despite the broad language of § 408 and the clear legislative goals behind the AFDC–FC program, appellants maintain that as a policy matter, relatives' homes should not constitute "foster family homes." They contend that permitting AFDC–FC assistance for foster children who live with relatives would create a "financial incentive" for relatives to refrain from caring for needy children until the children are removed from their homes by court order. Brief for Appellants 26. Even if this were true, "issue[s] of legislative policy . . . [are] better addressed to the wisdom of Congress than to the judgment of this Court." *Marquette Nat. Bank* v. *First of Omaha Service Corp.,* 439 U. S. 299, 319 (1978). Furthermore, we view the inclusion of related foster homes in § 408 as fully consistent with Congress' determination that homes of parents and relatives provide the most suitable environment for children. Congress evidently believed that encouraging relatives to care for these "most underprivileged children," 108 Cong. Rec. 12693 (1962) (remarks of Sen. Eugene McCarthy), whatever the cost, was worth the price. Indeed, if the State's interpretation of the statute were correct, relatives would have an incentive to refuse to accept foster children altogether. Concerned relatives might subordinate their interests in supervising the well-being of youngsters they love to ensure that these children receive the greater cash benefits and services available only to foster children placed in unrelated homes. Similarly, the availability of significantly more financial assistance under AFDC–FC might motivate child-placement authorities to refrain from placing foster children with relatives even when these homes are best suited to the needs of the child.

ing payments for AFDC–FC to exceed the federal share of basic AFDC payments.[22] The increase reflects Congress' recognition that state-supervised care and programs designed to meet the special needs of neglected children cost more than basic AFDC care.[23] The legislative history of the amendment reveals no basis for distinguishing between related and unrelated foster homes.[24] Rather, it discloses a generalized concern for the plight of all dependent children who should be sheltered from their current home environments but are forced to remain in such homes because of the States' inability to finance substitute care. S. Rep. No. 744, pp. 163–165; H. R. Rep. No. 544, pp. 100–101. Significantly, the Committee Reports suggest that increasing federal matching payments would encourage relatives "not legally responsible for support" to undertake the care of foster children "in order to obtain the best possible environment for the child." S. Rep. No. 744, p. 164; H. R. Rep. No. 544, p. 101. The amendments are therefore described, without qualification, as providing "more favorable Federal matching . . . for foster care for children removed from an unsuitable home by court order." S. Rep. No. 744, p. 4; H. R. Rep. No. 544, p. 4.

C

Our interpretation of the statute and its legislative history is buttressed by HEW Program Instruction APA–PI–75–9,

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[22] Social Security Amendments of 1967, Pub. L. 90–248, § 205 (b), 81 Stat. 892, § 403 (a)(1)(B) of the Social Security Act, as amended, 42 U. S. C. § 603 (a)(1)(B); see S. Rep. No. 744, 90th Cong., 1st Sess., 286 (1967) (hereinafter S. Rep. No. 744). These amendments also require all States that participate in the basic AFDC program to establish a Foster Care program. 81 Stat. 892, adding § 402 (a)(20) of the Act, 42 U. S. C. § 602 (a)(20).

[23] See S. Rep. No. 744, pp. 163–164; H. R. Rep. No. 544, 90th Cong., 1st Sess., 100–101 (1967) (hereinafter H. R. Rep. No. 544).

[24] Nor does the Illinois system indicate why such a distinction should be made. Since a related foster parent is subject to the same state-imposed responsibilities as a nonrelated foster parent, their costs must be equivalent.

which requires States to provide AFDC–FC benefits "regardless of whether the . . . foster family home in which a child is placed is operated by a relative." In reaching this conclusion, the Department of Health, Education, and Welfare reasoned:

> "A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the 1967 amendments to the Social Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster family care is more costly than care in the child's own home." HEW Program Instruction APA–PI–75–9.

We noted in vacating the original three-judge District Court decision in this case that "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." *Youakim* v. *Miller,* 425 U. S., at 235–236, citing *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 121 (1973); *Investment Co. Institute* v. *Camp,* 401 U. S. 617, 626–627 (1971). Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision. *Adams* v. *United States,* 319 U. S. 312, 314–315 (1943); *United States* v. *American Trucking Assns.,* 310 U. S. 534, 549 (1940). HEW's Program Instruction is fully supported by the statute, its legislative history, and the common-sense observation that all dependent foster children are similarly in need of the protections and monetary benefits afforded by the AFDC–FC program.[25]

[25] Relying on *General Electric Co.* v. *Gilbert,* 429 U. S. 125, 142–143 (1976), appellants maintain that the Program Instruction conflicts with an earlier HEW pronouncement and therefore deserves little weight. They refer to an inconsistent interpretation of § 408 sent to Illinois authorities

III

We think it clear that Congress designed the AFDC–FC program to include foster children placed with relatives. The overriding purpose of § 408 was to assure that the most appropriate substitute care be given to those dependent children so mistreated that a court has ordered them removed from their homes. The need for additional AFDC–FC resources—both monetary and service related—to provide a proper remedial environment for such foster children arises from the status of the child as a subject of prior neglect, not from the status of the foster parent.[26] Appellants attribute to Congress an intent to differentiate among children who are equally neglected and abused, based on a living arrangement bearing no relationship to the special needs that the AFDC–FC program was created to meet. Absent clear support in the statutory language or legislative history, we decline to make such an unreasonable attribution.

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in 1971 by a regional HEW official, which stated that foster children placed in related homes are not eligible for Foster Care benefits under the federal program. However, this correspondence was not approved by HEW's General Counsel or by any departmental official in the national office. See letter from HEW's Assistant General Counsel to Illinois Special Assistant Attorney General Richard Ryan (Dec. 22, 1976), App. to Brief for United States as *Amicus Curiae* 1a. Since the letter did not reflect an official position, we take the Program Instruction to be the agency's first and only national interpretation concerning § 408's coverage of foster care by relatives. Appellants' reliance on *General Electric Co.* v. *Gilbert, supra,* is therefore misplaced, and we are bound by the "principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969) (footnote omitted); see *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.,* 439 U. S. 234, 251 (1978); *Zemel* v. *Rusk,* 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman,* 380 U. S. 1, 16–18 (1965).

[26] Illinois recognizes as much by providing special grants to some foster children placed with relatives which are not available to other basic AFDC recipients. See n. 12, *supra.*

Accordingly, we hold that the AFDC–FC program encompasses foster children who, pursuant to a judicial determination of neglect, have been placed in related homes that meet a State's licensing requirements for foster homes.

The judgment below is

Affirmed.

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

Syllabus

MONTANA ET AL. *v.* UNITED STATES

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

No. 77–1134. Argued December 4, 1978—Decided February 22, 1979

Montana levies a 1% gross receipts tax upon contractors of public, but not private, construction projects. A public contractor may credit against the gross receipts tax its payments of personal property, corporate income, and individual income taxes. Any remaining gross receipts tax liability is customarily passed on in the form of increased construction costs to the governmental unit financing the project. In 1971, the contractor on a federal project in Montana brought a suit in state court contending that the gross receipts tax unconstitutionally discriminated against the Government and the companies with which it dealt. The litigation was directed and financed by the United States. Less than a month later, the Government brought this action in the Federal District Court challenging the constitutionality of the tax. By stipulation, the case was continued pending resolution of the state-court litigation, which concluded in a decision by the Montana Supreme Court upholding the tax. *Kiewit I.* The court found the distinction between public and private contractors consistent with the mandates of the Supremacy and Equal Protection Clauses. At the Solicitor General's direction, the contractor abandoned its request for review by this Court. The contractor then instituted a second state-court action regarding certain tax payments different from those in *Kiewit I.* The Montana Supreme Court, finding the second claim essentially no different from the first, invoked the doctrines of collateral estoppel and res judicata to affirm the dismissal of the complaint. *Kiewit II.* Thereafter the District Court heard the instant case on the merits, and concluded that the United States was not bound by *Kiewit I* and that the tax violated the Supremacy Clause. *Held:* The United States is collaterally estopped from challenging the prior judgment of the Montana Supreme Court. Pp. 153–164.

(a) The interests underlying the related doctrines of collateral estoppel and res judicata—that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ," *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48–49—are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest

and then seek to redetermine issues previously resolved. Here it is undisputed that the United States exercised sufficient control over the *Kiewit I* litigation to actuate principles of collateral estoppel. Pp. 153–155.

(b) The precise constitutional claim advanced by the United States in this litigation was presented and resolved against the Government in *Kiewit I*. Pp. 156–158.

(c) The factual and legal context in which the issues of this case arise has not materially changed since *Kiewit I*, and thus the normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status." *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620, 624. *Commissioner* v. *Sunnen*, 333 U. S. 591, distinguished. Pp. 158–162.

(d) Though preclusion may be inappropriate when issues of law arise in successive actions involving unrelated subject matter, that exception is inapposite here since the Government's "demands" are closely aligned in time and subject to those in *Kiewit I*. Nor is this a case where a party has been compelled to accept a state court's determination of issues essential to the resolution of federal questions. Rather the Government, "freely and without reservation submitte[d] [its] federal claims for decision by the state courts . . . and ha[d] them decided there. . . ." *England* v. *Medical Examiners*, 375 U. S. 411, 419. Since the Government has not alleged unfairness or inadequacy in the state procedures to which it voluntarily submitted, it is estopped from relitigating issues previously adjudicated. Pp. 162–164.

437 F. Supp. 354, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., filed a concurring statement, *post*, p. 164. WHITE, J., filed a dissenting opinion, *post*, p. 164.

Robert A. Poore, Special Assistant Attorney General of Montana, argued the cause for appellants. With him on the brief were *Terry B. Cosgrove,* Special Assistant Attorney General, and *Robert W. Corcoran.*

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

*Briefs of *amici curiae* urging reversal were filed by *Louis J. Lefkowitz,*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The State of Montana imposes a one percent gross receipts tax upon contractors of public, but not private, construction

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Attorney General, *Ruth Kessler Toch,* Solicitor General, and *Francis V. Dow,* Assistant Attorney General, for the State of New York; by *Slade Gorton,* Attorney General, *Richard H. Holmquist,* Senior Assistant Attorney General, and *Greg Montgomery,* Assistant Attorney General, for the State of Washington; and by the Attorneys General and other officials for their respective jurisdictions as follows: *J. Marshall Coleman,* Attorney General of Virginia, and *John G. MacConnell,* Assistant Attorney General; *John A. Lasota,* Acting Attorney General of Arizona, and *Ian A. MacPherson,* Assistant Attorney General; *Allen I. Olson,* Attorney General of North Dakota, and *Kenneth Jakes,* Special Assistant Attorney General; *Avrum M. Gross,* Attorney General of Alaska, and *Joseph K. Donohue,* Assistant Attorney General; *Paul L. Douglas,* Attorney General of Nebraska, and *Ralph H. Gillan,* Assistant Attorney General; *Frank B. Burch,* Attorney General of Maryland, and *Gerald Langbaum,* Assistant Attorney General; *Ronald Y. Amemiya,* Attorney General of Hawaii, and *T. Bruce Honda,* Deputy Attorney General; *Robert List,* Attorney General of Nevada, and *James H. Thompson,* Chief Deputy Attorney General; *James A. Redden,* Attorney General of Oregon; *William J. Baxley,* Attorney General of Alabama, and *Herbert I. Burson, Jr.; John J. Rooney,* Acting Attorney General of Wyoming, and *James D. Douglass,* Senior Assistant Attorney General; *Philip H. Jacobsen,* Acting Attorney General of Guam; *Slade Gorton,* Attorney General of Washington, and *Richard H. Holmquist,* Senior Assistant Attorney General; *Bill Clinton,* Attorney General of Arkansas, and *Martin J. Nevrla,* Assistant Attorney General; *Robert L. Shevin,* Attorney General of Florida, and *Maxie Broome,* Assistant Attorney General; *Chauncey H. Browning, Jr.,* Attorney General of West Virginia, and *Thomas J. Steele, Jr.,* Assistant Attorney General; *Richard C. Turner,* Attorney General of Iowa, and *George Murray,* Assistant Attorney General; *Wayne L. Kidwell,* Attorney General of Idaho, and *Theodore V. Spangler, Jr.; Toney Anaya,* Attorney General of New Mexico, and *Jan Unna,* Assistant Attorney General; *Theodore L. Sendak,* Attorney General of Indiana, and *Donald Bogard; Miguel Gimenez-Munoz,* Attorney General of Puerto Rico, and *Victor Cruz Ojeda; Frank J. Kelley,* Attorney General of Michigan; and *J. D. MacFarlane,* Attorney General of Colorado, and *Steven Kaplan,* Assistant Attorney General.

projects. Mont. Rev. Codes Ann. § 84–3505 (Supp. 1977).[1] A public contractor may credit against the gross receipts tax its payments of personal property, corporate income, and individual income taxes.[2] Any remaining gross receipts liability is customarily passed on in the form of increased construction costs to the governmental unit financing the project.[3] At issue in this appeal is whether a prior judgment by the Montana Supreme Court upholding the tax precludes the United States from contesting its constitutionality and if

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[1] Section 84–3505 (5), Mont. Rev. Codes Ann. (Supp. 1977), provides in part:

"each public contractor shall pay to the state an additional license fee in a sum equal to one per cent (1%) of the gross receipts from public contracts during the income year for which the license is issued . . . ."

The Act defines public contractors to include:

"(1) . . . any person who submits a proposal to or enters into a contract for performing all public construction work in the state with the federal government, state of Montana, or with any board, commission, or department thereof or with any board of county commissioners or with any city or town council . . . or with any other public board, body, commission, or agency authorized to let or award contracts for any public work when the contract cost, value, or price thereof exceeds the sum of $1,000.

"(2) . . . subcontractors undertaking to perform the work covered by the original contract or any part thereof, the contract cost, value, or price of which exceeds the sum of $1,000." § 84–3501 (Supp. 1977).

Gross receipts encompass:

"all receipts from sources within the state, whether in the form of money, credits, or other valuable consideration, received from, engaging in, or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses, or any other expense whatsoever. However, 'gross receipts' shall not include cash discounts allowed and taken on sales and sales refunds, either in cash or by credit, uncollectible accounts written off from time to time, or payments received in final liquidation of accounts included in the gross receipts of any previous return made by the person." § 84–3501 (3).

[2] See §§ 84–3513 and 84–3514 (Supp. 1977).

[3] See App. 98–108, 112–117, 164.

not, whether the tax discriminates against the Federal Government in violation of the Supremacy Clause.

I

In 1971, Peter Kiewit Sons' Co., the contractor on a federal dam project in Montana, brought suit in state court contending that the Montana gross receipts tax unconstitutionally discriminated against the United States and the companies with which it dealt. The litigation was directed and financed by the United States. Less than a month after the state suit was filed, the Government initiated this challenge to the constitutionality of the tax in the United States District Court for the District of Montana. On stipulation by the parties, the instant case was continued pending resolution of the state-court litigation.

That litigation concluded in a unanimous decision by the Montana Supreme Court sustaining the tax. *Peter Kiewit Sons' Co.* v. *State Board of Equalization,* 161 Mont. 140, 505 P. 2d 102 (1973) (*Kiewit I*). The court found the distinction between public and private contractors consistent with the mandates of the Supremacy and Equal Protection Clauses. *Id.,* at 149–154, 505 P. 2d, at 108–110. The contractor subsequently filed a notice of appeal to this Court, but abandoned its request for review at the direction of the Solicitor General. App. to Juris. Statement 86–87. It then instituted a second action in state court seeking a refund for certain tax payments different from those involved in *Kiewit I.* On determining that the contractor's second legal claim was, in all material respects, identical to its first, the Montana Supreme Court invoked the doctrines of collateral estoppel and res judicata to affirm the dismissal of the complaint. *Peter Kiewit Sons' Co.* v. *Department of Revenue,* 166 Mont. 260, 531 P. 2d 1327 (1975) (*Kiewit II*).

After the decision in *Kiewit II,* a three-judge District Court heard the instant case on the merits. In a divided opinion, the court concluded that the United States was not bound

by the *Kiewit I* decision, and struck down the tax as violative of the Supremacy Clause. 437 F. Supp. 354 (1977). The majority began with the premise that the Supremacy Clause immunizes the Federal Government not only from direct taxation by the States, but also from indirect taxation that operates to discriminate against the Government or those with whom it transacts business. *Id.*, at 359. See *United States* v. *Detroit,* 355 U. S. 466, 473 (1958); *Phillips Chemical Co.* v. *Dumas Independent School Dist.,* 361 U. S. 376, 387 (1960). Because no private contractors were subject to the Montana gross receipts tax, the court reasoned that the statute impermissibly singled out the Federal Government and those with whom it dealt for disparate treatment. That the tax applied to state and municipal as well as federal contractors did not, in the majority's view, negate the statute's discriminatory character. For although contractors on state projects might pass on the amount of their tax liability to the State in the form of higher construction costs, Montana would recoup its additional expenditure through the revenue that the tax generated. By contrast, when federal contractors shifted the burden of their increased costs to the United States, it would receive no such offsetting revenues. Accordingly, the court concluded that the statute encroached upon the immunity from discriminatory taxation enjoyed by the Federal Government under the Supremacy Clause. 437 F. Supp., at 358–359. One judge argued in dissent both that the United States was estopped from challenging the constitutionality of the tax and that the statutory scheme, because it encompassed receipts of municipal and state as well as federal contractors, was not discriminatory within the meaning of *Phillips Chemical Co.* v. *Dumas Independent School Dist., supra.* 437 F. Supp., at 365–366 (Kilkenny, J., dissenting).

We noted probable jurisdiction. 436 U. S. 916 (1978). Because we find that the constitutional question presented by

this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of collateral estoppel without reaching the merits.

II

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48–49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352 (1877); *Lawlor* v. *National Screen Service Corp.,* 349 U. S. 322, 326 (1955); 1B J. Moore, Federal Practice ¶ 0.405 [1], pp. 621–624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); *id.,* § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co.* v. *Shore,* 439 U. S. 322, 326 n. 5 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2–3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra,* at 49; *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U. S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources,

and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.[4]

These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.[5] As this Court observed in *Souffront* v. *Compagnie des Sucreries,* 217 U. S. 475, 486–487 (1910), the persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be "strangers to the cause. . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." See *Schnell* v. *Peter Eckrich & Sons, Inc.,* 365 U. S. 260, 262 n. 4 (1961); cf. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100, 111 (1969). Preclusion of such nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. And the cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right. See *G. & C. Merriam Co.* v. *Saalfield,* 241 U. S. 22, 29 (1916); Restatement (Second) of Judgments § 83, Comment *b,* p. 51 (Tent. Draft

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[4] See Hazard, Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036, 1042–1043 (1971); Vestal, Preclusion/Res Judicata Variables: Adjudicating Bodies, 54 Geo. L. J. 857, 858 (1966); Note, Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820 (1952).

[5] Although the term "privies" has been used on occasion to denominate nonparties who control litigation, see, *e. g., G. & C. Merriam Co.* v. *Saalfield,* 241 U. S. 22, 27 (1916); Restatement of Judgments § 83, Comment *a* (1942), this usage has been criticized as conclusory and analytically unsound. 1B Moore ¶ 0.411 [6], p. 1553; cf. Note, 65 Harv. L. Rev., at 856. The nomenclature has been abandoned in the applicable section of the Second Edition of the Restatement. See Restatement (Second) of Judgments § 83 (Tent. Draft No. 2, Apr. 15, 1975).

No. 2, Apr. 15, 1975); 1B Moore ¶ 0.411 [6], pp. 1553–1554; Note, Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 862 (1952).

That the United States exercised control over the *Kiewit I* litigation is not in dispute. The Government has stipulated that it:

> (1) required the *Kiewit I* lawsuit to be filed;
>
> (2) reviewed and approved the complaint;
>
> (3) paid the attorneys' fees and costs;
>
> (4) directed the appeal from State District Court to the Montana Supreme Court;
>
> (5) appeared and submitted a brief as *amicus* in the Montana Supreme Court;
>
> (6) directed the filing of a notice of appeal to this Court; and
>
> (7) effectuated Kiewit's abandonment of that appeal on advice of the Solicitor General. App. to Juris. Statement 86–87.

Thus, although not a party, the United States plainly had a sufficient "laboring oar" in the conduct of the state-court litigation to actuate principles of estoppel. *Drummond* v. *United States,* 324 U. S. 316, 318 (1945). See *Schnell* v. *Peter Eckrich & Sons, Inc., supra,* at 262 n. 4; *Souffront* v. *Compagnie des Sucreries, supra,* at 486–487; *Watts* v. *Swiss Bank Corp.,* 27 N. Y. 2d 270, 277–278, 265 N. E. 2d 739, 743–744 (1970).

III

To determine the appropriate application of collateral estoppel in the instant case necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved against the United States in *Kiewit I;* second, whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

A

A review of the record in *Kiewit I* dispels any doubt that the plaintiff there raised and the Montana Supreme Court there decided the precise constitutional claim that the United States advances here. In its complaint in *Kiewit I*, the contractor alleged that the gross receipts tax and accompanying regulations were unconstitutional because they, *inter alia:*

> "(a) illegally discriminate against the Plaintiff, the United States, and its agencies and instrumentalities, and those with whom the United States does business, and deny them due process of law and the equal protection of the laws;
>
> "(b) illegally impose a tax on Plaintiff which is not uniform upon the same class of subjects;
>
> "(c) illegally and improperly interfere with the Federal Government's power to select contractors and schedule construction and . . . conflict with Federal law and policy regulating Federal procurement;
>
> "(d) illegally violate the immunity of the Federal Government and its instruments (including Plaintiff) from state control in the performance of their functions; [and]
>
> . . . . .
>
> "(f) illegally frustrate the Federal policy of selecting the lowest possible bidder . . . ." App. 37.

The Montana Court rejected those contentions on the theory that:

> "The federal government is being treated in the same manner as the state of Montana treats itself and its subdivisions or municipalities. The only discrimination the federal government can claim is that private contractors are not paying the same tax as public contractors. However, according to [*Phillips Chemical Co.* v. *Dumas School Dist.*, 361 U. S. 376 (1960), and *Moses Lake*

> *Homes* v. *Grant County,* 365 U. S. 744 (1961),] . . . all [that is] required is that the state does not give itself special treatment over that received by the federal government. The Act involved here treats the federal government in the same manner as it treats those who deal with any part of the state government." *Kiewit I,* 161 Mont., at 152, 505 P. 2d, at 109.

No different constitutional challenge is at issue in this litigation. Indeed, the United States' amended complaint tracks almost verbatim the language of the plaintiff's in *Kiewit I* in alleging that the Montana tax provisions:

> "(1) illegally discriminate against the plaintiff, United States, and its agencies and instrumentalities, and those with whom the United States does business in violation of the Supremacy Clause, Article VI, Clause 2, and the Fourteenth Amendment;
>
> "(2) illegally impose a tax on plaintiff's contractors and subcontractors which is not uniform upon the same class of subjects in violation of the Fourteenth Amendment;
>
> "(3) illegally force the United States of America to pay more for its construction than does a private party or corporation in violation of the Supremacy Clause, Art. VI, Cl. 2; [and]
>
> . . . . .
>
> "(5) . . . illegally interfer[e] with the Federal Government's free choice to choose its contractors and frustrat[e] the policy of choosing the lowest bidder in violation of federal procurement law and the Supremacy Clause, Art. IV [*sic*], Cl. 2." App. 67.

Thus, the "question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" adversely to the Government in state court. *United States* v. *Moser,* 266 U. S. 236, 242 (1924). Absent significant changes in controlling facts or legal principles

since *Kiewit I,* or other special circumstances, the Montana Supreme Court's resolution of these issues is conclusive here.

B

Relying on *Commissioner* v. *Sunnen,* 333 U. S. 591 (1948), the United States argues that collateral estoppel extends only to contexts in which "the controlling facts and applicable legal rules remain unchanged. *Id.,* at 600. In the Government's view, factual stasis is missing here because the contract at issue in *Kiewit I* contained a critical provision which the contracts involved in the instant litigation do not.

Under its contract with the Army Corps of Engineers, Kiewit was unable to take advantage of the credit provisions of the gross receipts tax.[6] In 1971, however, the United States altered its policy and has since required Montana contractors to seek all available refunds and credits. See 437 F. Supp., at 358; App. 91. As the Government reads the *Kiewit I* decision, the Montana Supreme Court proceeded on the assumption that if Kiewit had been able to avail itself of the offsetting income and property tax credits, there might have been a "total washout" of its gross receipts tax liability. 161 Mont., at 145, 505 P. 2d, at 106. Thus, according to the Government, the holding of *Kiewit I* was that the Montana statute did not discriminate against the United States under circumstances where, but for the Federal Government's own contractual arrangement, the tax might have had no financial impact. Brief for United States 35–36. Because the uncontroverted evidence in this case establishes that after taking

[6] Clause 58 of the contract enumerated the credit provisions of the Montana statute and provided that "[t]he Contractor, and, in turn, the subcontractors will not take advantage of these credits." *Peter Kiewit Sons' Co.* v. *State Board of Equalization,* 161 Mont. 140, 145–146, 505 P. 2d 102, 106 (1973) (*Kiewit I*).

The record does not reflect the reason for the Government's policy. See Tr. of Oral Arg. 35.

all credits available, federal contractors are still subject to a gross revenue tax of one-half of one percent, App. to Juris. Statement 90, the Government submits that the factual premise of the *Kiewit I* holding is absent here.

We disagree.[7] It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues. See, *e. g., United States* v. *Certain Land at Irving Place & 16th Street,* 415 F. 2d 265, 269 (CA2 1969); *Metcalf* v. *Commissioner,* 343 F. 2d 66, 67–68 (CA1 1965); *Alexander* v. *Commissioner,* 224 F. 2d 788, 792–793 (CA5 1955); 1B Moore ¶ 0.448, pp. 4232–4233, ¶ 0.422 [4], pp. 3412–3413. But we do not construe the opinion in *Kiewit I* as predicated on the factual assumption that the gross receipts tax would cancel out if public contractors took all available refunds and credits.

The Montana Supreme Court adverted to the washout possibility when discussing the origin of the gross receipts tax as a revenue-enforcing rather than revenue-generating measure. Prior to the enactment of the statute, certain public contractors had evaded assessment of local property taxes by shifting equipment from one construction site to another, and by filing corporate or personal income tax returns that did not fairly reflect the amount of profit attributable to construction projects within the State. 161 Mont., at 143–145, 505 P. 2d,

[7] A threshold difficulty with the Government's argument is that the record does not support its assertion that contractual provisions barring contractors from taking credits are "no longer applicable in the contracts involved in this litigation." Brief for United States 14. See also Tr. of Oral Arg. 37. The Montana gross receipts statute was enacted in 1967, and the Government has not limited its request for relief to gross receipts taxes paid after 1971 when the contractual provisions involved in *Kiewit I* were discontinued. See *supra,* at 158. To the contrary, the Government's amended complaint in the instant case seeks a refund of all tax payments, less credits, made under the Montana statute. App. 68–69. Thus, the Government's contention concerning factual changes does not justify the District Court's refusal to invoke estoppel with respect to the pre-1971 claims.

at 104–105.[8] In establishing a flat percentage tax on gross receipts, with credits available for income and property tax payments, the Montana Legislature sought to remove any incentive for contractors to dissemble about the location of taxable equipment and the source of taxable revenues. Under the statutory scheme, a contractor who paid a substantial amount of property or income taxes might, by claiming those payments as credits, effectively cancel out his gross receipts tax liability. *Id.*, at 145, 505 P. 2d, at 105. In practice, the court noted in *Kiewit I*, the statute had not resulted in a total offset of the 1% gross receipts payments, in part because of provisions such as those in federal contracts. *Ibid.*, 505 P. 2d, at 106. Significantly, however, the court did not rely on the potential absence of tax liability in its analysis of Kiewit's constitutional challenge. Indeed, it did not even allude to the washout potential in the course of that discussion. *Id.*, at 147–154, 505 P. 2d, at 106–110. It focused rather on the rationality of the classification between public and private contractors, and on the parity of treatment between the United States and other public contractors. *Ibid.*

Our conclusion that the washout potential of the tax was not of controlling significance in *Kiewit I* is further reinforced by the Montana Supreme Court's holding in *Kiewit II*. There, the contractor alleged that its gross receipts tax liability had exceeded its property and income tax credits, and argued that "the only basis" for the decision in *Kiewit I* was that "if the Act were properly enforced it would result in a 'washout.'" *Kiewit II*, 166 Mont., at 262, 531 P. 2d, at 1328. The Montana Supreme Court rejected that reading of *Kiewit I* as "much too narro[w]." 166 Mont., at 263, 531 P. 2d, at 1329. That the offset possibility had not materialized for Kiewit was, in the court's view, a fact too "inconsequential" to warrant relitigation of the statute's constitutionality. *Id.*,

[8] Apparently the problem had not arisen to any appreciable extent with private contractors. Tr. of Oral Arg. 5–6.

at 264, 531 P. 2d, at 1329. So too here, we cannot view the absence of a total washout as altering facts essential to the judgment in *Kiewit I*.

Thus, unless there have been major changes in the law governing intergovernmental tax immunity since *Kiewit I*, the Government's reliance on *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), is misplaced. *Sunnen* involved the tax status of certain income generated by a license agreement during a particular tax period. Although previous litigation had settled the status of income from the same agreement during earlier tax years, the Court declined to give collateral estoppel effect to the prior judgment because there had been a significant "change in the legal climate." *Id.*, at 606. Underlying the *Sunnen* decision was a concern that modifications in "controlling legal principles," *id.*, at 599, could render a previous determination inconsistent with prevailing doctrine, and that

> "[i]f such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. [Collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." *Ibid.* (citations omitted).

No such considerations obtain here. The Government does not contend and the District Court did not find that a change in controlling legal principles had occurred between *Kiewit I* and the instant suit. That the Government's amended complaint in this action replicates in substance the legal argument advanced by the contractor's complaint in *Kiewit I* further

suggests the absence of any major doctrinal shifts since the Montana Supreme Court's decision.[9]

Because the factual and legal context in which the issues of this case arise has not materially altered since *Kiewit I,* normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status." *Tait* v. *Western Maryland R. Co.,* 289 U. S. 620, 624 (1933). See *United States* v. *Russel Mfg. Co.,* 349 F. 2d 13, 18–19 (CA2 1965).

C

The sole remaining question is whether the particular circumstances of this case justify an exception to general principles of estoppel. Of possible relevance is the exception which obtains for "unmixed questions of law" in successive actions involving substantially unrelated claims. *United States* v. *Moser,* 266 U. S. 236, 242 (1924). As we recognized in *Moser:*

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Ibid.* (emphasis added).

Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. See Restatement (Second) of Judgments § 68.1, Reporter's Note, pp. 43–44 (Tent. Draft No. 4, Apr. 15, 1977); 1B Moore ¶ 0.448, p. 4235; Scott, 56 Harv. L. Rev., at 10. This excep-

[9] See *supra,* at 156–157.

tion is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical. To be sure, the scope of the *Moser* exception may be difficult to delineate, particularly where there is partial congruence in the subject matter of successive disputes. But the instant case poses no such conceptual difficulties. Rather, as the preceding discussion indicates, the legal "demands" of this litigation are closely aligned in time and subject matter to those in *Kiewit I*.

Nor does this case implicate the right of a litigant who has "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims," and who is then "compelled, without his consent . . . , to accept a state court's determination of those claims." *England* v. *Medical Examiners,* 375 U. S. 411, 415 (1964) (footnote omitted). As we held in *England,* abstention doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions. *Id.,* at 417. See *NAACP* v. *Button,* 371 U. S. 415, 427 (1963). However, here, as in *England,* a party has "freely and without reservation submit[ted] his federal claims for decision by the state courts . . . and ha[d] them decided there . . . ." *England* v. *Medical Examiners, supra,* at 419.[10] Considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court.

Finally, the Government has not alleged unfairness or inadequacy in the state procedures to which it voluntarily

[10] The Government seeks to distinguish *England* on the ground that the court below did not technically abstain, but rather, at the parties' request, continued the action "pending the resolution in the state courts of Montana." App. to Juris. Statement 49–50. Further, in the Government's view, the rule of *England* arises only when a *party* freely submits his federal claims

submitted.[11] We must conclude therefore that it had a full and fair opportunity to press its constitutional challenges in *Kiewit I*. Accordingly, the Government is estopped from seeking a contrary resolution of those issues here.

The judgment of the District Court is

Reversed.

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion on the customary understanding that its references to law review articles and drafts or finally adopted versions of the Restatement of Judgments are not intended to bind the Court to the views expressed therein on issues not presented by the facts of this case.

MR. JUSTICE WHITE, dissenting.

I disagree that the Government was estopped from litigating its claim in federal court by virtue of the earlier action in the courts of Montana. And on the merits I think the Montana gross receipts tax is constitutionally infirm. Thus, I would affirm the decision below.

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to adjudication in state courts. Because the United States was not a party in *Kiewit I*, the Government submits that it is not bound by the judgment in that case. Brief for United States 34.

We agree that the District Court's action is properly characterized as a continuance and that res judicata, the doctrine involved in *England*, is inapplicable to nonparties. See *supra*, at 154–155. But neither point is availing here since we dispose of the case on grounds of collateral estoppel, which does apply to nonparties, see *ibid.*, and invoke *England* simply to dispel any inference that the same result would obtain if the Federal Government had been forced into state court and had reserved its federal claim.

[11] Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. See Restatement (Second) of Judgments § 68.1 (c) (Tent. Draft No. 4, Apr. 15, 1977); Note, The Preclusive Effect of State Judgements on Subsequent 1983 Actions, 78 Colum. L. Rev. 610, 640–653 (1978). Cf. *Gibson* v. *Berryhill*, 411 U. S. 564 (1973); *Trainor* v. *Hernandez*, 431 U. S. 434, 469–470, and n. 15 (1977) (STEVENS, J., dissenting).

I

It is basic that the principle of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged." *Commissioner* v. *Sunnen,* 333 U. S. 591, 599–600 (1948). The Court does not dispute this, but maintains that discrepancies in the facts underlying the state and federal actions were of no moment. It is clear, however, that the Montana Supreme Court assumed in *Kiewit I* that the tax under scrutiny was a tax-enforcing, rather than a revenue-collecting, measure. The significance of that supposition, in my view, is refuted neither by the opinion in *Kiewit I* nor by the state court's subsequent pronouncements in *Kiewit II.* That the assumption lost its force by the time of the federal litigation is undisputed. By then the Federal Government had abandoned its policy of requiring contractors with whom it dealt to forgo credits available under the gross receipts law. Though federal contractors accordingly availed themselves of the credits and refunds allowable under the law, "the uncontroverted evidence in this case establishes that . . . federal contractors are still subject to a [net] gross revenue tax of one-half of one percent." *Ante,* at 158–159. Because the facts developed before the three-judge court cast the constitutional issues in a wholly different light, I think the court properly proceeded to decide those issues uninhibited by the prior state adjudication.

At the outset of its discussion in *Kiewit I,* the Montana Supreme Court labored to demonstrate that the gross receipts tax in issue was a tax-enforcing measure, in that funds collected pursuant thereto would be applied, or credited, against taxes otherwise due. The court understood that the tax had not in practice resulted in a total washout of gross receipts payments, but it attributed this to the Federal Government's policy prohibiting certain contractors—such as the Kiewit Co.

itself—from taking refunds and credits available under the law, and to ignorance of, and indifference to, the credit provisions on the part of other contractors. The court maintained that, aside from such aberrations, the Act was intended to and would "operate as a *revenue enforcing* measure." *Peter Kiewit Sons' Co.* v. *State Board of Equalization,* 161 Mont. 140, 146, 505 P. 2d 102, 106 (1973) (emphasis added).

The majority surmises that the state court's extensive characterization of the tax was irrelevant to the court's constitutional analysis. But that view relegates to dicta the state court's careful appraisal of the operation and impact of the tax. By inspecting the state court's constitutional analysis independently of that court's evaluation of the nature of the tax, the majority assumes that the constitutional adjudication proceeded *in vacuo.* The logic of the state court's decision may well extend to a revenue-raising measure. But to say that *Kiewit I* may be persuasive authority on that score is not to establish that it has adjudicated the issue.

Moreover, the Court's reliance on *Kiewit II* to demonstrate the immateriality of the "washout" nature of the tax to the decision in *Kiewit I* is misplaced. I recognize that the Montana Supreme Court regarded Kiewit's second attack—launched after the contractual credit restrictions were removed by the Government—as foreclosed by the judgment in the first suit. But in addressing Kiewit's objection to the application of the tax in a manner to raise revenue, the court acknowledged that "it may be that Kiewit would be entitled to a refund or some other administrative remedy." *Peter Kiewit Sons' Co.* v. *Department of Revenue,* 166 Mont. 260, 262, 531 P. 2d 1327, 1328 (1975). The statute, of course, contemplates no such remedy, nor did the court affirmatively construe it to authorize one.[1] Yet the court's remark leaves

[1] The Administrator of the Miscellaneous Tax Division of the Montana Department of Revenue testified in the federal proceedings that no administrative remedy existed and that none was contemplated. Deposition of James Madison, Record Doc. No. 68, p. 16.

unclear whether, absent such a remedy, the court would persist in holding the tax constitutional. The statement underscores the court's assumption in *Kiewit I* that the gross receipts tax was a tax-enforcing device and suggests correlatively that the decision there did not condone imposition of an unmitigated positive tax solely on public contractors.[2] The majority is unsound in inferring from *Kiewit II* that the ruling in *Kiewit I* was insensitive to the then-presumed "washout" character of the gross receipts tax.

As I see it, then, there was a "modification of the significant facts" that rendered the prior state "determination obsolete . . . at least for future purposes," *Commissioner* v. *Sunnen, supra,* at 599; and the Government was free to litigate its constitutional challenge in federal court.

II

On the merits, the judgment below should be sustained. There is nothing wrong, of course, with a state gross receipts tax of general applicability that incidentally applies to contractors who deal with the Federal Government thus increasing its construction costs. *United States* v. *County of Fresno,* 429 U. S. 452, 460 (1977); *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160 (1937). "So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." *United States* v. *County of Fresno, supra,* at 460.

In *Fresno,* we stressed the requirement that the state tax be "imposed equally on the other similarly situated constituents of the State." 429 U. S., at 462. Such concern for discrim-

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[2] It is true that the court indicated that its first opinion held that there were reasonable grounds for distinguishing between private and public contractors for tax purposes. But the discussion differentiating private and public contractors to which the court alluded was addressed to Kiewit's equal protection claim, not its supremacy claim. See *Peter Kiewit Sons' Co.* v. *State Board of Equalization,* 161 Mont. 140, 146–151, 505 P. 2d 102, 106–109 (1973).

inatory taxation "returns to the original intent of *M'Culloch* v. *Maryland*[, 4 Wheat. 316 (1819)]." *Id.*, at 462–463. We observed that "[t]he political check against abuse of the taxing power found lacking in *M'Culloch* . . . is present where the State imposes a nondiscriminatory tax only on its constituents or their artificially owned entities; and *M'Culloch* foresaw the unfairness in forcing a State to exempt private individuals with beneficial interests in federal property from taxes imposed on similar interests held by others in private property." *Ibid.*

The Montana gross receipts tax cannot survive application of the foregoing principles. It is not a law generally embracing all similarly situated state constituents doing business in the private and public sectors. While mandating collection of revenue from contractors who transact with public entities, the law passes over all contractors who deal with private parties. Thus, the "political check" that would have been provided by private-sector contractors "against abuse of the taxing power [is] lacking." *Ibid.*

Appellants maintain that contractors who deal with private enterprises are not situated similarly to those who transact with public bodies. They point to special problems associated with enforcement of state tax laws against contractors prone to move about the State in pursuit of large public contracts. The gross receipts tax measure was necessary, it is argued, in order to facilitate enforcement of other tax laws against such contractors. Concededly, however, the same problems exist with respect to large private contractors; and even assuming that differentiation between public-sector and private-sector contractors is warranted in the context of tax enforcement measures, appellants' representations provide no basis for discriminating in regard to revenue raising.

The Montana Supreme Court in the *Kiewit* litigation defended the classification for equal protection purposes by submitting that the public's stake in the safety of building

projects, and hence in the qualifications of public contractors, warranted treating public-sector contractors differently from their private-sector counterparts. But these considerations, like the matters advanced by appellants, fail to explain why a tax is collected from the former but not the latter.[3] Moreover, though the law may be sustainable against an equal protection assault, the indulgent standard used in that area will not be applied when federal supremacy is threatened. See *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 383–385 (1960). In such circumstances, disparate treatment "must be justified by *significant* differences between the two classes"; there must be "considerations provid[ing] solid support for the classification." *Id.*, at 383–384 (emphasis added). It seems plain, then, that private-sector and public-sector contractors are similarly situated for purposes of this litigation.

III

Appellants contend, nonetheless, that it is enough that the tax reaches contractors dealing with all *public* entities—state or federal. Appellants root their contention in this Court's statement in *Phillips Chemical Co.* v. *Dumas Independent School Dist., supra,* at 385, that a State must "treat those who deal with the Government as well as it treats those *with whom it deals itself.*" (Emphasis added.) But *Phillips* furnishes no support for appellants' position. There, the Court held unconstitutional a state tax scheme that treated lessees

[3] The court suggested that public contractors warrant special tax treatment because public construction projects are more extensively regulated than private jobs and are subject to mandatory supervision or inspection. But the State has stipulated that no "federal contracts [are] subject to state standards, review or supervision, nor [does the State] have any right or authority to suspend any federal contractor's license, nor can the [State] interfere with selection of bidders for the Federal Government." App. to Juris. Statement 79. Thus, the considerations posited by the state court do not distinguish private-sector contractors from those who deal with the Federal Government.

of federal property more severely than lessees of state property. Even before addressing that issue, however, the Court ascertained that there was "no discrimination between the Government's lessees and lessees of private property." 361 U. S., at 381. Thus, the Court in *Phillips* evinced concern for equal treatment of all similarly situated persons connected with both the private and public sector, not just of persons within the public sector.

In any event, I see no basis whatsoever for extracting from the principle that a State may not favor itself over the Federal Government the further proposition that a State may favor its private-sector constituents so long as contractors working for public bodies are taxed. Indeed, in *Fresno* the Court sustained the tax only after assuring itself that persons who rented federal property were "no worse off under California tax laws than those who work for private employers and rent houses in the private sector." 429 U. S., at 465. Such laws, reaching broadly across the public and private sectors, are characteristic of those this Court has sustained. *E. g., United States* v. *Detroit,* 355 U. S. 466 (1958); *Detroit* v. *Murray Corp.,* 355 U. S. 489 (1958); *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941); *James* v. *Dravo Contracting Co.,* 302 U. S. 134 (1937); *Silas Mason Co.* v. *Tax Comm'n,* 302 U. S. 186 (1937).

There is good reason to insist that a state tax be "imposed equally" on all "similarly situated constituents of the State," *United States* v. *County of Fresno,* 429 U. S., at 462, whether connected with the public sector or private. Broad application of a tax is necessary to guarantee an efficacious "political check" on potentially abusive taxation. The Montana gross receipts tax, limited as it is to public-sector contractors, provides little such assurance. Taxation of contractors dealing directly with the State or state agencies affords no safeguard against discriminatory treatment of federal contracting agencies and the contractors with whom they deal. Any tax

increase passed along by a contractor would be borne fully by a federal agency but would be offset by the corresponding tax revenues in the case of the State; from the State's perspective the tax is a washout.

Municipalities and local districts, it is true, do not enjoy the same advantage, and they may resist tax increases that would, if successfully enforced, burden them and the Federal Government alike. But, at least potentially, local subdivisions may secure offsetting state assistance by indirection,[4] and that may diminish their incentive to oppose tax hikes. Even assuming, however, that local public bodies share an interest with the Federal Government in restraining taxes, it escapes me why the Government must acquiesce in the limited protection they provide when an enhanced political check would ensue from extension of the tax to other similarly situated state constituents. As I have indicated, there is no support for such a notion in the decisions of this Court. *McCulloch,* itself, condoned state taxation of private interests in federal property "in common with other property of the same description *throughout the State.*" *McCulloch* v. *Maryland,* 4 Wheat. 316, 436 (1819) (emphasis added). And in *Fresno* we observed that escalation of a state tax so as to destroy or impair a federal function might be forestalled by imposition of the tax "on the income and property interests of all other residents and voters of the State." 429 U. S., at 463 n. 11. These decisions counsel against nice determinations regarding the political leverage of this group or that and establish the simple but fundamental proposition that the Federal Government is entitled to the full measure of protection

[4] Montana has authorized payment of state funds to local political entities in certain contexts. *E. g.,* Mont. Rev. Codes Ann. §§ 50–1802 to 50–1810 (Supp. 1977) (funding for certain highway improvements and expansion of services due to coal development); § 11–1834 (Supp. 1977) (state payments to municipalities with police departments); § 11–1919 (Supp. 1977) (state payments to municipalities with fire department relief associations).

derivable from inclusion of all similarly situated state constituents in the class subject to the tax.

Appellants suggested at oral argument that private-sector contracting comprises a relatively small percentage of all contracting in the State and argue that exclusion of private-sector contractors from the ambit of the gross receipts tax is therefore excusable. But appellants do not seriously contend that private-sector contracting in Montana is *de minimis,* nor would any such assertion find support in the record.[5] Private contracting parties, if subjected to this tax, would provide significant additional protection against abuse of the state taxing power. Exempting the private sector from the Montana gross receipts tax was accordingly contrary to the Constitution.

As I believe the three-judge court properly reached and decided the merits of the Government's claim, I dissent from reversal of the judgment below.

[5] The record indicates, if anything, that private-sector contracting is nonnegligible. See App. 108–109, 166–167, 179, 183. See also Bureau of the Census, 1972 Census of Construction Industries 39–2, 39–4, 39–7 (1975).

Syllabus

ILLINOIS STATE BOARD OF ELECTIONS *v.* SOCIALIST WORKERS PARTY ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77–1248. Argued November 6, 1978—Decided February 22, 1979

Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections. However, the minimum number of signatures required in elections for offices of political subdivisions of the State is 5% of the number of persons who voted at the previous election for such offices. Application of these provisions to a special mayoral election in Chicago produced the result that a new party or independent candidate needed substantially more signatures than would be needed for ballot access in a statewide election. In actions by appellees, an independent candidate, two new political parties, and certain voters, challenging this discrepancy on equal protection grounds, the District Court enjoined enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, and the Court of Appeals affirmed. *Held:*

1. This Court's summary affirmance in *Jackson* v. *Ogilvie*, 403 U. S. 925, of the District Court's decision in 325 F. Supp. 864, upholding Illinois' 5% signature requirement is not dispositive of the equal protection question presented here. The precedential effect of a summary affirmance can extend no further than "the precise issues presented and necessarily decided by those actions," *Mandel* v. *Bradley*, 432 U. S. 173, 176. In contrast to this case, the challenge in *Jackson* involved only the discrepancy between the 5% requirement and the less stringent requirements for candidates of established political parties. The issue presented here was not referred to by the *Jackson* District Court, and was mentioned only in passing in the jurisdictional statement subsequently filed with this Court. Thus, the issue was not adequately presented to, or decided by, this Court in its summary affirmance. Pp. 180–183.

2. The Illinois Election Code, insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 183–187.

(a) When such fundamental rights as the freedom to associate as a political party and the right to cast votes effectively are at stake, a State must establish that its regulation of ballot access is necessary to serve a compelling interest. Pp. 184–185.

(b) "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper* v. *Pontikes,* 414 U. S. 51, 58–59, and States must adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved. Since the State has determined that a smaller number of signatures in a larger political unit adequately serves its interest in regulating the number of candidates on the ballot, the signature requirements for independent candidates and political parties seeking offices in Chicago are clearly not the least restrictive means of achieving the same objective. Appellant State Board of Elections has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for elections in Chicago than for statewide elections. Pp. 185–186.

(c) Prior invalidation of Illinois' rules regarding geographic distribution of signatures tied the requirements for both city and state candidates solely to a population standard. However, while this may explain the anomaly at issue here, it does not justify it. Historical accident, without more, cannot constitute a compelling state interest. Pp. 186–187.

3. The Court of Appeals properly dismissed as moot appellant's claim that the Chicago Board of Election Commissioners lacked authority to conclude a settlement agreement with respect to the unresolved issue whether the 5% signature requirement coupled with the filing deadline impermissibly burdened First and Fourteenth Amendment rights. Appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Pp. 187–188.

566 F. 2d 586, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined, and in Parts I, II, and IV of which STEVENS, J., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 188. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 189. BURGER, C. J., concurred in the judgment. REHNQUIST, J., filed an opinion concurring in the judgment, *post,* p. 190.

Michael L. Levinson argued the cause for appellant. With him on the briefs were *Michael E. Lavelle* and *Franklin J. Lunding, Jr.*

Jeffrey D. Colman argued the cause for appellees Rose et al. With him on the brief was *William H. Luking*. *Ronald Reosti* argued the cause for appellees Socialist Workers Party et al. With him on the brief was *Lance Haddix*. *Thomas A. Foran* filed a brief for appellee Chicago Board of Election Commissioners.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections.[1] However, a different standard applies in elections

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[1] Under Ill. Ann. Stat., ch. 46, § 10–2 (Supp. 1978):

"A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an 'established political party' as to the State and as to any district or political subdivision thereof.

"A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an 'established political party' within the meaning of this Article as to such district, political subdivision or municipality."

A *new* political party is one that has not met these requirements.

Individuals desiring to form a new political party throughout the State must file with the State Board of Elections a petition that, *inter alia,* is "signed by not less than 25,000 qualified voters." In *Communist Party of Illinois* v. *State Board of Elections,* 518 F. 2d 517 (CA7), cert. denied,

for offices of political subdivisions of the State. The minimum number of signatures required for those elections is 5% of the number of persons who voted at the previous election for offices of the particular subdivision.[2] In the city of Chicago, application of this standard has produced the in-

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423 U. S. 986 (1975), the Court of Appeals held unconstitutional the proviso in this section requiring "that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures." Ill. Ann. Stat., ch. 46, § 10–2 (Supp. 1978).

A party that files a completed petition becomes entitled to place "upon the ballot at such next ensuing election such list of . . . candidates for offices to be voted for throughout the State . . . under the name of and as the candidates of such new political party." *Ibid.*

With respect to independent candidates, § 10–3 (Supp. 1978) provides in pertinent part:

"Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures."

The record does not reveal whether the State enforces the proviso.

[2] Section 10–2 provides:

"If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area."

Under § 10–3:

"Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area."

congruous result that a new party or an independent candidate needs substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office.[3] The question before us is whether this discrepancy violates the Equal Protection Clause of the Fourteenth Amendment.

I

In January 1977, the Chicago City Council ordered a special mayoral election to be held on June 7, 1977, to fill the vacancy created by the death of Mayor Richard J. Daley. Pursuant to that order, the Chicago Board of Election Commissioners (Chicago Board) issued an election calendar that listed the filing dates and signature requirements applicable to independent candidates and new political parties. Independent candidates had to obtain 35,947 valid signatures by February 19, and new political parties were required to file petitions with 63,373 valid signatures by April 4.[4] Subsequently, the Chicago Board and the State Board of Elections (State Board) agreed for purposes of the special election to bring into conformity the requirements for independent candidates

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[3] Candidates and new parties in Cook County, Ill., which is more populous than Chicago, would also have to obtain more than 25,000 signatures. In all political subdivisions of the State other than Chicago and Cook County, the 5% standard requires fewer than 25,000 signatures. Tr. of Oral Arg. 20.

[4] This disparity in the signature requirements arose because the State and Chicago Boards used voting figures from the April 1, 1975, elections in computing the requirements for independents, but used figures from the November 2, 1976, general election in their calculations for new parties. The pertinent statutory language regarding signature requirements for independent candidates, however, is identical to that for new parties. Compare Ill. Ann. Stat., ch. 46, § 10–3 (Supp. 1978), with § 10–2.

Section 10–6 of the Election Code provides that nominating petitions for independents and new parties must be filed at least 64 days prior to the election, here, by April 4. The record does not reflect what caused the discrepancy in filing dates in this case.

and new parties. The filing deadline for independents was extended to April 4, and the signature requirement for new parties was reduced to 35,947.

Because they had received less than 5% of the votes cast in the last mayoral election, the Socialist Workers Party and United States Labor Party were new political parties as defined in the Illinois statute. See n. 1, *supra*. Along with Gerald Rose, a candidate unaffiliated with any party, they were therefore subject to the signature requirements and filing deadlines specified in the election calendar. On January 24, 1977, the Socialist Workers Party and two voters who supported its candidate for Mayor brought this action against the Chicago Board and the State Board to enjoin enforcement of the signature requirements and filing deadlines for new parties.[5] One week later, Gerald Rose, the United States Labor Party, and four voters sued the Chicago Board, challenging the restrictions on new parties and independent candidates. The State Board intervened as a defendant pursuant to 28 U. S. C. § 2403, and the District Court consolidated the two cases for trial.

Plaintiff-appellees contended at trial that the discrepancy between the requirements for state and city elections violated the Equal Protection Clause. They argued further that the restrictions on independent candidates and new parties were unconstitutionally burdensome in the context of a special election because of the short time for collection of signatures between notice of the election and the filing deadline. The

[5] The Chicago Board is responsible for accepting nominating petitions for candidates and preparing the ballots for special elections. Ill. Ann. Stat., ch. 46, §§ 7–60, 7–62, 10–6 (Supp. 1978). It also has "charge of and make[s] provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time." § 6–26 (Supp. 1978). The State Board exercises "general supervision over the administration of the registration and election laws throughout the State." § 1A–1 (Supp. 1978); Ill. Const., Art. 3, § 5.

Chicago Board's primary response was that the decision in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (ND Ill.), summarily aff'd, 403 U. S. 925 (1971), upholding Illinois' 5% signature requirement, foreclosed the constitutional challenge in this case.[6]

In an opinion issued on March 14, 1977, the District Court determined that *Jackson* addressed neither the circumstances of a special election nor the disparity between state and city signature requirements at issue here. *Socialist Workers Party* v. *Chicago Bd. of Election Comm'rs,* 433 F. Supp. 11, 16–17, 19. On the merits of appellees' equal protection challenge, the court found

> "[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall* v. *Jernigan,* 424 F. Supp. 951 (ED Ark. 1977). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents." *Id.,* at 20 (footnote omitted).

Accordingly, the District Court permanently enjoined the enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, the number required for statewide elections. The court also declined to dismiss appellees' claim

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[6] Although the State Board was afforded notice and an opportunity to participate in the District Court proceedings, only the Chicago Board appeared for argument on plaintiff-appellees' motion for a permanent injunction. After the court entered the injunction, the State Board moved to vacate the decision, advancing many of the grounds previously asserted by the Chicago Board.

Only the State Board has appealed to this Court. The Chicago Board, defending its settlement agreement, see *infra,* at 180, appears as an appellee. Subsequent references to the "appellees" in this opinion, however, will include only the plaintiff-appellees.

that the April 4 filing deadline coupled with the signature requirement impermissibly burdened First and Fourteenth Amendment rights, but it postponed a decision on this issue pending submission of additional evidence to justify the selection of that date.

On March 17, 1977, the Chicago Board and the appellees concluded a settlement agreement with respect to the unresolved issues. The agreement was incorporated into an order entered the same day which provided that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977," the signature requirement would be reduced to 20,000 and the filing deadline extended to April 18. App. 74. The District Court denied the State Board's subsequent motion to vacate both orders.

The State Board, but not the Chicago Board, appealed from both the March 14 order and the March 17 order. In a *per curiam* decision rendered six months after the election, the Court of Appeals for the Seventh Circuit adopted the opinion of the District Court. 566 F. 2d 586, 587 (1977). Also, with respect to the March 17 order, the Court of Appeals dismissed as moot the State Board's contention that the Chicago Board lacked authority to conclude a settlement agreement without prior state approval. In so ruling, the court noted that the settlement order applied only to the June 7 election, which had long passed, and held that the question of the Chicago Board's authority for its actions was not "capable of repetition, yet evading review," *id.*, at 588, quoting *DeFunis* v. *Odegaard,* 416 U. S. 312, 318–319 (1974).

We noted probable jurisdiction, 435 U. S. 994 (1978), and we now affirm.

II

Appellant argues here, as it did below, that this Court's summary affirmance of *Jackson* v. *Ogilvie, supra,* is dispositive of the equal protection challenge here. In analyzing this contention, we note at the outset that summary affirmances have considerably less precedential value than an opinion on

the merits. See *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974). As MR. CHIEF JUSTICE BURGER observed in *Fusari* v. *Steinberg,* 419 U. S. 379, 392 (1975) (concurring opinion), "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." See *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S. 1, 14 (1976).

Moreover, we agree with the District Court's conclusion that *Jackson* does not govern the issues currently before us. In that case, the Reverend Jesse Jackson, an independent candidate for Mayor of Chicago, attacked the 5% signature requirement for independent candidates as an impermissible burden on the exercise of First Amendment rights. He contended as well that the discrepancy between the 5% rule and the less stringent requirements for candidates of established political parties violated the Equal Protection Clause. A three-judge District Court rejected both claims, finding the 5% requirement reasonable and the burdens imposed on independent and established party candidates roughly equivalent. Appellees mount a different challenge. They do not attack the lines drawn between independent and established party candidates. Rather, their equal protection claim rests on the discrimination between those independent candidates and new parties seeking access to the ballot in statewide elections and those similarly situated candidates and parties seeking access in city elections.

Appellant urges, however, that even though the District Court in *Jackson* did not explicitly mention the equal protection issue presented here, the issue was raised in a memorandum supporting Jackson filed with the District Court by the State. In the course of arguing that the election law discriminated against independent candidates, the memorandum stated:

> "It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than

> it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state officers, (Section 10–2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago." Memorandum of Law, App. to Juris. Statement in *Jackson* v. *Ogilvie,* O. T. 1970, No. 70–1341, p. B–23.[7]

In view of the District Court's ultimate decision, appellant contends, this issue was necessarily resolved against Jackson, and therefore was resolved by this Court as well in its summary affirmance.

The District Court in *Jackson,* however, framed the equal protection issue before it as "whether [the 5% signature] requirement operates to discriminate against the plaintiff by depriving him of a right granted to candidates of established political parties." 325 F. Supp., at 868. The jurisdictional statement posed the question in similar terms. Juris. Statement in *Jackson* v. *Ogilvie,* O. T. 1970, No. 70–1341, pp. 14–15. Although the jurisdictional statement alluded to the State's memorandum, *id.,* at 15, and incorporated it as a separate appendix, *id.,* at B–21—B–24, at no point did it directly address the question now before us.

This omission disposes of appellant's argument. As we stated in *Mandel* v. *Bradley,* 432 U. S. 173, 176 (1977), the precedential effect of a summary affirmance can extend no farther than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms

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[7] Appellees Rose and the United States Labor Party argue that even this statement does not present the issue now before the Court. In their view, it refers to the purported disparity between the treatment of independent candidates and that of new political parties. In fact, appellees argue, there is and was no such disparity. Compare Ill. Ann. Stat., ch. 46, § 10–2 (Supp. 1978), with § 10–3.

only the judgment of the court below, *ibid.*, quoting *Fusari* v. *Steinberg, supra,* at 391–392 (BURGER, C. J., concurring), and no more may be read into our action than was essential to sustain that judgment. See *Usery* v. *Turner Elkhorn Mining Co., supra,* at 14; *McCarthy* v. *Philadelphia Civil Service Comm'n,* 424 U. S. 645, 646 (1976) (*per curiam*). Questions which "merely lurk in the record," *Webster* v. *Fall,* 266 U. S. 507, 511 (1925), are not resolved, and no resolution of them may be inferred. Assuming that the State's memorandum in *Jackson* can be read as advancing the issue presented here, see n. 7, *supra,* the issue was by no means adequately presented to and necessarily decided by this Court. *Jackson* therefore has no effect on the constitutional claim advanced by appellees.

III

In determining whether the Illinois signature requirements for new parties and independent candidates as applied in the city of Chicago violate the Equal Protection Clause, we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification. See *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 253–254 (1974); *Dunn* v. *Blumstein,* 405 U. S. 330, 335 (1972); *Kramer* v. *Union School Dist.,* 395 U. S. 621, 626 (1969); *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968).

The provisions of the Illinois Election Code at issue incorporate a geographic classification. For purposes of setting the minimum-signature requirements, the Code distinguishes state candidates, political parties, and the voters supporting each, from city candidates, parties, and voters. In 1977, an independent candidate or a new political party in Chicago, a city with approximately 718,937 voters eligible to sign nominating petitions for the mayoral election in 1977,[8] had to

[8] Chicago Board of Election Commissioners, Municipal Election Results (Apr. 1, 1975).

secure over 10,000 more signatures on nominating petitions than an independent candidate or new party in state elections, who had a pool of approximately 4.5 million eligible voters from which to obtain signatures.[9] That the distinction between state and city elections undoubtedly is valid for some purposes does not resolve whether it is valid as applied here.

Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes, supra,* at 30. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 U. S., at 30–31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin* v. *Panish,* 415 U. S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964); *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964); *Dunn* v. *Blumstein, supra,* at 336.

When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. *American Party of Texas* v. *White,* 415 U. S. 767, 780–781 (1974); *Storer* v. *Brown,* 415 U. S. 724, 736 (1974); *Williams* v. *Rhodes, supra,* at 31. To be sure, the Court has previously acknowledged that States have a

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[9] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 505 (1977).

legitimate interest in regulating the number of candidates on the ballot. In *Lubin* v. *Panish, supra,* at 715, we observed:

> "A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not."

Similarly, in *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972) (footnote omitted), the Court expressed concern for the States' need to assure that the winner of an election "is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Consequently, we have upheld properly drawn statutes that require a preliminary showing of a "significant modicum of support" before a candidate or party may appear on the ballot. *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971); see, *e. g., American Party of Texas* v. *White, supra.*

However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper* v. *Pontikes,* 414 U. S. 51, 58–59 (1973), and we have required that States adopt the least drastic means to achieve their ends. *Lubin* v. *Panish, supra,* at 716; *Williams* v. *Rhodes, supra,* at 31–33. This requirement is particularly important where restrictions on access to the ballot are involved. The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always elec-

toral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. See A. Bickel, Reform and Continuity 79–80 (1971); W. Binkley, American Political Parties 181–205 (3d ed. 1959); H. Penniman, Sait's American Political Parties and Elections 223–239 (5th ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives. The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago. At oral argument, appellant explained that the signature provisions for statewide elections originally reflected a different approach than those for elections in political subdivisions. Tr. of Oral Arg. 35–37. Not only were independent candidates and new political parties in state elections required to obtain 25,000 signatures, but those signatures also had to meet standards pertaining to geographic distribution. By comparison, candidates and parties in city elections had only to obtain signatures from a flat percentage of the qualified voters. In *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), this Court struck down on equal protection grounds Illinois' requirement that the nominating petition of a candidate for statewide office include the signatures of at least 200 qualified voters from at least 50 counties. Following *Moore,* the Court of Appeals for the Seventh Circuit invalidated a provision in the amended statute which specified that no more than 13,000 signatures on a new party's petition for statewide elections could come from any one county. *Communist Party of Illinois* v. *State Board of Elections,* 518 F. 2d 517, cert. denied,

423 U. S. 986 (1975). Thus, appellant noted, the invalidation of the geographic constraints has tied the requirements for both city and state candidates solely to a population standard, giving rise to the anomaly at issue here.

Although this account may explain the anomaly, appellant still has suggested no reasons that justify its continuation. Historical accident, without more, cannot constitute a compelling state interest. We therefore hold that the Illinois Election Code is unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago.

IV

Appellant finally challenges the Court of Appeals' disposition of its appeal from the March 17 settlement order. The court dismissed as moot appellant's claim that the Chicago Board lacked authority to conclude a settlement agreement without the State's consent. In appellant's view, the court erred in not placing this claim within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911).

In *Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975), we elaborated on this exception, holding that a case is not moot when:

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Although the first branch of the test is satisfied here, appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Appellant's conclusory assertions that the actions are capable of repetition

are not sufficient to satisfy the *Weinstein* test, particularly since appellant does not contend that the Chicago Board has ever attempted previously to conclude litigation without its approval. The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue, cf. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 165 n. 6 (1977), nor even a consistent pattern of behavior, cf. *SEC* v. *Sloan*, 436 U. S. 103, 109–110 (1978). And the Chicago Board's action patently was not a matter of statutory prescription, as was the case in other election decisions on which appellant relies, *e. g.*, *Storer* v. *Brown*, 415 U. S., at 737 n. 8; *Moore* v. *Ogilvie*, *supra*, at 816. We therefore find that appellant's challenge was properly dismissed as moot.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE BLACKMUN, concurring.

Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." See, *ante*, at 184, 185, and 186. I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to

vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion.

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

Placing additional names on a ballot adds to the cost of conducting elections and tends to confuse voters. The State therefore has a valid interest in limiting access to the ballot to serious candidates. If that interest is adequately served by a 25,000-signature requirement in a statewide election, the same interest cannot justify a larger requirement in a smaller election.

Nonetheless, I am not sure that the disparity evidences a violation of the Equal Protection Clause. The constitutional requirement that Illinois govern impartially would be implicated by a rule that discriminates, for example, between Socialists and Republicans or between Catholics and Protestants. But I question whether it has any application to rules prescribing different qualifications for different political offices. Rather than deciding that question, I would simply hold that legislation imposing a significant interference with access to the ballot must rest on a rational predicate. This legislative remnant is without any such support. It is either a product of a malfunction of the legislative process or merely a by-product of this Court's decision in *Moore* v. *Ogilvie,* 394 U. S. 814, see *post,* at 190–191 (REHNQUIST, J., concurring in judgment). In either event, I believe it has deprived appellees of their liberty without the "due process of lawmaking" that the

Fourteenth Amendment requires. Cf. *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 98 (STEVENS, J., dissenting).

For these reasons I concur in the Court's judgment and in Parts I, II, and IV of its opinion.

MR. JUSTICE REHNQUIST, concurring in the judgment.

I concur in the judgment of the Court, but I cannot join its opinion: It employs an elaborate analysis where a very simple one would suffice. The disparity between the state and city signature requirements does not make sense, and this Court is intimately familiar with the reasons why.

In 1968, Illinois had a coherent set of petition requirements for obtaining a place on the ballot. In order to appear on the ballot in a county or city election, it was necessary for independent candidates and new political parties to obtain voter signatures equal in number to 5% of the voters who voted in the political subdivision at the last general election. Requirements for statewide office put greater emphasis on geographical balance: Independent candidates and new political parties needed 25,000 signatures, and at least 200 signatures had to be obtained from each of 50 counties within the State. Thus, a candidate for statewide office at that time could get on the ballot with fewer signatures than a candidate for office in Cook County, but he was also subject to special restrictions. It was reasonable for Illinois to conclude that this scheme best vindicated its interest in "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter*, 405 U. S. 134, 145 (1972). Cook County is not Illinois, and all the State asked was that candidates and political parties interested in statewide office produce this minimal evidence of statewide support.

In 1969, this Court held that the 200 voters per county requirement violated the Equal Protection Clause because dif-

ferent counties had different populations. *Moore* v. *Ogilvie,* 394 U. S. 814 (1969). That decision led to a holding by the Seventh Circuit that the statute, as amended by the legislature after *Moore* to place a 13,000-signature limit on new political party signatures from any one county, was likewise a denial of equal protection. *Communist Party of Illinois* v. *State Board of Elections,* 518 F. 2d 517 (CA7), cert. denied, 423 U. S. 986 (1975).

The courts having knocked out key panels in an otherwise symmetrical mosaic, it is not surprising that little sense can be made of what is left. Given this history, I cannot subscribe to my Brother STEVENS' alternative characterization of Illinois' problem as "a malfunction of the legislative process." The legislature enacted a comprehensive Election Code, and amended it once in response to a decision of this Court. The attorneys for the State Board of Elections are now placed in the position of having to defend a law which is but a truncated version of the original enactment.

All of this explains the disparate treatment of statewide and Chicago candidates; it does not justify it under any rational-basis test, and appellant has scarcely made any effort to do so before this Court. In the light of this history, and without engaging in any elaborate analysis which pretends that we are dealing with the considered product of a legislature, I would hold that the disparate treatment bears no rational relationship to any state interest.

FEDERAL ENERGY REGULATORY COMMISSION *v.* SHELL OIL CO. ET AL.

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

No. 77–1652. Argued January 15, 1979—Decided February 22, 1979*

566 F. 2d 536, affirmed by an equally divided Court.

Howard E. Shapiro argued the cause for petitioner in No. 77–1652 and respondent in No. 77–1654. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Barnett, Richard A. Allen,* and *M. Frazier King, Jr. Charles E. Hill* argued the cause and filed briefs for petitioner in No. 77–1654.

Thomas G. Johnson argued the cause for respondents in No. 77–1652. With him on the brief were *David G. Stevenson, David M. Whitney, W. O. Strong III, Richard F. Generelly, Alan Berlin, B. James McGraw, Edwin S. Nail, Justin R. Wolf, Thomas H. Burton, Robert C. Murray, David C. Henri, Arthur S. Berner, Richard G. Harris, William A. Sackmann, Tom P. Hamill, Robert D. Haworth, John L. Williford, Paul W. Hicks, Richard F. Remmers, James D. Olsen, W. B. Wagner, Jr., Pat F. Timmons, John A. Ramsey, Paul J. Broyles, Karen, A. Berndt, George C. Bond,* and *Kenneth L. Riedman, Jr. Stephen M. Hackerman, Charles M. Darling IV, John M. Young,* and *Michael B. Silva* filed a brief for Tenneco Oil Co. et al., respondents in No. 77–1652. *Edwin W. Edwards,* Governor of Louisiana, *William J. Guste, Jr.,* Attorney General, *James R. Patton, Jr., David B. Robinson,* and *Harry E.*

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*Together with No. 77–1654, *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission,* also on certiorari to the same court.

Barsh, Jr., filed a brief for the State of Louisiana, respondent in No. 77–1652.†

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

†Briefs of *amici curiae* urging reversal were filed by *Robert J. Hobbs* for the Action Alliance of Senior Citizens of Greater Philadelphia; by *Frederick Moring* for the Associated Gas Distributors; and by *Charles F. Wheatley, Jr.*, for the United States Conference of Mayors et al.

Avrum M. Gross, Attorney General, *Robert M. Maynard*, Assistant Attorney General, and *Robert H. Loeffler* filed a brief for the State of Alaska as *amicus curiae* urging affirmance.

HARRAH INDEPENDENT SCHOOL DISTRICT ET AL. *v.* MARTIN

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

No. 78–443. Decided February 26, 1979

Respondent, a tenured teacher, was denied salary increases during the 1972–1974 school years because of her refusal to comply with the School Board's continuing-education requirement, which was incorporated by reference into her employment contract. After the Oklahoma Legislature enacted a law mandating certain salary raises for teachers regardless of their compliance with the continuing-education policy, the School Board notified respondent that her contract would not be renewed for the 1974–1975 school year unless she enrolled in the required continuing-education courses. When respondent refused to comply, the School Board found that her persistent noncompliance with the continuing-education requirement constituted "wilful neglect of duty" under an Oklahoma statute and refused to renew her contract for the following school year. The District Court dismissed respondent's complaint, which claimed that the School Board's action denied respondent her liberty and property without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment. The Court of Appeals reversed. *Held:*

1. The School Board's actions did not violate respondent's due process rights. Respondent has no colorable claim of a denial of procedural due process: she was advised of the School Board's decision not to renew her contract and of her right to a hearing before the Board, and, at her request, a hearing was held at which both she and her attorney appeared and unsuccessfully contested the Board's determination that her refusal to enroll in continuing-education courses constituted "wilful neglect of duty." Nor did the School Board's action deny respondent substantive due process. After the state legislature, by making pay raises mandatory, deprived the Board of the sanction that it had earlier used to enforce its teachers' contractual obligation to earn continuing-education credits, the Board turned to contract nonrenewal, but applied this sanction purely prospectively so that those who might have relied on its past practice would nonetheless have an opportunity to bring themselves into compliance with the terms of their contracts. Such a course of conduct on the part of a school board responsible for the public

education of students within its jurisdiction, and employing teachers to perform the principal portion of that task, can scarcely be described as arbitrary.

2. Respondent was not deprived of equal protection of the laws. The School Board's concern with the educational qualifications of its teachers cannot under any reasoned analysis be described as impermissible, and it is not contended that the Board's continuing-education requirement bears no rational relationship to that legitimate governmental concern. The sanction of contract nonrenewal, imposed uniformly on the "class" of teachers who refuse to comply with the continuing-education requirement, is quite rationally related to the Board's objective of enforcing the continuing-education obligation of its teachers. That the Board was forced by the state legislature to penalize noncompliance differently than it had in the past in no way alters the equal protection analysis of respondent's claim.

Certiorari granted; 579 F. 2d 1192, reversed.

PER CURIAM.

Respondent Martin was employed as a teacher by petitioner School District under a contract that incorporated by reference the School Board's rules and regulations. Because respondent was tenured, Oklahoma law required the School Board to renew her contract annually unless she was guilty of, among other things, "wilful neglect of duty." Okla. Stat., Tit. 70, § 6–122 (Supp. 1976) (repealed 1977). The same Oklahoma statute provided for hearing and appeal procedures in the event of nonrenewal. One of the regulations incorporated into respondent's contract required teachers holding only a bachelor's degree to earn five semester hours of college credit every three years. Under the terms of the regulation, noncompliance with the continuing-education requirement was sanctioned by withholding salary increases.

Respondent, hired in 1969, persistently refused to comply with the continuing-education requirement and consequently forfeited the increases in salary to which she would have otherwise been entitled during the 1972–1974 school years. After her contract had been renewed for the 1973–1974 school term, however, the Oklahoma Legislature enacted a

law mandating certain salary raises for teachers regardless of their compliance with the continuing-education policy. The School Board, thus deprived of the sanction which it had previously employed to enforce the provision, notified respondent that her contract would not be renewed for the 1974–1975 school year unless she completed five semester hours by April 10, 1974. Respondent nonetheless declined even to enroll in the necessary courses and, appearing before the Board in January 1974, indicated that she had no intention of complying with the requirement in her contract. Finding her persistent noncompliance with the continuing-education requirement "wilful neglect of duty," the Board voted at its April 1974 meeting not to renew her contract for the following school year. After unsuccessfully pursuing administrative and judicial relief in the Oklahoma state courts, respondent brought this action in the United States District Court for the Western District of Oklahoma. She claimed that the Board's action had denied her liberty and property without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.

The District Court dismissed her complaint; it refused to assert "pendent jurisdiction" over respondent's state-law claim that her refusal to comply with the continuing-education provision in her contract did not constitute "wilful neglect of duty" within the meaning of the Oklahoma tenure statute, and it concluded upon the stipulated evidence that the Board had not violated the Fourteenth Amendment in refusing to renew her contract. The Court of Appeals for the Tenth Circuit reversed. 579 F. 2d 1192 (1978). Following its own precedent of *Weathers* v. *West Yuma County School Dist. R–J–1*, 530 F. 2d 1335 (1976), the Court of Appeals determined that respondent had no protected "liberty" interest under the Fourteenth Amendment, but nonetheless held that under an amalgam of the equal protection and due process

guarantees of the Fourteenth Amendment she had a constitutional right to retain her employment as a teacher. The Board's "arbitrary and capricious" action, concluded the Court of Appeals, "violated Fourteenth Amendment notions of fairness embodied in the Due Process Clause generally and the Equal Protection Clause particularly." 579 F. 2d 1192, 1200 (1978).

While our decisions construing the Equal Protection and Due Process Clauses of the Fourteenth Amendment do not form a checkerboard of bright lines between black squares and red squares, neither do they leave courts, and parties litigating federal constitutional claims in them, quite as much at sea as the Court of Appeals apparently thought was the case. It is true, as that court observed, that the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions. *Kelley* v. *Johnson,* 425 U. S. 238, 244 (1976). But our cases supply an analytical framework for determining whether the Fourteenth Amendment rights of a person in the position of respondent have been violated. Employing that framework here, we conclude that the Court of Appeals' judgment should be reversed.

The School District has conceded at all times that respondent was a "tenured" teacher under Oklahoma law, and therefore could be dismissed only for specified reasons. She was accorded the usual elements of procedural due process. Shortly after the Board's April 1974 meeting, she was advised of the decision not to renew her contract and of her right to a hearing before the Board. At respondent's request, a hearing was held at which both she and her attorney appeared and unsuccessfully contested the Board's determination that her refusal to enroll in the continuing-education courses constituted "wilful neglect of duty." Thus, as the Court of Appeals recognized, respondent has no colorable claim of a

denial of procedural due process. See *Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593, 599–603 (1972). If respondent is to succeed in her claims under the Fourteenth Amendment, it must be on the basis of either "substantive" due process or equal protection.

Relying on the Fourteenth Amendment's protection of the "substantive aspects" of "life, liberty, and property," the Court of Appeals held, apparently, that the School Board's decision to substitute the sanction of contract nonrenewal for the sanction of withholding routine pay increases was so "arbitrary" that it offended "notions of fairness" generally embodied in the Due Process Clause. Here, however, there is no claim that the interest entitled to protection as a matter of substantive due process was anything resembling "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." *Kelley* v. *Johnson, supra,* at 244; see *Roe* v. *Wade,* 410 U. S. 113 (1973); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Stanley* v. *Illinois,* 405 U. S. 645 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). Rather, respondent's claim is simply that she, as a tenured teacher, cannot be discharged under the School Board's purely prospective rule establishing contract nonrenewal as the sanction for violations of the continuing-education requirement incorporated into her contract.

The School Board's rule is endowed with a presumption of legislative validity, and the burden is on respondent to show that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers. See *Kelley* v. *Johnson, supra,* at 247; *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952); *Prince* v. *Massachusetts,* 321 U. S. 158, 168–170 (1944); *CSC* v. *Letter Carriers,* 413 U. S. 548 (1973). Respondent's claim that the Board acted arbitrarily in imposing a new penalty for noncompliance with the continuing-

education requirement simply does not square with the facts. By making pay raises mandatory, the state legislature deprived the Board of the sanction that it had earlier used to enforce its teachers' contractual obligation to earn continuing-education credits. The Board thus turned to contract nonrenewal, but applied this sanction purely prospectively so that those who might have relied on its past practice would nonetheless have an opportunity to bring themselves into compliance with the terms of their contracts. Indeed, of the four teachers in violation of the continuing-education requirement when the state legislature mandated salary increases, only respondent persisted in refusing to enroll in the necessary courses. Such a course of conduct on the part of a school board responsible for the public education of students within its jurisdiction, and employing teachers to perform the principal portion of that task, can scarcely be described as arbitrary. Respondent's claim of a denial of substantive due process under these circumstances is wholly untenable.

The Court of Appeals' reliance upon the equal protection guarantee of the Fourteenth Amendment was likewise mistaken. Since respondent neither asserted nor established the existence of any suspect classification or the deprivation of any fundamental constitutional right, see *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 40 (1973), the only inquiry is whether the State's classification is "rationally related to the State's objective." *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S. 307, 315 (1976). The most cursory examination of the agreed facts demonstrates that the Board's action met this test.

The School District's concern with the educational qualifications of its teachers cannot under any reasoned analysis be described as impermissible, and respondent does not contend that the Board's continuing-education requirement bears no rational relationship to that legitimate governmental concern.

Rather, respondent contests "the permissibility of the classification by which [she] and three other teachers were required to achieve [by April 1974] the number of continuing-education credits that all other teachers were given three years to achieve." Brief in Opposition 7.

The Board's objective in sanctioning violations of the continuing-education requirement was, obviously, to encourage future compliance with the requirement. Admittedly, imposition of a penalty for noncompliance placed respondent and three other teachers in a "class" different from those teachers who had complied with their contractual obligations in the past. But any sanction designed to enforce compliance with a valid rule, whatever its source, falls only on those who break the rule. Respondent and those in her "class" were the only teachers immediately affected by the Board's action because they were the only teachers who had previously broken their contractual obligation. There is no suggestion here that the Board enforces the continuing-education requirement selectively; the Board refuses to renew the contracts of those teachers and only those teachers who refuse to comply with the continuing-education requirement.

That the Board was forced by the state legislature in 1974 to penalize noncompliance differently than it had in the past in no way alters the equal protection analysis of respondent's claim. Like all teachers employed in the School District, respondent was given three years to earn five continuing-education credits. Unlike most of her colleagues, however, respondent refused to comply with the requirement, thus forfeiting her right to routine pay raises. Had the legislature not mandated salary increases in 1974, the Board presumably would have penalized respondent's continued refusal to comply with the terms of her contract by denying her an increase in salary for yet another year. The Board, having been deprived by the legislature of the sanction previously employed to enforce the continuing-education requirement, merely sub-

stituted in its place another, albeit more onerous, sanction. The classification created by both sanctions, however, was between those who had acquired five continuing-education credits within the allotted time and those who had not.

At bottom, respondent's position is that she is willing to forgo routine pay raises, but she is not willing to comply with the continuing-education requirement or to give up her job. The constitutional permissibility of a sanction imposed to enforce a valid governmental rule, however, is not tested by the willingness of those governed by the rule to accept the consequences of noncompliance. The sanction of contract nonrenewal is quite rationally related to the Board's objective of enforcing the continuing-education obligation of its teachers. Respondent was not, therefore, deprived of equal protection of the laws.

The petition for certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

Mr. Justice Marshall concurs in the result.

UNITED STATES *v.* BODCAW CO.

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

No. 78-551. Decided February 26, 1979

Respondent property owner's expenses in securing appraisals of the land involved in the United States' easement condemnation action *held* not to constitute part of the "just compensation" required by the Fifth Amendment for the taking of private property for public use. Since this litigation no more than reflects the rather typical situation where the landowner is dissatisfied with the Government's valuation, the case does not qualify as an exception to the general rule that indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled.

Certiorari granted; 574 F. 2d 238, reversed and remanded.

PER CURIAM.

The United States brought this condemnation action to acquire a permanent easement in land owned by the respondent. The jury determined that just compensation for the easement was $146,206, a sum about halfway between the Government's offer and the respondent's claim. The District Court granted the respondent's motion to increase the award by $20,512.50 to compensate it for the expenses of securing appraisals of the land and for the fees of expert witnesses. A divided panel of the Court of Appeals for the Fifth Circuit affirmed the award in part, holding that the appraisal fees in this case were an appropriate part of the compensation required by the Fifth Amendment:

> "Under the facts of this case, we cannot conclude that the Bodcaw Company has been made whole for the Government's taking of its land if the large amount expended by it for appraisals in order to demonstrate the unfairness of the price offered by the United States is not considered

an element of just compensation." *United States* v. *1,380.09 Acres of Land,* 574 F. 2d 238, 241 (1978).[1]

The Fifth Amendment forbids the taking of "private property . . . for public use, without just compensation." This Court has often faced the problem of defining just compensation. One principle from which it has not deviated is that just compensation "is for the property, and not to the owner." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326 (1893). As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. See, *e. g., Dohany* v. *Rogers,* 281 U. S. 362 (1930); *Mitchell* v. *United States,* 267 U. S. 341 (1925); *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668 (1923). See generally 4A J. Sackman, Nichols' Law of Eminent Domain, ch. 14 (rev. 3d ed. 1977). Thus, "[a]ttorneys' fees and expenses are not embraced within just compensation . . . ." *Dohany* v. *Rogers, supra,* at 368.

There may be exceptions to this general rule. This case, however, does not qualify as such an exception.[2] As the dissenting judge in the Court of Appeals described this litigation, it no more than reflects "the rather typical, oft-recurring situation where the landowner is dissatisfied with the Government's valuation." 574 F. 2d, at 242. The court, therefore, was in error in holding that the respondent was entitled to compensation for the costs of the appraisals it had had made.[3]

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[1] The Court of Appeals reduced the award by the amount of compensation allowed by the trial court for expert witness fees.

[2] The Court of Appeals relied on its previous decision in *United States* v. *Lee,* 360 F. 2d 449 (1966). In that case the court allowed as part of a compensation award the owner's expenses in having a survey made of the land to be taken. But the *Lee* case involved misrepresentation on the part of the Government as to the amount of land to be taken. Even if correctly decided, therefore, that case presented a situation quite different from the present case, where no such misrepresentation was alleged.

[3] The Court of Appeals necessarily rested its decision on constitutional grounds. It is settled that litigation costs cannot be assessed against the

Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. See Ayer, Allocating the Costs of Determining "Just Compensation," 21 Stan. L. Rev. 693 (1969). Congress moved in that direction with Pub. L. 91–646, 84 Stat. 1894, codified at 42 U. S. C. §§ 4601–4655. Among other costs which the Act placed on the Government were the property owner's reasonable litigation expenses (including attorney's fees) when a condemnation action is dismissed as being unauthorized, when the Government abandons a condemnation, or when the property owner has recovered through an inverse condemnation action under the Tucker Act. 42 U. S. C. § 4654. But such compensation is a matter of legislative grace rather than constitutional command. The respondent's appraisal expenses were not part of the "just compensation" required by the Fifth Amendment.

The petition for certiorari is granted, the judgment is reversed, and the case is remanded to the Court of Appeals for the Fifth Circuit for proceedings consistent with this opinion.

It is so ordered.

United States in the absence of statutory authorization. *United States* v. *Worley,* 281 U. S. 339, 344 (1930). Although Congress has provided that court costs may sometimes be assessed against the Government when the opposing party prevails, 28 U. S. C. § 2412, that authorization does not apply to condemnation cases. Fed. Rule Civ. Proc. 71A (*l*); *United States* v. *2,186.63 Acres of Land,* 464 F. 2d 676 (CA10 1972); *United States ex rel. TVA* v. *An Easement,* 452 F. 2d 729 (CA6 1971). Thus, even if the appraisal expenses in this case were to be considered "costs," they could not be taxed to the United States. Congress has provided that appraisal fees will be paid by the Government in some condemnation cases, but this case does not fall within the scope of that provision. 42 U. S. C. § 4654.

Syllabus

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.

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

No. 77–952. Argued October 11, 1978—Decided February 27, 1979

Petitioner Blue Shield, a Texas insurance company, offers policies that entitle the insured to obtain prescription drugs. The insured may obtain the drugs from a pharmacy participating in a "Pharmacy Agreement" with Blue Shield (in which case the insured must pay only $2 for every prescription drug, with the remainder of the cost being paid directly by Blue Shield to the participating pharmacy) or from a nonparticipating pharmacy (in which case the insured pays the full price and may be reimbursed by Blue Shield for 75% of the difference between that price and $2). Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas, the participating pharmacy to agree to furnish Blue Shield policyholders prescription drugs at $2 each, with Blue Shield to agree to reimburse the pharmacy for its cost in acquiring the drug. Respondents, nonparticipating pharmacies, brought this antitrust action alleging that Blue Shield and three participating pharmacies, also petitioners, had violated § 1 of the Sherman Act by entering into agreements fixing the retail prices of drugs and that petitioners' activities had caused Blue Shield policyholders to boycott certain respondents. The trial court granted petitioners summary judgment on the ground that the agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act (Act), because the agreements are the "business of insurance," are regulated by Texas, and are not boycotts within the meaning of the Act. The Court of Appeals reversed. *Held:* The Pharmacy Agreements are not the "business of insurance" within the meaning of § 2 (b). Pp. 210–233.

(a) Section 2 (b) exempts the "business of insurance," not the "business of insurers." Pp. 210–211.

(b) A primary element of an insurance contract is the underwriting or spreading of risk, *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, but that element is not involved in the Pharmacy Agreements, which are merely arrangements for the purchase of goods and services by Blue Shield, enabling it to effect cost savings. Pp. 211–215.

(c) The Pharmacy Agreements involve contractual arrangements between Blue Shield and the pharmacies, not its policyholders. Pp. 215–217.

(d) The legislative history of the Act confirms the conclusion that the "business of insurance" was understood by Congress to involve the underwriting of risk and the relationship and transactions between insurance companies and their policyholders, and no legislative intention is disclosed to exempt agreements or transactions between insurance companies and entities outside the insurance industry. Moreover, at the time of the Act's enactment health-care plans such as those of Blue Shield were not considered to constitute insurance at all, and it is difficult to assume that Congress, contrary to that contemporary view, could have considered such plans to be the "business of insurance" within the meaning of the Act. Even if Congress did consider certain aspects of such plans to be the "business of insurance," however, it still does not follow that the Pharmacy Agreements in this case are within the meaning of that phrase. Pp. 217–230.

(e) This result is consistent with the principle that exemptions from the antitrust laws are to be construed narrowly. Pp. 231–233.

556 F. 2d 1375, affirmed.

STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and MARSHALL and POWELL, JJ., joined, *post*, p. 233.

Keith E. Kaiser argued the cause for petitioners. With him on the briefs were *J. Burleson Smith, R. Laurence Macon, Richard A. Whiting, Charles R. Shaddox, D. Dudley Oldham, Martin D. Beirne, William R. Pakalka, William C. Church, Jr.*, and *Richard B. Moore.*

Joel H. Pullen argued the cause and filed a brief for respondents.

Richard A. Allen argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield,* and *Barry Grossman.**

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*Briefs of *amici curiae* urging reversal were filed by *Thomas E. Kauper, John A. Fillion, M. Jay Whitman, J. Albert Woll,* and *Laurence Gold* for

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a Federal District Court against the petitioners, Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. § 1012 (b), because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 59 Stat. 34, 15 U. S. C.

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the International Union, UAW, et al.; by *James W. Rankin* and *Roger G. Wilson* for the Blue Shield Assn.; by *Peter F. Sloss* and *Godfrey L. Munter, Jr.*, for the California Dental Service et al.; by *Chester Inwald* for the District Council 37 Health & Security Plan et al.; by *John H. Pickering, Arnold M. Lerman, C. Loring Jetton, Jr.*, and *William H. Crabtree* for the Motor Vehicle Manufacturers Assn. of the United States, Inc.; and by *Stephen F. Gordon* for the United Federation of Teachers Welfare Fund.

Briefs of *amici curiae* urging affirmance were filed by *William J. Brown*, Attorney General, and *Charles D. Weller* for the State of Ohio; by *Donald A. Randall* and *Jonathan T. Howe* for the Automotive Service Councils, Inc.; by *Richard M. Rindler* and *Phillip A. Proger* for the National Assn. of Retail Druggists; by *A. Stewart Kerr* for the Pharmacists Guild of Michigan; and by *Roger Tilbury* and *Henry Kane* for the Portland Retail Druggists Assn., Inc.

Briefs of *amici curiae* were filed by *Max Thelen, Jr.*, for the Kaiser-Permanente Medical Care Program; and by *Jon S. Hanson, Richard A. Hemmings*, and *David J. Brummond* for the National Assn. of Insurance Commissioners.

§ 1013 (b).[1] 415 F. Supp. 343 (WD Tex.). The Court of Appeals for the Fifth Circuit reversed the judgment. Holding that the agreements in question are not the "business of insurance" within the meaning of § 2 (b), the appellate court did not reach the other questions decided by the trial court. 556 F. 2d 1375. We granted certiorari because of intercircuit conflicts as to the meaning of the phrase "business of insurance" in § 2 (b) of the Act.[2] 435 U. S. 903.

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[1] The Act provides in relevant part:

"Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, . . . and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 33–34, as amended, 61 Stat. 448.

[2] The position of the Fifth Circuit is in conflict with that of the Third, Fourth, and District of Columbia Circuits. See *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 554 F. 2d 1253 (CA3 1977); *Anderson* v.

I

Blue Shield offers insurance policies which entitle the policyholders to obtain prescription drugs. If the pharmacy selected by the insured has entered into a "Pharmacy Agreement" with Blue Shield, and is therefore a participating pharmacy, the insured is required to pay only $2 for every prescription drug. The remainder of the cost is paid directly by Blue Shield to the participating pharmacy. If, on the other hand, the insured selects a pharmacy which has not entered into a Pharmacy Agreement, and is therefore a nonparticipating pharmacy, he is required to pay the full price charged by the pharmacy. The insured may then obtain reimbursement from Blue Shield for 75% of the difference between that price and $2.

Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at $2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this $2 markup can profitably participate in the plan.[3]

Medical Service of District of Columbia, 551 F. 2d 304 (CA4 1977); *Proctor* v. *State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C. 264, 561 F. 2d 262 (1977).

[3] The *amicus curiae* brief of the United States provides a useful illustration of the operation of the Pharmacy Agreement:

"Suppose the usual and customary retail price for a quantity of Drug X charged both by 'participating' Pharmacy A and 'non-participating' Pharmacy B is $10.00, and the wholesale price (or acquisition cost) to both is $8.00. If an insured buys Drug X from Pharmacy A, the insured pays $2.00. Pharmacy A receives $2.00 from the insured and $8.00 from Blue Shield, or $10.00 total. If an insured buys Drug X from Pharmacy B, the insured pays Pharmacy B $10.00, and receives $6.00 (75 percent of the difference between the retail price and $2.00) from Blue Shield. While

The only issue before us is whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the "business of insurance" within the meaning of § 2 (b) of the McCarran-Ferguson Act. If that conclusion is correct, then the Agreements are not exempt from examination under the antitrust laws.[4] Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us.[5]

II

A

As the Court stated last Term in *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U. S. 531, 541,[6] the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself. See also *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 756 (POWELL, J., concurring). It is important, therefore, to observe at the outset that the statutory language in question

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Pharmacy B receives the same as Pharmacy A, the insured must pay $4.00 for the drug and also must take steps to obtain reimbursement.

"If the pharmacy's acquisition cost for the drug is $5.00 rather than $8.00, the situations of Pharmacy B and the insured are unchanged. But now Pharmacy A will receive only $5.00 from Blue Shield, for a total of $7.00."

[4] Even if they are the "business of insurance," the Agreements are exempt from the antitrust laws only if they are also "regulated by State law" within the meaning of § 2 (b) and not "boycotts" or other conduct described by § 3 (b). See n. 1, *supra.* See also *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U. S. 531.

[5] It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal. The United States in its *amicus* brief urging affirmance has taken the position that the Pharmacy Agreements probably do not violate the antitrust laws, though recognizing that that issue is not presented here.

[6] The issue in that case was the meaning of the "boycott" exception in § 3 (b) of the Act. The issue here, the meaning of the "business of insurance" exemption in § 2 (b) of the Act, was not before the Court.

here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption is for the "business of insurance," not the "business of insurers":

> "The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply." *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 459–460. (Emphasis in original.)

Since the law does not define the "business of insurance," the question for decision is whether the Pharmacy Agreements fall within the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history. Cf. *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 199, and n. 19.

B

The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959). See also R. Keeton, Insurance Law § 1.2 (a) (1971) ("Insurance is an arrangement for transferring and distributing risk"); 1 G. Richards, The Law of Insurance § 2 (W. Freedman 5th ed. 1952).[7]

[7] Webster's New International Dictionary of the English Language 1289 (unabr. 2d ed. 1958) defines insurance as:

"Act of insuring, or assuring, against loss or damage by a contingent event; a contract whereby, for a stipulated consideration, called a *premium,*

The significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this Court in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65. That case involved several corporations, representing themselves as "life insurance" companies, that offered variable annuity contracts for sale in interstate commerce. The companies were regulated by the insurance commissioners of several States. Purchasers of the contracts were not entitled to any fixed return, but only to a pro rata participation in the investment portfolios of the companies. Thus a policyholder could receive substantial sums if investment decisions were successful, but very little if they were not. One of the questions presented was whether these variable annuity contracts were the "business of insurance" under § 2 (b) of the McCarran-Ferguson Act.[8] The Court held that the annuity contracts were not insurance, even though they were regulated as such under state law and involved actuarial prognostications of mortality. Central to the Court's holding was the premise that "the concept of 'insurance' involves some investment risk-taking on the part of the company." 359 U. S., at 71. Since the variable annuity contracts offered no guarantee of fixed income, they placed all the investment risk on the annuitant and none on the company. *Ibid.* The Court concluded, therefore, that the annuities involved "no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Id.*, at 73 (footnote omitted). Cf. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 412 ("The effect of insurance—indeed

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one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a *risk*, the contract being set forth in a document called the *policy* . . . ."

[8] The issue in *SEC* v. *Variable Annuity Life Ins. Co.* was whether the variable annuity contracts were subject to regulation under the Securities Act of 1933 and the Investment Company Act of 1940. The Court held that the contracts were subject to such regulation as securities since they were not "insurance" or "annuity" policies specifically exempt

it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible").

The petitioners do not really dispute that the underwriting or spreading of risk is a critical determinant in identifying insurance. Rather they argue that the Pharmacy Agreements do involve the underwriting of risks. As they state in their brief:

> "In *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.*, 359 U. S. 65, 73 (1959), the 'earmark' of insurance was described as the 'underwriting of risks' in exchange for a premium. Here the risk insured against is the possibility that, during the term of the policy, the insured may suffer a financial loss arising from the purchase of prescription drugs, or that he may be financially unable to purchase such drugs. In consideration of the premium, Blue Shield assumes this risk by agreeing with its insureds to contract with Participating Pharmacies to furnish the needed drugs and to reimburse the Pharmacies for each prescription filled for the insured. In short, each of the fundamental elements of insurance is present here—the payment of a premium in exchange for a promise to indemnify the insured against losses upon the happening of a specified contingency."

The fallacy of the petitioners' position is that they confuse the obligations of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations.[9] The

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from the Securities Act, and because they were not the "business of insurance" within the meaning of the McCarran-Ferguson Act.

[9] It is true that some type of provider agreement is necessary for a service benefit plan to exist. But it does not follow that because an agree-

benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription.[10] So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.[11]

The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance." [12]

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ment is necessary to provide insurance, it is also the "business of insurance." Assume, for example, that an indemnity insurer must have a line of credit or other commercial arrangement with a bank in order to pay off monetary claims. Despite the fact that the line of credit is "necessary" for the insurer to fulfill its obligations, it is nevertheless not the "business of insurance."

[10] Thus, the benefit promised to Blue Shield policyholders under the policy is that they "shall be required to pay no more than the drug deductible for each of such covered drugs."

[11] As the Court of Appeals stated:

"Blue Shield's policyholders are basically unconcerned with the contract between the insurer and the Participating Pharmacy. They are obligated to pay a Participating Pharmacy two dollars ($2.00) for a prescription regardless of the presence or absence of a price fixing arrangement. Thus, by minimizing costs and maximizing profits, the Participating Pharmacy Agreements inure principally to the benefit of Blue Shield." 556 F. 2d 1375, 1381.

[12] As the United States points out in its *amicus* brief, there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces

The Pharmacy Agreements are thus legally indistinguishable from countless other business arrangements that may be made by insurance companies to keep their costs low and thereby also keep low the level of premiums charged to their policyholders. Suppose, for example, that an insurance company entered into a contract with a large retail drug chain whereby its policyholders could obtain drugs under their policies only from stores operated by this chain. The justification for such an agreement would be administrative and bulk-purchase savings resulting from obtaining all of the company's drug needs from a single dealer. Even though these cost savings might ultimately be reflected in lower premiums to policyholders, would such a contract be the "business of insurance"? Or suppose that the insurance company should decide to acquire the chain of drug stores in order to lower still further its costs of meeting its obligations to its policyholders. Such an acquisition would surely not be the "business of insurance." *SEC* v. *National Securities, Inc.*, 393 U. S. 453.[13]

C

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. In enacting the McCarran-Ferguson Act Congress was concerned with:

> "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpreta-

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its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk.

[13] In *National Securities*, the Arizona Director of Insurance approved, pursuant to statute, a merger between two insurance companies. This Court held, however, that the Arizona statute was not enacted for the purpose of regulating the "business of insurance." 393 U. S., at 460. If a merger between two insurance companies is not the "business of insurance," then an acquisition by an insurer of a manufacturer or a retail chain, although conceptually indistinguishable from the Pharmacy Agreements in this case, is also not the "business of insurance."

tion, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." *SEC* v. *National Securities, Inc., supra,* at 460.

The Pharmacy Agreements are not "between insurer and insured." They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance.

The petitioners argue that nonetheless the Pharmacy Agreements so closely affect the "reliability, interpretation, and enforcement" of the insurance contract and "relate so closely to their status as reliable insurers" as to fall within the exempted area.[14] This argument, however, proves too much.

At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a

[14] The petitioners argue that the absence of the Pharmacy Agreements "which permit the insured to obtain drugs on the terms and for the amounts stated in the policies would constitute a breach of the contract of insurance." But the benefit Blue Shield provides its policyholders is the assurance that they can obtain drugs in return for a direct maximum payment of $2 for each prescription. The Pharmacy Agreements are separate contractual arrangements between Blue Shield and certain pharmacists fixing the cost Blue Shield will pay for drugs. The wholly separate nature of the two categories of agreements is in no way affected by the fact that the Pharmacy Agreements are indirectly referred to in the insurance policies.

reliable insurer. The manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits. If terms such as "reliability" and "status as a reliable insurer" were to be interpreted in the broad sense urged by the petitioners, almost every business decision of an insurance company could be included in the "business of insurance." Such a result would be plainly contrary to the statutory language, which exempts the "business of insurance" and not the "business of insurance companies."

III

A

The conclusion that the Pharmacy Agreements are not the "business of insurance" is fully confirmed by the legislative history of the McCarran-Ferguson Act. The law was enacted in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. The indictment in that case charged that the defendants had conspired to fix insurance rates and commissions, and had conspired to boycott and coerce noncooperating insurers, agents, and insureds. In the District Court the defendants had successfully demurred to the indictment on the ground that the insurance industry was not a part of interstate commerce subject to regulation under the Commerce Clause.[15] On direct appeal, this Court reversed the judgment, holding that the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the insurance industry from its coverage.

B

The primary concern of Congress in the wake of that decision was in enacting legislation that would ensure that

[15] Since the leading case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it had been understood that "[i]ssuing a policy of insurance is not a transaction of commerce."

the States would continue to have the ability to tax and regulate the business of insurance.[16] This concern is reflected in §§ 1 and 2 (a) of the Act,[17] neither of which is involved in this case. A secondary concern was the applicability of the antitrust laws to the insurance industry.[18] Months before

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[16] S. Rep. No. 20, 79th Cong., 1st Sess., 2 (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess., 2–3 (1945). The problem was that if insurance was interstate commerce, then the constitutionality of state regulation and taxation would be questionable. As the House Report stated:

"Inevitable uncertainties . . . followed the handing down of the decision in the *Southeastern Underwriters Association* case . . . .

"[Y]our committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when *such laws may subsequently be held unconstitutional* in keeping with the precedent-smashing decision in the *Southeastern Underwriters case,* will subject insurance executives to both civil and criminal actions for misappropriation of company funds." *Ibid.* (Emphasis added.)

[17] See text of statute at n. 1, *supra.*

[18] There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different *secondary* purpose of the McCarran-Ferguson Act—to give insurance companies only a limited exemption from the antitrust laws.

The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct—and entirely irrevelant to the issue now before the Court. See n. 38, *infra.* For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under

this Court's decision in *South-Eastern Underwriters* was announced, proposed legislation to totally exempt the insurance industry from the Sherman and Clayton Acts had been introduced in Congress.[19] Less than three weeks after the actual decision, the House of Representatives passed a bill which would also have provided the insurance industry with a blanket exemption from the antitrust laws, thus restoring the state of law that had existed before the decision in *South-Eastern Underwriters*.[20]

Congress, however, rejected this approach.[21] Instead of a total exemption, Congress provided in § 2 (b) that the antitrust laws "shall be applicable" unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under § 3 (b) the Sherman Act was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the States time to adjust to the applicability of the antitrust laws to the insurance industry,

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the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

In short, the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the Commerce Clause. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only "the business of insurance." See *SEC* v. *National Securities, Inc.*, 393 U. S. 453.

[19] H. R. 3270, 78th Cong., 1st Sess. (1943); S. 1362, 78th Cong., 1st Sess. (1943). These bills would have provided that nothing in the Sherman or Clayton Acts "shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States."

[20] 90 Cong. Rec. 6565 (1944).

[21] The total exemption bill failed in the Conference Committee because of a fear that it could not pass in the Senate and in any event would be vetoed by the President. 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock). Also important was the opposition of the National Association of Insurance Commissioners to a blanket antitrust exemption. 90 Cong. Rec. 8482 (1944).

Congress imposed a 3-year moratorium.[22] After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the antitrust laws would be applicable to the business of insurance "to the extent that such business is not regulated by State law." [23]

By making the antitrust laws applicable to the insurance industry except as to conduct that is the business of insurance, regulated by state law, and not a boycott, Congress did not intend to and did not overrule the *South-Eastern Underwriters* case.[24] While the power of the States to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that § 2 (b) of the Act does create a partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws—a concept that had prevailed before the *South-Eastern Underwriters* decision.

C

References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act

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[22] See n. 1, *supra*. The purpose of the moratorium was to allow the States three years to take steps to regulate the business of insurance. 91 Cong. Rec. 1443 (1945) (remarks of Sen. McCarran).

[23] *Ibid.* (remarks of Sen. Ferguson); McCarran, Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1, 34 A. B. A. J. 539, 540 (1948).

[24] That Congress did not intend to restore the law to what it had been before *South-Eastern Underwriters* is made dramatically clear in the following exchange between Senator McKellar and Senator Ferguson:

"Mr. McKELLAR. As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States. Is that correct?

"Mr. FERGUSON. No." 91 Cong. Rec. 478 (1945).

See also *id.*, at 1444 (exchange between Sens. Pepper and McCarran).

strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." H. R. Rep. No. 873, 78th Cong., 1st Sess., 8–9 (1943).[25] See also S. Rep. No. 1112, 78th Cong., 2d Sess., 6 (1944); 90 Cong. Rec. 6526 (1944) (remarks of Rep. Hancock).

Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws. The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the National Association of Insurance Commissioners on November 16, 1944.[26] The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill.[27] The report emphasized that the concern of the insurance commissioners was that smaller enterprises and insurers other than life insurance companies were unable to underwrite risks accurately, and it therefore concluded:

> "For these and other reasons this subcommittee believes it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. *To prohibit com-*

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[25] The recognition by Congress that the ability to control costs was not within the ability of insurance companies is further evidence that the Pharmacy Agreements, which are solely designed to minimize costs, are not insurance.

[26] 90 Cong. Rec. A4403–4408 (1944).

[27] 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

bined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business. We do not regard it as necessary to labor this point any further because Congress itself recently recognized *the necessity for concert of action in the collection of statistical data and rate making* when it enacted the District of Columbia Fire Insurance Rating Act." *Id.*, at A4405 (emphasis added).

The bill proposed by the NAIC enumerated seven specific practices to which the Sherman Act was not to apply.[28] Each of the specific practices involved intra-industry cooperative or concerted activities. None involved contractual arrangements that insurance companies might make with providers of goods or services to reduce the costs to the companies of meeting their underwriting obligations to their policyholders.[29]

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[28] 90 Cong. Rec. A4406 (1944). This specific list of exempted activities was not included in the law ultimately enacted.

[29] The dissenting opinion makes the argument that because Congress rejected bills that would have limited the "business of insurance" to a specific list of insurance company practices, Congress intended that the exemption it finally enacted be interpreted "broadly." Precisely the opposite is true.

At the time Congress was considering one of the early versions of the Act, H. R. 3270, 78th Cong., 1st Sess. (1943), which would have wholly exempted from the antitrust laws "the business of insurance or . . . acts in the conduct of that business," an amendment was introduced which would have exempted specific activities. 90 Cong. Rec. 6561 (1944). The proponent of the amendment, Representative Anderson, explained that its purpose was to provide broader protection than provided by H. R. 3270:

"But I say to this House that some legislation should be passed which asserts the right of the States to control the questions of risks, rates, premiums, commissions, policies, investments, reinsurance, capital requirements, and items of that nature. It is for that purpose I have insisted upon bringing this at this time to the attention of the House. If you pass H. R. 3270 as it now stands and go back home and any of your insurance friends ask you what you did to safeguard the protection of insurance by the State, you must answer them in all truth that all you did was to pass

The floor debates also focused simply on whether cooperative ratemaking should be exempt. Thus, Senator Ferguson, in explaining the purpose of the bill, stated:

> "This bill would permit—and I think it is fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses." 91 Cong. Rec. 1481 (1945).

The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. *Id.*, at 1444 and 1485 (remarks of Sen. O'Mahoney); 485 (remarks of Sen. Taft).[30] President Roosevelt, in signing the bill, also em-

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a bill which provided antitrust protection for companies now under indictment."

The amendment was defeated. 90 Cong. Rec. 6562 (1944).

Thus, Congress rejected an amendment which exempted specific activities of insurance companies (not including anything remotely resembling the Pharmacy Agreements in this case) which was perceived to be broader than H. R. 3270. Since H. R. 3270 was itself broader than the Act as eventually enacted, it necessarily follows that the exemption of the Act is narrower than the bills which would have exempted specific practices. This pattern is consistent with the entire legislative history of the McCarran-Ferguson Act, which was characterized by a continual narrowing of the original blanket exemption.

[30] The dissenting opinion states that the "compelling explanation" for the lack of discussion of provider agreements in the legislative history was the congressional concern about fire insurance companies. *Post*, at 234 n. 2. However, input from all types of insurance companies was sought through

phasized that the bill would allow cooperative rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1944–1945 Vol., p. 587 (1950).[31] There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance." [32]

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the Insurance Commissioners of the various States "because the Commissioners were aware of the chaotic condition which exists at the present time." 91 Cong. Rec. 484 (1945) (remarks of Sen. Ferguson). Moreover, the National Association of Insurance Commissioners, whose concern was surely not limited to fire insurance, was certainly aware of provider agreements since it drafted model state enabling legislation to govern service-benefit health plans. But this Association, which played a major role in the drafting of the McCarran-Ferguson Act, did not include provider agreements in its proposed bill exempting specific practices of insurance companies from the scope of the antitrust laws. 90 Cong. Rec. A4406 (1944). Given this background, the failure of Congress to mention provider agreements, or anything in any way resembling them, suggests that Congress did not intend that provider agreements were to be exempt.

[31] The dissenting opinion states that the *National Securities* case recognized that the legislative history of the Act "sheds little light" on the meaning of the "business of insurance." *Post,* at 234. In *National Securities,* however, the Court went on to state that the legislative history indicated that "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." 393 U. S., at 458–459.

[32] One question not resolved by this legislative history is which of the various practices alleged in the *South-Eastern Underwriters* indictment Congress intended to be covered by the phrase "business of insurance." The indictment in that case had charged, for example, that the defendants had fixed their agents' commissions as well as premium rates. It is clear from the legislative history that the fixing of rates is the "business of

D

At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their

insurance." The same conclusion does not so clearly emerge with respect to the fixing of agents' commissions.

The bills introduced before the *South-Eastern Underwriters* decision which would have totally exempted the insurance industry from the antitrust laws specifically included agreements regarding agents' commissions as an exempt practice. *E. g.*, H. R. 4444, 78th Cong., 2d Sess. (1944). Similarly, the bill proposed by the National Association of Insurance Commissioners two months after the *South-Eastern Underwriters* case was decided would have also exempted agents' commissions. 90 Cong. Rec. A4406 (1944). The subsequent bill that followed the approach of the NAIC and exempted specific activities, however, was limited to traditional underwriting activities and made no mention of agreements with insurance agents:

§ 4 (b). "On and after March 1, 1946, the provisions of said Sherman Act shall not apply to any agreement or concerted or cooperative action between two or more insurance companies for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules . . . ." S. 12, 79th Cong., 1st Sess. (1945).

One inference that can be drawn from this pattern is that Congress was aware of the existence of agreements regarding agents' commissions, and chose not to include them within the exemption for the "business of insurance." On the other hand, the fact that the indictment in *South-Eastern Underwriters* had included a charge that insurance companies did boycott agents who insisted on selling other lines of insurance, together with the fact that § 3 (b) presumably removes an exemption that, but for its absence, would be conferred by § 2, suggests that the "business of insurance" may have been intended to include dealings within the insurance industry between insurers and agents.

Even if it be assumed, however, that transactions between an insurer and its agents, including independent agents, are the "business of insurance," it still does not follow that the Pharmacy Agreements also fall within the definition. Transactions between an insurer and an agent, unlike the Pharmacy Agreements, are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services. Moreover, there are historical reasons why the Pharmacy Agreements should not be considered the "business of insurance," whatever may be the status of agreements between an insurer and its agents. See Part III–D, *infra*.

members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. *E. g., Jordan* v. *Group Health Assn.,* 71 App. D. C. 38, 107 F. 2d 239 (1939); *California Physicians' Service* v. *Garrison,* 155 P. 2d 885 (Cal. App. 1945), aff'd, 28 Cal. 2d 790, 172 P. 2d 4 (1946); *Commissioner of Banking & Insurance* v. *Community Health Service,* 129 N. J. L. 427, 30 A. 2d 44 (1943); *State ex rel. Fishback* v. *Universal Service Agency,* 87 Wash. 413, 151 P. 768 (1915).[33] Similarly, States which regulated prepaid health-service plans at the time the Act was enacted either exempted them from the requirements of the state insurance code or provided that they "shall not be construed as being engaged in the business of insurance" under state law. Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 534 (1939).[34] Since the legisla-

[33] The only case to the contrary was *Cleveland Hospital Service Assn.* v. *Ebright,* 142 Ohio St. 51, 49 N. E. 2d 929 (1943). There have been few cases dealing with the issue since the enactment of the McCarran-Ferguson Act; most of them have also held that Blue Cross and Blue Shield plans are not insurance. See, *e. g., Michigan Hospital Service* v. *Sharpe,* 339 Mich. 357, 63 N. W. 2d 638 (1954); *Hospital Service Corp.* v. *Pennsylvania Ins. Co.,* 101 R. I. 708, 227 A. 2d 105 (1967).

[34] The dissenting opinion argues that "regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve." *Post,* at 240. It is not at all clear that States that passed enabling statutes regarded the plans as insurance. These statutes typically authorized the plans to operate but did not specify whether or not they were insurance. *E. g.,* 1935 Ill. Laws, p. 621 ("An Act to provide for the Incorporation and Regulation of non-profit Hospital Service Corporations"); 1939 Mich. Pub. Acts No. 109 ("An Act to provide for and to regulate the incorporation of non-profit hospital service corporations"); 1938 N. J. Laws, ch. 336 ("An Act concerning hospital service corporations and regulating the establishment, maintenance and operation of hospital service plans"); ch. 698, 53 Stat. 1412 (1939) ("Providing for the incorporation of certain persons as Group Hospitalization, Inc."). This latter statute enacted by Congress also pro-

tive history makes clear that Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

The *Jordan* v. *Group Health Assn.* case, *supra,* is illustrative of the contemporary view of health-care plans. Group Health was organized as a nonprofit corporation to provide various medical services and supplies to members who paid a fixed annual premium. To implement the plan, Group Health contracted with physicians, hospitals, and others, to provide medical services. These groups were compensated exclusively by Group Health. By contracting with the various medical groups directly, Group Health was able to obtain

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vided in § 7: "This corporation shall not be subject to the provisions of statutes regulating the business of insurance in the District of Columbia, but shall be exempt therefrom unless specifically designated therein." The Senate Report stated: "This bill does not change existing law but merely creates a private corporation which did not heretofore exist in the District of Columbia." S. Rep. No. 1012, 76th Cong., 1st Sess., 2 (1939). At the time this statute was passed in 1939, the group health services plan in the District of Columbia had been construed not to be engaged in the business of insurance. *Group Health Assn.* v. *Moor,* 24 F. Supp 445 (DC 1938).

Indeed, courts have continued to hold that Blue Shield plans are not insurance even in States that have enacted enabling statutes. *E. g., Michigan Hospital Service* v. *Sharpe, supra.* In that case, the court specifically rejected the proposition that the existence of the enabling statute was sufficient to demonstrate that the plan was insurance.

But even if certain aspects of a Blue Shield plan are the "business of insurance," the Pharmacy Agreements in this case are not—for all the reasons set out in this opinion. It is to be emphasized that the question whether provider agreements like the Pharmacy Agreements in this case, or other aspects of insurance companies, were in 1945 or are now regulated by state law is irrelevant to the issue before the Court in the present case. See n. 38, *infra.*

services at a lower cost than if each member contracted separately. The plan, therefore, was somewhat similar to the Pharmacy Agreements in this case. The court in *Group Health* held that this type of arrangement was not insurance:

> "Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance . . . require these elements. Hazard is essential and equally so a shifting of its incidence.
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> . . . . . .
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> "Although Group Health's activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the quantity purchase of well-rounded, continuous medical service by its members. Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk . . . . On the other hand, the cooperative is concerned principally with *getting service rendered to its members* and doing so at lower prices made possible by quantity purchasing and economies in operation." 71 App. D. C., at 44, 46, 107 F. 2d, at 245, 247. (Emphasis supplied in part; footnotes omitted.) [35]

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[35] Despite the fact that courts did not view plans like Blue Cross and Blue Shield as insurance at the time of the passage of the McCarran-Ferguson Act, the petitioners argue that Attorney General Biddle's remarks when testifying in the Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, and H. R. 3270, 78th Cong., 1st Sess., 41–42 (1943), indicate a congressional understanding that such plans were indeed insurance.

The thrust of Attorney General Biddle's remarks was that this Court's decision in *American Medical Assn.* v. *United States,* 317 U. S. 519,

Indeed, Blue Cross and Blue Shield organizations themselves have historically taken the position that they are not insurance companies in seeking to avoid state regulation and taxation.[36] It is thus difficult to assume that contrary to this historical position and a majority of court decisions, Congress in 1945 understood that advance-payment medical-

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justified the indictment in the *South-Eastern Underwriters* case. In the *AMA* case, the Court had held that a health-maintenance organization was engaged in "trade" within the meaning of the Sherman Act. Based on this decision, Attorney General Biddle expressed the view that the plan was insurance and that therefore the Court had already held that insurance was commerce. Thus, he argued that the indictment in *South-Eastern Underwriters* was proper.

It seems clear, however, why this testimony does not demonstrate that Congress believed that Blue Cross or Blue Shield plans are insurance. First, the statement of the Attorney General that the plan in the *AMA* case was insurance was not accepted by Congress. Senator Bailey rejected the characterization, pointing out that the Court had not referred to the plan as insurance. To Senator Bailey, the plan was not insurance but a "group cooperative movement." (Indeed, the precise plan at issue was held not to be insurance in *Jordan* v. *Group Health Assn.*, 71 App. D. C. 38, 107 F. 2d 239 (1939).) But even if it can nonetheless be inferred that some Members of Congress may have agreed with the Attorney General that prepaid health plans are insurance, his testimony did not remotely suggest that agreements between an insurer and a third party fixing the cost at which goods and services will be purchased is also insurance.

Similarly, the fact that a few years later some witnesses at a Senate Committee hearing referred to Blue Cross as insurance in discussing alternatives to national health insurance, *e. g.*, Hearings before the Senate Committee on Education and Labor on S. 1606, 79th Cong., 2d Sess., pt. 1, pp. 172–176 (1946), does not establish that Congress shared this view, let alone that provider agreements like the Pharmacy Agreements in this case are insurance.

[36] Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L. J. 587, 624 n. 174. As one commentator has stated about the effectiveness of the traditional opposition of these organizations to being characterized as insurance:

"[I]nsurance experts are fond of expressing amazement at Blue Cross and Blue Shield opinion that the Blues are not insurance but something else, such as 'pre-payment plans.' The insurance experts should control their

benefits plans are the "business of insurance." [37] It is next to impossible to assume that Congress could have thought that agreements (even by insurance companies) which provide for the purchase of goods and services from third parties at a set price are within the meaning of that phrase.[38]

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incredulity of this view, or at least save some for the courts. For the fact is that the majority of cases have in effect upheld these so-called 'outrageous' opinions of Blue Cross adherents." Denenberg, The Legal Definition of Insurance, 30 J. Ins. 319, 322 (1963).

[37] This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the "business of insurance" within the meaning of the Act.

[38] This conclusion is in no way affected by the existence of state enabling statutes regulating advance-payment medical-benefits plans at the time the McCarran-Ferguson Act was enacted. *E. g.*, 1937 Cal. Stats., ch. 882, as amended by 1941 Cal. Stats., ch. 311; 1939 Conn. Pub. Acts, ch. 150; 1935 Ill. Laws, p. 621; 1936 Miss. Gen. Laws, ch. 177; 1939 Mich. Pub. Acts, No. 109; 1938 N. J. Laws, ch. 719. These statutes generally provided that the plans were not insurance. See *supra*, at 226–227, and n. 34. Even if it is assumed that some state legislatures believed that these plans are insurance, however, it still does not follow that provider agreements like the Pharmacy Agreements in this case were considered by Congress to be the "business of insurance."

Many aspects of insurance companies are regulated by state law, but are not the "business of insurance." Similarly, the enabling statutes in existence at the time the Act was enacted typically regulated such diverse aspects of the plans as the composition of their boards of directors, when their books and records could be inspected, how they could invest their funds, when they could liquidate or merge, as well as how they could purchase goods and services by entering into provider agreements.

Provider agreements are no more the "business of insurance" because they were regulated by state law at the time of the McCarran-Ferguson Act than are these other facets of the plans which were similarly regulated. If Congress had exempted the "business of insurance companies," then these aspects of the plans which are not themselves insurance as that term is commonly understood would nevertheless be arguably exempt. But since Congress explicitly rejected this approach, they are not within the exemption even though they are the subject of state regulation.

This Court has implicitly recognized that state regulation of a practice

IV

It is well settled that exemptions from the antitrust laws are to be narrowly construed. *E. g., Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1; *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616; *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726; *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions. *E. g., Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc., supra*, at 11–12 (the Nonprofit Institutions Act); *FMC* v. *Seatrain Lines, Inc., supra*, at 733 (§ 15 of the Shipping Act); *United States* v. *McKesson & Robbins, supra*, at 316 (the Miller-Tydings and McGuire Acts).

Application of this principle is particularly appropriate in this case because the Pharmacy Agreements involve parties wholly outside the insurance industry. In analogous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties. The Court has held, for example, that an exempt agricultural cooperative under the Capper-Volstead Act loses its exemption if it conspires with nonexempt parties. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384; *United States* v. *Borden Co.*, 308 U. S. 188. Similarly, the Court has consistently stated that a union forfeits its exemption from the antitrust laws if it agrees with one set of employers to impose a wage scale on other bargaining units. *Ramsey* v. *Mine Workers,*

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of an insurance company does not mean that the practice is the "business of insurance" within the meaning of the McCarran-Ferguson Act. In both cases, *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, and *SEC* v. *National Securities, Inc.*, 393 U. S. 453, the challenged conduct was regulated by the State Insurance Commissioner, but this Court held that the practices were not the "business of insurance."

401 U. S. 302, 313; *Mine Workers* v. *Pennington*, 381 U. S. 657, 665–666.[39]

If agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers may make to keep their costs under control—whether with automobile body repair shops or landlords.[40] Such agreements

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[39] As the Court stated in *Pennington*, 381 U. S., at 665–666 (footnote omitted):

"[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

[40] There is no principled basis upon which a line could rationally be drawn that would extend the McCarran-Ferguson Act exemption only to an insurer's agreement with providers of goods and services to be furnished to its policyholders—such as agreements with hospitals, doctors, lawyers, and the like. But assuming that such a line could rationally be drawn, to hold that even such provider agreements are the "business of insurance" is to ignore the language and purpose of the Act not to exempt the insurance industry as such from the antitrust laws.

Moreover, exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences. Recent studies have concluded that physicians and other health-care providers typically dominate the boards of directors of Blue Shield plans. Thus, there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level. This domination of Blue Shield by providers is said to have resulted in rapid escalation of health-care costs to the detriment of consumers generally. See Skyrocketing Health Care Costs: The Role of Blue Shield, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 4–34 (1978) (remarks of Michael Pertschuk, Chairman, Federal Trade Commission).

would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the "business of insurance companies." [41] But that is precisely what Congress did not do.

For all these reasons, the judgment of the Court of Appeals is

Affirmed.

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

The McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in § 1013 (b).[1] The single question presented by this case is whether the "business of insurance"

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[41] It might be argued that some such agreements are exempt from the antitrust laws under the state-action exemption of *Parker* v. *Brown,* 317 U. S. 341. But that exemption would exist because of the extent of state regulation and not because the agreements are the "business of insurance."

[1] Section 2 (b) of the Act, as set forth in 15 U. S. C. § 1012 (b), provides:

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U. S. C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Section 3 (b), as set forth in 15 U. S. C. § 1013 (b), provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third parties to provide benefits owed to the insurer's policyholders. The Court today holds that it does not.

I disagree: Since (a) there is no challenge to the status of Blue Shield's drug-benefits *policy* as the "business of insurance," I conclude (b) that some provider agreements negotiated to carry out the policy obligations of the insurer to the insured should be considered part of such business, and (c) that the specific Pharmacy Agreements at issue in this case should be included in such part. Before considering this analysis, however, it is necessary to set forth the background of the enactment of the McCarran-Ferguson Act.

I

SEC v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969), recognized that the legislative history of the McCarran-Ferguson Act sheds little light on the meaning of the words "business of insurance." See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). But while the legislative history is largely silent on the matter,[2] it does indicate that Congress deliberately chose

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[2] The Court argues that the silence with respect to agreements between insurers and third parties, coupled with the fact that Congressmen did discuss horizontal agreements between insurance companies, establishes by negative inference that third-party agreements were not considered "the business of insurance." There is, however, a compelling explanation for the lack of mention of provider agreements. As the Court has noted in several cases, see, *e. g.*, *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969); *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 538–539 (1978), the McCarran-Ferguson Act was a reaction to the decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). See *infra*, at 236–237. That case involved an organization of fire insurance companies, and much of the congressional discussion accordingly concerned alleged abuses by and regulation of such companies. See, *e. g.*, 91 Cong.

to phrase the exemption broadly. Congress had draft bills before it which would have limited the "business of insurance" to a narrow range of specified insurance company practices, but chose instead the more general language which ultimately became law.[3]

Rec. 1091–1092, 1479 (1945); 90 Cong. Rec. 6449–6455, 6527 (1944). Indeed, health insurers did not even participate in the hearings on the Act. See Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362 et al., 78th Cong., 1st Sess. (1943). Since fire insurers paid their policyholders cash indemnities, these companies had no reason to contract with third parties for the provision of goods or services. That fact fully explains the absence of discussion of such contracts in the congressional debates. Such absence no more indicates a congressional intent to exclude provider agreements from the "business of insurance" than does the absence of any mention of health insurance companies indicate a congressional intent arbitrarily to exclude all health insurance from the "business of insurance."

[3] S. 12, 79th Cong., 1st Sess. (1945), would have specified

"any agreement or concerted or cooperative action *between two or more insurance companies* for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules." (Emphasis added.)

See also § 4 (b) of a draft bill of the National Association of Insurance Commissioners, 90 Cong. Rec. A4406 (1944). A significant Senate floor debate with regard to such limiting bills is the following:

"MR. PEPPER. Would it not be better that those agreements, if there are such that are legitimatized, be identified in the statute?

"MR. O'MAHONEY. I quite agree with the Senator, and I endeavored to the very best of my ability to induce the committees of Congress to write into the law specific exemptions from the antitrust law, but I was unable to prevail in the Committee on the Judiciary and I was unable to prevail on the floor of the Senate." 91 Cong. Rec. 1444 (1945).

The Court challenges the conclusion that Congress intended to phrase the exemption broadly by referring to the legislative history of one obscure amendment to an early House version of the Act. *Ante,* at 222–223, n. 29. Closer examination of the short debate surrounding that amendment reveals only the Representatives' repeated expressions of their confusion over what the amendment meant. See 90 Cong. Rec. 6562 (1944) (remarks of Reps. Summers, Hobbs, and Fernandez).

The historical background of the statute's enactment, developed by the Court in *SEC* v. *National Securities, Inc.*, *supra,* provides the guide to congressional purpose:

> "The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '[i]ssuing a policy of insurance is not a transaction of commerce.' *Paul* v. *Virginia,* 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters,* this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly . . . [, being] concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' 59 Stat. 33 (1945), 15 U. S. C. § 1011. As this Court said shortly afterward, '[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 429 (1946).
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> "The . . . Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." 393 U. S., at 458–459.

See also *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U. S. 531, 538–539 (1978); 90 Cong. Rec. 6524 (1944) (Cong. Wal-

ter) ("[T]he legislation . . . is designed to restore to the status quo the position the insurance business of this Nation occupied before the Supreme Court recently legislated [in *South-Eastern Underwriters*]").

Since continuation of state regulation as it existed before *South-Eastern* was Congress' goal,[4] evidence of what States

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[4] There can be no quarrel with the Court's statement, *ante*, at 220, and n. 24, that the McCarran-Ferguson Act was not intended to restore the law, *in all respects*, to what it had been before *South-Eastern Underwriters*. But the principal differences between pre-*South-Eastern* and post-McCarran-Ferguson law are irrelevant for purposes of this case, and do not detract from the Court's oft-repeated statement that the purpose of the Act was to preserve state regulatory schemes as they existed before *South-Eastern Underwriters*.

Before *South-Eastern*, insurance companies might boycott, coerce, and intimidate without violating federal antitrust statutes since insurance was not considered "commerce" and hence was beyond the reach of federal law. For the same reason, even unregulated insurance transactions were free from antitrust attack. Finally, Congress, because of the "commerce" problem, could not otherwise regulate insurance. None of these elements survived the decision in *South-Eastern*, and none was revived by McCarran-Ferguson. These differences between pre-*South-Eastern* and post-McCarran-Ferguson law were what Senator Ferguson had in mind when he answered "no" to Senator McKellar's question, cited by the Court, *ante*, at 220 n. 24, asking whether the effect of the Act was to re-establish the law as it stood prior to *South-Eastern*. This is revealed by quotation of Senator Ferguson's full answer to Senator McKellar.

"MR. FERGUSON. No. I would say that subsection (b), at the bottom of page 2, would allow the provisions of the Sherman Act to apply to all agreements or acts of boycott, coercion, or intimidation, and subsection 4 (a) would suspend the application of the provisions of the Sherman Act and the Clayton Act, insofar as States may regulate and tax such companies, until certain dates or until Congress may act in the meantime in respect to what Congress thinks should be done with the business of insurance." 91 Cong. Rec. 478 (1945).

These discrete differences between pre-*South-Eastern* and post-McCarran-Ferguson law are not applicable here, and do not conflict with the holdings of this Court's prior opinions that, with respect to *state-regulated*

might reasonably have considered to be and regulated as insurance at the time the McCarran-Ferguson Act was passed in 1945 is clearly relevant to our decision. This does not mean that a transaction not viewed as insurance in 1945 cannot be so viewed today.

> "We realize that . . . insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the concep[t] of 'insurance' . . . into the mold [it] fitted when these Federal Acts were passed." *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 71 (1959).

It is thus logical to suppose that if elements common to the ordinary understanding of "insurance" are present, new forms of the business should constitute the "business of insurance" for purposes of the McCarran-Ferguson Act. The determination of the scope of the Act, therefore, involves both an analysis of the proximity between the challenged transactions and those well recognized as elements of "insurance," and an examination of the historical setting of the Act. On both counts, Blue Shield's Pharmacy Agreements constitute the "business of insurance."

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insurance practices *not constituting boycotts,* McCarran-Ferguson was intended to preserve pre-existing state insurance regulation.

This analysis also explains, and renders irrelevant for this case, Congress' rejection of the "total" exemption bills cited by the Court, *ante,* at 218–219, and n. 21. Those bills, unlike the one that passed, would have exempted boycotts and unregulated transactions. It was this aspect of the "total" exemption bills to which the National Association of Insurance Commissioners objected. See 90 Cong. Rec. 8482 (1944). These bills were rejected not because of a decision to narrow the scope of the nonboycott activities to be exempted, but because Congress determined that the business of insurance should be exempted only where regulated by the States, rather than unconditionally.

II

I start with common ground. Neither the Court, *ante,* at 230 n. 37, nor the parties challenge the fact that the drug-benefits policy offered by Blue Shield to its policyholders—as distinguished from the contract between Blue Shield and the pharmacies—is the "business of insurance." Whatever the merits of scholastic argument over the technical definition of "insurance," the policy both transfers and distributes risk. The policyholder pays a sum certain—the premium—against the risk of the uncertain contingency of illness, and if the company has calculated correctly, the premiums of those who do not fall ill pay the costs of benefits above the premiums of those who do. See R. Mehr & E. Cammack, Principles of Insurance 31–32 (6th ed. 1976). An important difference between Blue Shield's policy and other forms of health insurance is that Blue Shield "pays" the policyholder in goods and services (drugs and their dispensation), rather than in cash. Since we will not "freeze the concep[t] of 'insurance' . . . into the mold it fitted" when McCarran-Ferguson was passed, this difference cannot be a reason for holding that the drug-benefits policy falls outside the "business of insurance" even if our inquiry into the understandings of what constituted "insurance" in the 1930's and 1940's were to suggest that a contrary view prevailed at that time.[5]

Fortunately, logic and history yield the same result. It is true that the first health insurance policies provided only cash indemnities. However, although policies that specifically provided drug benefits were not available during the 1930's and 1940's, analogous policies providing hospital and medical services—rather than cash—were available.

The hospital service-benefit concept originated in Texas in

[5] See *SEC* v. *National Securities, Inc.,* 393 U. S., at 460 ("The relationship between insurer and insured, [and] *the type of policy which could be issued* . . . [are] the core of the 'business of insurance' "). (Emphasis added.)

1929; medical services were first offered in 1939. R. Eilers, Regulation of Blue Cross and Blue Shield Plans 10, 15 (1963) (hereinafter Eilers). In 1940, 4,500,000 people in 60 communities were covered by Blue Cross or related hospital-benefits plans. C. Rorem, Non-Profit Hospital Service Plans 1–2 (1940) (hereinafter Rorem I). During the 1940's, health insurance became a subject of collective bargaining, with unions demanding the service-benefit approach of Blue Cross and Blue Shield. S. Law, Blue Cross 11 (1974) (hereinafter Law). By 1945, the year the McCarran-Ferguson Act was enacted, over 20 million people were enrolled in service-benefit programs, with service-benefit plans comprising 61% of the total hospitalization insurance market. See Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, p. 173 (1946); Eilers 19; Law 11.

Moreover, regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve. Led by New York in 1934, 24 States passed enabling Acts by 1939 which, while relieving the plans of certain reserve requirements and tax obligations, specifically subjected service-benefit plans to the supervision and control of state departments of insurance.[6] See Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 531, 534 (1939) (hereinafter Rorem II); N. Sinai, O. Anderson, & M. Dollar, Health Insurance in the United States

[6] See 1935 Ala. Acts No. 544; 1935 Cal. Stats., ch. 386; 1939 Conn. Pub. Acts, ch. 150; ch. 698, 53 Stat. 1412 (1939) (District of Columbia); 1937 Ga. Laws, p. 690; 1935 Ill. Laws, p. 621; 1939 Iowa Acts, ch. 222; 1938 Ky. Acts, ch. 23; 1939 Me. Acts, ch. 149; 1937 Md. Laws, ch. 224; 1936 Mass. Acts, ch. 409; 1939 Mich. Pub. Acts No. 109; 1936 Miss. Gen. Laws, ch. 177; 1939 N. H. Laws, ch. 80; 1938 N. J. Laws, ch. 366; 1939 N. M. Laws, ch. 66; 1934 N. Y. Laws, ch. 595; 1939 Ohio Leg. Acts, p. 154; 1937 Pa. Laws No. 378; 1939 R. I. Acts, ch. 719; 1939 S. C. Acts No. 296; 1939 Tex. Gen. Laws, p. 123; 1939 Vt. Laws No. 174; 1939 Wis. Laws, ch. 118.

48–49 (1946) (hereinafter Sinai); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 174 (1943). Another 16 States apparently limited the issuance of hospitalization insurance to stock and mutual insurance companies. Nine acted on the premise that the plans were not "insurance" and authorized operation under general corporation laws, exempt from reserve requirements. Rorem II, p. 532. By the time the McCarran-Ferguson Act was passed, 35 States had enabling legislation.[7] During this period, the National Association of Insurance Commissioners (NAIC), the organization of state insurance directors which played a major role in drafting the McCarran-Ferguson Act,[8] was also drafting model state enabling legislation to govern service-benefit health plans. Proceedings of the NAIC, 75th Sess., 226 (1944); *id.*, 76th Sess., 250 (1945).[9]

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[7] F. Hedinger, The Social Role of Blue Cross as a Device for Financing the Costs of Hospital Care 51 (1966). The additional statutes were: 1945 Ariz. Sess. Laws, ch. 13 (1st Spec. Sess.); 1939 Fla. Laws, ch. 19108; 1941 Kan. Sess. Laws, ch. 259; 1940 La. Acts No. 267; 1941 Minn. Laws, ch. 53; 1941 Neb. Laws, ch. 43; 1941 N. C. Pub. Laws, ch. 338; 1943 N. D. Laws, ch. 103; 1945 Tenn. Pub. Acts, ch. 98; 1940 Va. Acts, ch. 230; 1943 W. Va. Acts, ch. 8.

[8] See 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

[9] Debate arose during this period as to whether service-benefit plans were technically insurance. See *ante*, at 225–230. Most state insurance commissioners ruled during the 1930's that the plans constituted insurance, and therefore had to meet the capital stock, reserve, and assessment requirements applicable to the commercial stock and mutual insurance companies which offered cash indemnity policies. Eilers 101. In addition, this meant that the plans were subject to special state taxation. *Ibid.* Such holdings limited the feasibility of the plans at a time when they were widely perceived as being socially beneficial. Moreover, it was argued that these rulings were inappropriate to service-benefit plans, which were generally "nonprofit," and often included guarantees by hospitals to provide services regardless of the financial state of the insurer—potentially an adequate substitute for the cash reserves needed by indemnity plans. *Id.*, at 135–136, 239.

Some courts, and even some Blue Cross-type organizations, attempted to

Thus, when the McCarran-Ferguson Act became law, service-benefit plans similar to the Blue Shield plan at issue here were a widespread and well-recognized form of insurance, subject to regulation in most of the States. Congress itself treated these important programs as insurance. In 1939, Congress adopted an enabling Act incorporating a hospitalization-benefits plan in the District of Columbia, with supervi-

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surmount these barriers to effectuation of plans deemed to be in the public interest by arguing that the plans were not technically "insurance" subject to the jurisdiction of state insurance commissioners, and hence were not bound by the requirements of the stock and mutual insurance companies. See, *e. g.*, *Jordan* v. *Group Health Assn.*, 71 App. D. C. 38, 107 F. 2d 239 (1939). But see *Cleveland Hospital Service Assn.* v. *Ebright*, 142 Ohio St. 51, 49 N. E. 2d 929 (1943) (hospital service plans *are* insurance); *McCarty* v. *King County Medical Service Corp.*, 26 Wash. 2d 660, 175 P. 2d 653 (1946) (same). But contemporary commentators questioned the soundness of such views and argued that the plans should be treated as insurance, although as a special kind not subject to the traditional requirements. See, *e. g.*, Note, The Legal Problems of Group Health, 52 Harv. L. Rev. 809, 815 (1939); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 172 (1943). The 35 state enabling Acts governing service-benefit health plans reflected the States' agreement that the plans were "a special type of insurance" differing from the stock and mutual companies. Rorem II, p. 534; Sinai 48. This is most clearly demonstrated by the fact that the vast majority of the state statutes, while relieving the plans of "other" insurance law requirements (primarily the reserve requirements and special insurance taxes), subjected their activities to the control of the state insurance commissioner. The 1939 New Mexico Statute, for example, amended the State's *Insurance* Code by adding a new section entitled "Non-Profit Hospital Service Plans." The amendment subjected the plans, and in particular both their premiums and rates of payment to hospitals, to the approval of the *Superintendent of Insurance*, while exempting them from "all *other* provisions of the insurance law." 1939 N. M. Laws, ch. 66 (emphasis added). This approach was in accord with the commonly held view that such plans were forms of "insurance," as reflected by the statements of numerous Congressmen in the congressional hearings on the proposed National Health Program, see *infra*, at 243. And everyday meaning, rather than some technical term of art, is what Congress intended by its use of the word "insurance" in the McCarran-Ferguson Act.

sory authority placed in the hands of the Superintendent of Insurance. See H. R. 6266, 76th Cong., 1st Sess. (1939); H. R. Rep. No. 1247, 76th Cong., 1st Sess. (1939); 84 Cong. Rec. 11224 (1939). And in hearings held the year after passage of the McCarran-Ferguson Act, the same Congress that approved that Act debated Blue Shield-type programs as alternatives to national health insurance, with participating Congressmen frequently referring to them as "insurance." Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, pp. 55, 83, 108, 172, pt. 2, p. 558 (1946).[10] The status of service-benefit policies as "insurance," both logically and historically, is therefore sufficiently established to make that the first premise in an analysis of the status of the Pharmacy Agreements at issue in this case.

III

The next question is whether at least some contracts with third parties to procure delivery of benefits to Blue Shield's insureds would also constitute the "business of insurance." Such contracts, like those between Blue Shield and the druggists in this case, are known as "provider agreements." The Court, adopting the view of the Solicitor General, today holds that no provider agreements can be considered part of the "business of insurance."[11] It contends that the "underwriting or spreading of risk [is] an indispensable characteristic of

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[10] Messages of two Presidents to the Congress on the subject of national health care also referred to service-benefit plans as forms of insurance. Message from the President of the United States, Report and Recommendations on National Health, H. R. Doc. No. 120, 76th Cong., 1st Sess., 63 (1939); Message from the President, A National Health Program, H. R. Doc. No. 380, 79th Cong., 1st Sess., 9, 10 (1945).

[11] The respondents do not argue this view. They agree that some provider contracts may constitute the "business of insurance." Brief for Respondents 33.

insurance," *ante,* at 212,[12] and that "[a]nother commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured." *Ante,* at 215. Because provider agreements neither themselves spread risk, nor involve transactions between insurers and insureds, the Court excludes them from the "business of insurance."

The argument fails in light of this Court's prior decisions and the legislative history of the Act. The Court has held, for example, *FTC* v. *National Casualty Co.,* 357 U. S. 560 (1958), that the advertising of insurance, a unilateral act which does not involve underwriting, is within the scope of the McCarran-Ferguson Act. And the legislative history makes it abundantly clear that numerous horizontal agreements between insurance companies which do not technically involve the underwriting of risk were regarded by Congress as within the scope of the Act's exemption for the "business of insurance." For example, rate agreements among insurers, a conspicuous congressional illustration, see, *e. g.,* 91 Cong. Rec. 1481, 1484 (1945) (remarks of Sens. Pepper and Ferguson), and the subject of the *South-Eastern Underwriters* case, see *SEC* v. *National Securities, Inc.,* 393 U. S., at 460, do not themselves spread risk. Indeed, the Court apparently concedes that arrangements among insurance companies respecting premiums and benefits would constitute the "business of insurance," despite their failure to fit within its formula. *Ante,* at 221 and 224–225, n. 32.

But the Court's attempt to limit its concession to horizontal transactions still conflicts with the legislative history. Compelling evidence is the fact that Congress actually rejected a proposed bill to limit the exemption to agreements between

[12] "Underwriting," the Solicitor General argues, means "spread[ing] risk more widely or reduc[ing] the role of chance events." Brief for United States as *Amicus Curiae* 17 (hereinafter Government Brief). For purposes of argument I will assume that this is a correct definition of "underwriting." But see R. Holtom, Underwriting Principles and Practices 11 (1973).

insurance companies. S. 12, 79th Cong., 1st Sess. (1945). See n. 3, *supra.* Moreover, vertical relationships between insurance companies and independent sales agencies were a subject of the indictment in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 535 (1944), were the object of discussion in the House, 90 Cong. Rec. 6538 (1944) (remarks of Cong. Celler), and were expressly included as part of the "business of insurance" in an early draft of the Act, *id.*, at A4406 (NAIC bill, § 4 (b)(5)). Again, the Court concedes that such transactions, between insurers and agents, might fall within the "business of insurance," despite the inconsistency with the Court's own theory. *Ante,* at 224–225, n. 32.[13]

The Court's limitation also ignores the significance of pervasive state insurance regulation—prevailing when the Act was passed—of hospitalization-benefits plans whose "distinctive feature," Rorem I, p. 64; Proceedings of the NAIC, 75th Sess., 228 (1944), was the provider contract with the participating hospital to provide service when needed. The year prior to adoption of the Act the NAIC emphasized the relationship between provider agreements and service-benefit policies:

> "A hospital service plan is designed to provide service rather than to indemnify and this can only be guaranteed through contractual arrangements between plans and hospitals." *Ibid.*

The Association also proposed, in the year McCarran-Ferguson passed, a model state enabling Act requiring "full approval of . . . contracts with hospitals . . . by the insurance commissioner." Proceedings of the NAIC, 76th Sess., 250

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[13] The effort to distinguish insurer/agent transactions from provider agreements on the ground that the former are "wholly intra-industry" while the latter are not, *ante,* at 225 n. 32, constitutes argument by tautology. The former are "intra-industry" and the latter not, only because the Court so holds today.

(1945). That proposal reflected well the actual contents of existing state enabling Acts which armed insurance commissioners with considerable authority to regulate provider agreements.[14] Congress itself authorized the service-benefit plan it incorporated in the District of Columbia "to enter into contracts with hospitals for the care and treatment of [its subscribers]." H. R. 6266, 76th Cong., 1st Sess. (1939). In light of Congress' objective through the McCarran-Ferguson Act to insure the continuation of existing state regulation, the conclusion that at least some provider agreements were intended to be within the "business of insurance" is inescapable.

Logic compels the same conclusion. *Some* kind of provider agreement becomes a necessity if a service-benefits insurer is to meet its obligations to the insureds. The policy before us in this case, for example, promises payment of benefits in drugs. Thus, some arrangement must be made to provide those drugs for subscribers.[15] Such an arrangement obtains

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[14] See, *e. g.*, 1935 Cal. Stats., ch. 386; 1939 Iowa Acts, ch. 222; 1937 Md. Laws, ch. 224; 1939 Me. Acts, ch. 149; 1939 N. H. Laws, ch. 80; 1939 S. C. Acts No. 296. See also Rorem I, pp. 67–68; Sinai 48–49. Such provisions were often quite extensive, *e. g.*, requiring approval by the insurance commissioner of contracts between hospitals and the corporation, including rates of payment, *ibid.*; requiring that the contracts contain guarantees of services by the hospitals to policyholders despite financial difficulties of the insurer, Rorem I, p. 67; or even limiting the kind of hospitals with which contracts could be made, *id.*, at 68.

[15] Indeed, unions negotiating for drug-coverage plans have requested that the plans include contractual arrangements with pharmacies, in order to guarantee that the policy's promises are kept. See Brief for Motor Vehicle Manufacturers Assn. as *Amicus Curiae* 10–11.

It might be argued that the drug-benefits policy could operate successfully without any agreement between Blue Shield and the pharmacies. The consumer could simply pay the pharmacist his full price, whereupon he would normally receive the drugs without hesitation. Blue Shield could then reimburse the policyholder for the full price minus the $2 deductible. This would not, however, be the policy bargained for in this case. That

the very benefits promised in the policy; it does not simply relate to the general operation of the company. A provider contract in a service-benefit plan, therefore, is critical to "the type of policy which could be issued" as well as to its "reliability" and "enforcement." It thus comes within the terms of *SEC* v. *National Securities, Inc.*, 393 U. S., at 460. That case explained that the "business of insurance" involves not only the "relationship between insurer and insured," but also "other activities of insurance companies [that] *relate so closely* to their status as reliable insurers that they too must be placed in the same class." Thus, "[s]tatutes aimed at protecting or regulating . . . [the insurer/insured] relationship, *directly or indirectly,* are laws regulating the 'business of insurance.'" *Ibid.* (emphasis added).

The Congress that passed McCarran-Ferguson was composed of neither insurance experts nor dictionary editors. Rather than use the technical term "underwriting" to express its meaning, Congress chose "the business of insurance," a common-sense term connoting not only risk underwriting, but contracts closely related thereto.[16] Since Congress knew of service-benefit policies, and viewed them as insurance, it would strain common sense to suppose Congress viewed con-

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policy guarantees provision of drugs upon a minimal $2 payment, without requiring the policyholder to advance the full price when the contingency of illness occurs—a time when he may not be able to afford the out-of-pocket payment. Moreover, such cash-reimbursement plans almost inevitably include payment ceilings, again distinguishing them from the full-coverage service plan bargained for in this case. See discussion, *infra,* at 252, and n. 20.

[16] The Court errs in its reading of *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65 (1959). There a "variable annuity" plan was held not to be "the business of insurance" because all risk remained on the policyholder and no underwriting of risk occurred. The key to *Variable Annuity* is that neither the agreement at issue nor *any* with which it was involved effectuated a transference of risk. *Id.*, at 71. That is not the case here, where the policyholder has successfully transferred his risk by trading his premium for the certainty of benefits in the event of illness.

tracts necessary to effectuate those policies' commitments as being outside the business it sought to exempt from the antitrust laws.

IV

The remaining question is whether the provider agreement in *this* case constitutes the "business of insurance." Respondents contend that even if some contract between Blue Shield and the pharmacies is necessary, this one is not. Under the contract at issue, the druggist agrees to dispense drugs to Blue Shield's insureds for a $2 payment, and Blue Shield agrees to reimburse the druggist for the acquisition cost of each drug so dispensed. The pharmacy is thus limited to a $2 "markup." With support from the Court of Appeals, respondents argue that only the first half of the bargain is necessary for Blue Shield to fulfill its policy obligations. Those are fulfilled when Blue Shield binds the pharmacy to dispense the requested drug for $2. The second half of the agreement, the amount Blue Shield reimburses the druggist, is assertedly irrelevant to the policyholder. As an alternative to the existing plan, the respondents and the Court of Appeals suggest that Blue Shield could simply pay the pharmacist his usual charge (minus the $2 paid by the policyholder). The present plan, which limits reimbursement to acquisition cost and freezes the markup at $2, is said to set a "fixed" price. From this premise respondents argue that such fixed-price plans are "anticompetitive," and therefore not the "business of insurance."

Respondents' argument is directly contradicted by history. The service-benefit plans available when the McCarran-Ferguson Act was passed actually "fixed" more of the payment to their participating providers than does the plan here, which "fixes" only the markup. Those early plans usually paid established and equal amounts to their participating hospitals, rather than paying whatever each hospital charged. Rorem I, p. 64. Moreover, under the typical state enabling Act, those

payments were subject to the approval of the state department of insurance.[17] The 1937 Pennsylvania statute, for example, provided that "all rates of payments to hospitals made by such [service-benefit plan] corporations . . . and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department." 1937 Pa. Laws No. 378. Therefore, as insurer/provider fee agreements were part of the system of state regulation which the McCarran-Ferguson Act sought to preserve, there is no historical reason to exclude Blue Shield's Pharmacy Agreements from the ambit of the exemption; there is instead a good historical reason for including them.

Nor does respondents' claim that the Pharmacy Agreements are "anticompetitive" exclude them from constituting the "business of insurance." The determination of whether Blue Shield's Pharmacy Agreements actually involve antitrust violations or are otherwise anticompetitive has been held in abeyance, pending final decision as to whether the agreements fall within the scope of the McCarran-Ferguson Act. But even if the agreements were anticompetitive, that alone could not be the basis for excluding them from the "business of insurance." An antitrust exemption by its very nature must protect some transactions that are anticompetitive; an exemption that is extinguished by a finding that challenged activity violates the antitrust laws is no exemption at all.

While this reason for excluding the Pharmacy Agreements from the circle of exempt provider agreements is unconvincing, there are substantial reasons, in addition to history, for including them within that circle. First, it is clear that the contractual arrangement utilized by Blue Shield affects its

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[17] Sinai 49. See, *e. g.*, 1937 Ga. Laws, p. 690; 1939 Iowa Acts, ch. 222; 1939 Mich. Pub. Acts No. 109; 1939 N. M. Laws, ch. 66; 1939 Tex. Gen. Laws, p. 123. The same is true of the modern state statutes. See Eilers 106–107.

costs, and thus affects both the setting of rates and the insurer's reliability. This is definitely a factor relevant to the determination of whether a transaction is within the "business of insurance." See *SEC* v. *National Securities, Inc.*, 393 U. S., at 460. See also *Proctor* v. *State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C. 264, 561 F. 2d 262 (1977). True, that factor alone is not determinative, for as argued by the Court, innumerable agreements, including the lease on the insurance company's offices, affect cost. This contract, however, has more than a mere incidental connection to the policy and premium. It is a direct arrangement to provide the very goods and services whose purchase is the risk assumed in the insurance policy. It is therefore integral to the insurer's rate-setting process, as the correlation between rates and drug prices in a drug-benefits policy is necessarily high. Moreover, the ability of state insurance commissioners to regulate rates, an important concern of the Act, is measurably enhanced by their ability to control the formulas by which insurers reimburse providers.[18] The same is true of state efforts to ensure that plans are financially reliable. See *Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 481 F. 2d 80, 83 n. 9 (CA3 1973) (quoting the Pennsylvania Insurance Commissioner). This close nexus between the Pharmacy Agreements and both the rates and fiscal reliability of Blue Shield's plan speaks strongly for their inclusion within the "business of insurance." See generally *Proctor* v. *State*

[18] Indeed, some state insurance commissioners have made aggressive use of their authority over provider contracts as a means of controlling premium rates. See *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104, 1106 (ED Pa. 1976), aff'd, 554 F. 2d 1253 (CA3), cert. denied, 434 U. S. 860 (1977); State of Michigan, Commissioner of Ins., No. 77–R–101 (Mar. 3, 1977); State of Illinois, Dept. of Ins., Hearing No. 1607 (Apr. 8, 1977). This may also explain why the Federal Government, in programs in which it functions as a health insurer, requires that its provider agreements include specified fee formulas. See, *e. g.*, 42 U. S. C. §§ 1395u, 1395x (v) (Medicare).

Farm Mutual Automobile Ins. Co., supra, at 271–272, 561 F. 2d, at 269–270.

Another reason, in addition to this nexus to basic insurance elements, also supports the conclusion that fixed-price provider agreements are the "business of insurance." Such agreements themselves perform an important insurance function. It may be true, as the Court contends, that conventional notions of insurance focus on the underwriting of risk. But they also include efforts to reduce the unpredictable aspects of the risks assumed. Traditional plans achieve this end by setting ceilings on cash payments or utilizing large deductibles. R. Mehr & E. Cammack, Principles of Insurance 222 (6th ed. 1976). Even if the insurer cannot know how often a policyholder might become ill, it can know the extent of its exposure in the event of illness. The actuarial uncertainty, therefore, is greatly reduced. A fixed-price provider agreement attempts to reach the same result by contracting in advance for a price, rather than agreeing to pay as the market fluctuates. The agreement on price at least minimizes the variance of the "payoff" variable, even if the probability of its occurrence remains an unknown. Indeed, if examined carefully, this function comes within the latter half of the definition of "underwriting" offered by the Solicitor General: "spread[ing] risk more widely or reduc[ing] the role of chance events." See n. 12, *supra.* Of course, the Pharmacy Agreements in this case do not totally control "the role of chance" in drug prices since acquisition costs may fluctuate even if "markup" is fixed, but they are at least an attempt to reduce the role of chance to manageable proportions.[19]

Moreover, a service-benefit plan which "pay[s] the cost . . . whatever it might be," as hypothesized by the Court of

[19] The pharmacist respondents would not be better off if Blue Shield set acquisition cost as well as markup. In that event they might not even meet the cost of their own outlays.

Appeals, 556 F. 2d, at 1381, would run grave risks of bankruptcy. Since it would expose the insurer to unknown liability, it would measurably increase the probability that an incorrect assessment of exposure would occur. This could lead to a failure to cover actual losses with premiums. Respondents argue that this fiscal-reliability problem could be solved by placing a dollar limit on benefits. But such a plan would be almost indistinguishable from a cash-indemnity policy. It would not be the full-service-regardless-of-price plan for which the policyholders bargained.[20] The Pharmacy Agreements are thus "other activities of insurance companies relate[d] so closely to their status as reliable insurers that they too must be placed in the same class." *SEC* v. *National Securities, Inc., supra,* at 460.

V

The process of deciding what is and is not the "business of insurance" is inherently a case-by-case problem. It is true that the conclusion advocated here carries with it line-drawing problems. That is necessarily so once the provider-agreement line is crossed by holding some to be within the "business." But that is a line which history and logic compel me to cross. I would hold that the *concept* of a provider agreement for benefits promised in the policy is within the "business of insurance" because some form of provider agreement is necessary to fulfill the obligations of a service-benefit policy. I would hold that *these* provider agreements, Blue Shield's Pharmacy Agreements, are protected because they (1) directly obtain the very benefits promised in the policy [21] and therefore

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[20] The plan here was "bargained for" in the literal sense. It had its origins in a 1967 collective-bargaining agreement between the United Auto Workers and the three largest domestic automobile manufacturers. Brief for Petitioners 6.

[21] The Solicitor General suggests that this test could be subverted by an insurer's decision to list all kinds of incidental and even unrelated

directly affect rates, cost, and insurer reliability, and (2) themselves constitute a critical element of risk "prediction." [22] The conclusion that these kinds of agreements are the "business of insurance" is that reached by every Court of Appeals except the Court of Appeals in this case.[23]

I would not suggest, however, that *all* provider agreements come within the McCarran-Ferguson Act proviso. Given the facts found by the District Court upon summary judgment, this is not a case where the petitioner pharmacies themselves conspired to exclude others from the market, and either pressured Blue Shield to go along, or were voluntarily joined by the insurer. See also Government Brief 13 n. 6. Such an agreement among pharmacies, itself neither necessary nor related to the insurer's effort to satisfy its obligations to its policyholders, would be outside the "business of insurance." An insurance company cannot immunize an illegal conspiracy by joining it. Cf. *Parker* v. *Brown,* 317 U. S. 341, 351–352

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transactions in its policy. As with other forms of antitrust immunity, I have no difficulty concluding that "sham" arrangements should not be honored. Cf. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, 144 (1961); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972).

[22] These factors together are sufficient to decide this case. I need not decide whether either would independently suffice, nor whether in the absence of these factors others might also be capable of bringing a provider agreement within the exemption.

[23] See *Proctor* v. *State Farm Mutual Automobile Ins. Co.,* 182 U. S. App. D. C. 264, 561 F. 2d 262 (1977), aff'g 406 F. Supp. 27 (DC 1975), cert. pending, No. 77–580; *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia,* 557 F. 2d 1001 (CA3 1976), aff'g 431 F. Supp. 5 (ED Pa. 1975); *Frankford Hospital* v. *Blue Cross of Greater Philadelphia,* 554 F. 2d 1253 (CA3 1976), aff'g 417 F. Supp. 1104 (ED Pa.), cert. denied, 434 U. S. 860 (1977); *Anderson* v. *Medical Service of District of Columbia,* 551 F. 2d 304 (CA4 1977), aff'g 1976–1 Trade Cases ¶ 60,884 (ED Va); *Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania,* 481 F. 2d 80 (CA3), aff'g 361 F. Supp. 774 (WD Pa. 1972), cert. denied, 414 U. S. 1093 (1973).

(1943). Moreover, since in this case the Blue Shield plan was offered to all San Antonio pharmacies and was in fact agreed to by at least 12, I am not called upon to decide whether an exclusive arrangement with a single provider would be so tenuously related to providing policyholder benefits as to be beyond the exemption's protection. See generally *Proctor* v. *State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C., at 270 n. 10, 561 F. 2d, at 268 n. 10.[24]

Finally, the conclusion that Blue Shield's Pharmacy Agreements should be held within the "business of insurance" [25]

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[24] Such an arrangement could not be suspect simply because it would be anticompetitive, see discussion, *supra*, at 249. Rather, that means of providing policy benefits might be regarded as so unnecessary, and so likely to have its principal impact on pharmacies rather than policyholders, as to cross the boundary line of what constitutes the "business of insurance." I intimate no view upon the question.

[25] The analogies to other antitrust exemptions referred to by the Court, *ante*, at 231–232, are inapt. It is true that as a general rule an "exempt" party loses its immunity when it makes an agreement that is outside the scope of the exemption. But that general rule has no application here unless one assumes what the respondents need to prove—that the Pharmacy Agreements are outside the scope of the McCarran-Ferguson Act. Reference to the cases under the Capper-Volstead Act is not helpful on the matter, as that Act limits its exemption to those who are "engaged in the production of agricultural products *as farmers, planters, ranchmen, dairymen, nut or fruit growers.*" 42 Stat. 388, 7 U. S. C. § 291 (emphasis added). As a result, this Court has held that agreements involving nonfarmers are not exempt. *National Broiler Marketing Assn.* v. *United States*, 436 U. S. 816 (1978). As the Court emphasizes, however, the McCarran-Ferguson Act exemption was not written in terms of "insurance companies," but extends instead to the "business of insurance." Hence, the participation of pharmacies does not automatically vitiate the exemption, as does the participation of nonfarmers in the Capper-Volstead "analogy."

Nor is reference to the labor exemption helpful to the Court. The quotation from *Mine Workers* v. *Pennington*, 381 U. S. 657, 665–666 (1965), cited by the Court, *ante*, at 232 n. 39, is in complete accord with what I would conclude here: "[A] union [read 'insurer'] may make wage

does not alone establish whether the agreements enjoy an exemption from the antitrust laws. To be entitled to an exemption, petitioners still would have to demonstrate that the transactions are in fact truly regulated by the State, 15 U. S. C. § 1012 (b), and that they do not fall within the "boycott" exception of 15 U. S. C. § 1013 (b). The District Court held for petitioners on both issues. Neither issue was reached by the Court of Appeals, however, in light of its holding that the contracts were not the "business of insurance." Accord-

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[pharmacy] agreements with a multi-employer bargaining unit [a group of pharmacies] . . . . But . . . [o]ne group of employers [pharmacies] may not conspire to eliminate competitors from the industry and the union [insurer] is liable with the employers [pharmacies] if it becomes a party to the conspiracy." The labor exemption is a particularly poor analogy for the Court to stress because in yet another footnote, *Pennington* expressly approved a set of transactions virtually identical to those complained of in this case. Here, respondents contend that Blue Shield adopted a uniform fee policy, even though it may have suspected that some pharmacies would not be able to compete if required to limit their markup to that demanded by Blue Shield. There was, however, no additional evidence of a conspiracy among the participating pharmacies to drive out their less able brethren, which Blue Shield then joined. This was precisely the set of circumstances held by the *Pennington* Court to be *within* the scope of the exemption:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." 381 U. S., at 665 n. 2.

Thus, the approach taken by the Court today does not merely "narrowly" construe "insurance" in accordance with our general practice. Rather, that approach actively discriminates between kinds of insurance, effectively confining "insurance" to traditional forms and effectively excluding forms that provide full-service coverage via provider agreements. It thereby places a significant obstacle in the path of the latter.

ingly, I would reverse the judgment of the Court of Appeals and remand the case for further proceedings.[26]

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[26] The Court argues, *ante*, at 232 n. 40, that provider agreements may have anticompetitive consequences which could lead to escalation of health-care costs. The argument is not without force, but I must note that the very purpose of an antitrust exemption is to protect anticompetitive conduct. The argument, therefore, is better directed to the legislature, which has the power to modify or repeal McCarran-Ferguson, rather than to this Court. Referral to the legislators is particularly appropriate in this case, as the policy aspects may not be as one-sided as those painted by the Court. There is authority for the proposition that provider agreements, far from increasing costs, constitute an effective means for reduction in health-care prices and premiums. Council on Wage and Price Stability, Employee Health Care Benefits: Labor and Management Sponsored Innovations in Controlling Cost, 41 Fed. Reg. 40298, 40305 (1976). And the argument that "there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level" overlooks the vital consideration that many if not most of these plans originate in collective-bargaining agreements where "the consumer power and negotiating expertise of organized labor" combine to "reduce the unit price of health services." *Ibid.* Control over provider agreements by state insurance commissioners constitutes a second "incentive" operating in the same direction. See n. 18, *supra*. Whether or not the potential anticompetitive impact of McCarran-Ferguson outweighs these positive effects on health-care costs is a judgment properly to be made by Congress.

Syllabus

ARONSON *v.* QUICK POINT PENCIL CO.

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

No. 77–1413. Argued December 6, 1978—Decided February 28, 1979

Petitioner entered into a contract with respondent whereby, in return for the exclusive right to make and sell a keyholder designed by petitioner for which a patent application was pending, respondent agreed to pay petitioner a royalty of 5% of the selling price. If the patent was not allowed within five years, the royalty was to be reduced to 2½% of sales. The patent was not allowed within five years, whereupon respondent accordingly reduced the royalty to 2½%. Subsequently the patent application was rejected. After respondent had paid petitioner royalties for a number of years following rejection of the patent application, it brought an action in District Court seeking a declaratory judgment that the royalty agreement was unenforceable on the ground that state law which otherwise made the contract enforceable was pre-empted by federal patent law. The District Court upheld the contract, but the Court of Appeals reversed, holding that the contract became unenforceable once petitioner failed to obtain a patent within the stipulated 5-year period and that a continuing obligation to pay royalties would be contrary to "the strong federal policy in favor of the full and free use of ideas in the public domain," *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 674. *Held:* Federal patent law does not pre-empt state contract law so as to preclude enforcement of the contract. Cf. *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U. S. 470. Pp. 261–266.

(a) Enforcement of the contract is not inconsistent with the purposes of the federal patent system (1) to foster and reward invention; (2) to promote disclosure of inventions, stimulate further innovation, and permit the public to practice the invention once the patent expires; and (3) to assure that ideas in the public domain remain there for the free use of the public. Pp. 262–264.

(b) Enforcement of the contract does not prevent anyone from copying the keyholder but merely requires respondent to pay the consideration it promised in return for the use of a novel device which enabled it to pre-empt the market. P. 264.

(c) When, as here, no patent has issued, and no ideas have been withdrawn from public use, the case is not controlled by the holding of *Lear, supra,* that a patent licensee who establishes the invalidity of a patent need not pay royalties accrued after the issuance of the patent,

nor by the rationale of that case that it is desirable to encourage licensees to challenge the validity of patents in order to further the strong federal policy that only inventions meeting the rigorous requirements of patentability shall be withdrawn from the public domain. P. 264.

(d) Enforcement of the contract comports with the principle that the monopoly granted *under a patent* cannot lawfully be used "to negotiate with the leverage of that monopoly," *Brulotte* v. *Thys Co.*, 379 U. S. 29, 33, since the challenged reduced royalty, rather than being so negotiated, rested on the contingency that no patent would issue within five years. Pp. 264–265.

567 F. 2d 757, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 266.

C. Lee Cook, Jr., argued the cause for petitioner. With him on the briefs were *David C. Bogan, Robert S. Robin,* and *Robert E. Knechtel.*

Erwin N. Griswold argued the cause and filed a brief for respondent.

Barry Grossman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, Deputy Solicitor General Easterbrook, Stephen M. Shapiro,* and *Roger B. Andewelt.**

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

We granted certiorari, 436 U. S. 943, to consider whether federal patent law pre-empts state contract law so as to pre-

**Ned L. Conley* filed a brief for the Patent, Trademark and Copyright Section of the State Bar of Texas as *amicus curiae* urging reversal.

Edward S. Irons and *Richard H. Stern* filed a brief for Ercon, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Tom Arnold* for the American Patent Law Assn.; and by *Leonard B. Mackey* and *Eugene L. Bernard* for the Licensing Executives Society (U. S. A.), Inc.

clude enforcement of a contract to pay royalties to a patent applicant, on sales of articles embodying the putative invention, for so long as the contracting party sells them, if a patent is not granted.

(1)

In October 1955 the petitioner, Mrs. Jane Aronson, filed an application, Serial No. 542677, for a patent on a new form of keyholder. Although ingenious, the design was so simple that it readily could be copied unless it was protected by patent. In June 1956, while the patent application was pending, Mrs. Aronson negotiated a contract with the respondent, Quick Point Pencil Co., for the manufacture and sale of the keyholder.

The contract was embodied in two documents. In the first, a letter from Quick Point to Mrs. Aronson, Quick Point agreed to pay Mrs. Aronson a royalty of 5% of the selling price in return for "the exclusive right to make and sell keyholders of the type shown in your application, Serial No. 542677." The letter further provided that the parties would consult one another concerning the steps to be taken "[i]n the event of any infringement."

The contract did not require Quick Point to manufacture the keyholder. Mrs. Aronson received a $750 advance on royalties and was entitled to rescind the exclusive license if Quick Point did not sell a million keyholders by the end of 1957. Quick Point retained the right to cancel the agreement whenever "the volume of sales does not meet our expectations." The duration of the agreement was not otherwise prescribed.

A contemporaneous document provided that if Mrs. Aronson's patent application was "not allowed within five (5) years, Quick Point Pencil Co. [would] pay . . . two and one half percent (2½%) of sales . . . so long as you [Quick Point] continue to sell same."†

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†In April 1961, while Mrs. Aronson's patent application was pending, her husband sought a patent on a different keyholder and made plans to

In June 1961, when Mrs. Aronson had failed to obtain a patent on the keyholder within the five years specified in the agreement, Quick Point asserted its contractual right to reduce royalty payments to 2½% of sales. In September of that year the Board of Patent Appeals issued a final rejection of the application on the ground that the keyholder was not patentable, and Mrs. Aronson did not appeal. Quick Point continued to pay reduced royalties to her for 14 years thereafter.

The market was more receptive to the keyholder's novelty and utility than the Patent Office. By September 1975 Quick Point had made sales in excess of $7 million and paid Mrs. Aronson royalties totaling $203,963.84; sales were continuing to rise. However, while Quick Point was able to pre-empt the market in the earlier years and was long the only manufacturer of the Aronson keyholder, copies began to appear in the late 1960's. Quick Point's competitors, of course, were not required to pay royalties for their use of the design. Quick Point's share of the Aronson keyholder market has declined during the past decade.

(2)

In November 1975 Quick Point commenced an action in the United States District Court for a declaratory judgment, pursuant to 28 U. S. C. § 2201, that the royalty agreement was unenforceable. Quick Point asserted that state law which might otherwise make the contract enforceable was pre-empted by federal patent law. This is the only issue presented to us for decision.

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license another company to manufacture it. Quick Point's attorney wrote to the couple that the proposed new license would violate the 1956 agreement. He observed that

"your license agreement is in respect of the disclosure of said Jane [Aronson's] application (not merely in respect of its claims) and that even if no patent is ever granted on the Jane [Aronson] application, *Quick Point Pencil Company is obligated to pay royalties in respect of any keyholder manufactured by it in accordance with any disclosure of said application.*" (Emphasis added.)

Both parties moved for summary judgment on affidavits, exhibits, and stipulations of fact. The District Court concluded that the "language of the agreement is plain, clear and unequivocal and has no relation as to whether or not a patent is ever granted." Accordingly, it held that the agreement was valid, and that Quick Point was obliged to pay the agreed royalties pursuant to the contract for so long as it manufactured the keyholder.

The Court of Appeals reversed, one judge dissenting. 567 F. 2d 757. It held that since the parties contracted with reference to a pending patent application, Mrs. Aronson was estopped from denying that patent law principles governed her contract with Quick Point. Although acknowledging that this Court had never decided the precise issue, the Court of Appeals held that our prior decisions regarding patent licenses compelled the conclusion that Quick Point's contract with Mrs. Aronson became unenforceable once she failed to obtain a patent. The court held that a continuing obligation to pay royalties would be contrary to "the strong federal policy favoring the full and free use of ideas in the public domain," *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 674 (1969). The court also observed that if Mrs. Aronson actually had obtained a patent, Quick Point would have escaped its royalty obligations either if the patent were held to be invalid, see *ibid.*, or upon its expiration after 17 years, see *Brulotte* v. *Thys Co.,* 379 U. S. 29 (1964). Accordingly, it concluded that a licensee should be relieved of royalty obligations when the licensor's efforts to obtain a contemplated patent prove unsuccessful.

(3)

On this record it is clear that the parties contracted with full awareness of both the pendency of a patent application and the possibility that a patent might not issue. The clause de-escalating the royalty by half in the event no patent issued within five years makes that crystal clear. Quick Point apparently placed a significant value on exploiting the basic novelty

of the device, even if no patent issued; its success demonstrates that this judgment was well founded. Assuming, *arguendo,* that the initial letter and the commitment to pay a 5% royalty was subject to federal patent law, the provision relating to the 2½% royalty was explicitly independent of federal law. The cases and principles relied on by the Court of Appeals and Quick Point do not bear on a contract that does not rely on a patent, particularly where, as here, the contracting parties agreed expressly as to alternative obligations if no patent should issue.

Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law. *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U. S. 470, 479 (1974); see *Goldstein* v. *California,* 412 U. S. 546 (1973). In this as in other fields, the question of whether federal law pre-empts state law "involves a consideration of whether that law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941)." *Kewanee Oil Co., supra,* at 479. If it does not, state law governs.

In *Kewanee Oil Co., supra,* at 480–481, we reviewed the purposes of the federal patent system. First, patent law seeks to foster and reward invention; second, it promotes disclosure of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public.

Enforcement of Quick Point's agreement with Mrs. Aronson is not inconsistent with any of these aims. Permitting inventors to make enforceable agreements licensing the use of their inventions in return for royalties provides an additional incentive to invention. Similarly, encouraging Mrs. Aronson

to make arrangements for the manufacture of her keyholder furthers the federal policy of disclosure of inventions; these simple devices display the novel idea which they embody wherever they are seen.

Quick Point argues that enforcement of such contracts conflicts with the federal policy against withdrawing ideas from the public domain and discourages recourse to the federal patent system by allowing states to extend "perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards," *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 232 (1964).

We find no merit in this contention. Enforcement of the agreement does not withdraw any idea from the public domain. The design for the keyholder was not in the public domain before Quick Point obtained its license to manufacture it. See *Kewanee Oil Co., supra,* at 484. In negotiating the agreement, Mrs. Aronson disclosed the design in confidence. Had Quick Point tried to exploit the design in breach of that confidence, it would have risked legal liability. It is equally clear that the design entered the public domain as a result of the manufacture and sale of the keyholders under the contract.

Requiring Quick Point to bear the burden of royalties for the use of the design is no more inconsistent with federal patent law than any of the other costs involved in being the first to introduce a new product to the market, such as outlays for research and development, and marketing and promotional expenses. For reasons which Quick Point's experience with the Aronson keyholder demonstrate, innovative entrepreneurs have usually found such costs to be well worth paying.

Finally, enforcement of this agreement does not discourage anyone from seeking a patent. Mrs. Aronson attempted to obtain a patent for over five years. It is quite true that had she succeeded, she would have received a 5% royalty only on

keyholders sold during the 17-year life of the patent. Offsetting the limited terms of royalty payments, she would have received twice as much per dollar of Quick Point's sales, and both she and Quick Point could have licensed any others who produced the same keyholder. Which course would have produced the greater yield to the contracting parties is a matter of speculation; the parties resolved the uncertainties by their bargain.

(4)

No decision of this Court relating to patents justifies relieving Quick Point of its contract obligations. We have held that a state may not forbid the copying of an idea in the public domain which does not meet the requirements for federal patent protection. *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964); *Sears, Roebuck & Co.* v. *Stiffel Co., supra.* Enforcement of Quick Point's agreement, however, does not prevent anyone from copying the keyholder. It merely requires Quick Point to pay the consideration which it promised in return for the use of a novel device which enabled it to pre-empt the market.

In *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969), we held that a person licensed to use a patent may challenge the validity of the patent, and that a licensee who establishes that the patent is invalid need not pay the royalties accrued under the licensing agreement subsequent to the issuance of the patent. Both holdings relied on the desirability of encouraging licensees to challenge the validity of patents, to further the strong federal policy that only inventions which meet the rigorous requirements of patentability shall be withdrawn from the public domain. *Id.*, at 670–671, 673–674. Accordingly, neither the holding nor the rationale of *Lear* controls when no patent has issued, and no ideas have been withdrawn from public use.

Enforcement of the royalty agreement here is also consistent with the principles treated in *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964). There, we held that the obligation to pay

royalties in return for the use of a patented device may not extend beyond the life of the patent. The principle underlying that holding was simply that the monopoly granted *under a patent* cannot lawfully be used to "negotiate with the leverage of that monopoly." The Court emphasized that to "use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent. . . ." *Id.*, at 33. Here the reduced royalty which is challenged, far from being negotiated "with the leverage" of a patent, rested on the contingency that no patent would issue within five years.

No doubt a pending patent application gives the applicant some additional bargaining power for purposes of negotiating a royalty agreement. The pending application allows the inventor to hold out the hope of an exclusive right to exploit the idea, as well as the threat that the other party will be prevented from using the idea for 17 years. However, the amount of leverage arising from a patent application depends on how likely the parties consider it to be that a valid patent will issue. Here, where no patent ever issued, the record is entirely clear that the parties assigned a substantial likelihood to that contingency, since they specifically provided for a reduced royalty in the event no patent issued within five years.

This case does not require us to draw the line between what constitutes abuse of a pending application and what does not. It is clear that whatever role the pending application played in the negotiation of the 5% royalty, it played no part in the contract to pay the 2½% royalty indefinitely.

Our holding in *Kewanee Oil Co.* puts to rest the contention that federal law pre-empts and renders unenforceable the contract made by these parties. There we held that state law forbidding the misappropriation of trade secrets was not pre-empted by federal patent law. We observed:

> "Certainly the patent policy of encouraging invention is not disturbed by the existence of another form of

incentive to invention. In this respect the two systems [patent and trade secret law] are not and never would be in conflict." 416 U. S., at 484.

Enforcement of this royalty agreement is even less offensive to federal patent policies than state law protecting trade secrets. The most commonly accepted definition of trade secrets is restricted to confidential information which is not disclosed in the normal process of exploitation. See Restatement of Torts § 757, Comment *b*, p. 5 (1939). Accordingly, the exploitation of trade secrets under state law may not satisfy the federal policy in favor of disclosure, whereas disclosure is inescapable in exploiting a device like the Aronson keyholder.

Enforcement of these contractual obligations, freely undertaken in arm's-length negotiation and with no fixed reliance on a patent or a probable patent grant, will

> "encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention." (Footnote omitted.) 416 U. S., at 485.

The device which is the subject of this contract ceased to have any secrecy as soon as it was first marketed, yet when the contract was negotiated the inventiveness and novelty were sufficiently apparent to induce an experienced novelty manufacturer to agree to pay for the opportunity to be first in the market. Federal patent law is not a barrier to such a contract.

Reversed.

MR. JUSTICE BLACKMUN, concurring in the result.

For me, the hard question is whether this case can meaningfully be distinguished from *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964). There the Court held that a patent licensor could not use the leverage of its patent to obtain a royalty contract

that extended beyond the patent's 17-year term. Here Mrs. Aronson has used the leverage of her patent application to negotiate a royalty contract which continues to be binding even though the patent application was long ago denied.

The Court, *ante,* at 265, asserts that her leverage played "no part" with respect to the contingent agreement to pay a reduced royalty if no patent issued within five years. Yet it may well be that Quick Point agreed to that contingency in order to obtain its other rights that depended on the success of the patent application. The parties did not apportion consideration in the neat fashion the Court adopts.

In my view, the holding in *Brulotte* reflects hostility toward extension of a patent monopoly whose term is fixed by statute, 35 U. S. C. § 154. Such hostility has no place here. A patent application which is later denied temporarily discourages unlicensed imitators. Its benefits and hazards are of a different magnitude from those of a granted patent that prohibits all competition for 17 years. Nothing justifies estopping a patent-application licensor from entering into a contract whose term does not end if the application fails. The Court points out, *ante,* at 263, that enforcement of this contract does not conflict with the objectives of the patent laws. The United States, as *amicus curiae,* maintains that patent-application licensing of this sort is desirable because it encourages patent applications, promotes early disclosure, and allows parties to structure their bargains efficiently.

On this basis, I concur in the Court's holding that federal patent law does not pre-empt the enforcement of Mrs. Aronson's contract with Quick Point.

ORR *v.* ORR

APPEAL FROM THE COURT OF CIVIL APPEALS OF ALABAMA

No. 77-1119. Argued November 27, 1978—Decided March 5, 1979

Following a stipulation between appellant husband and appellee wife, in which appellant agreed to pay appellee alimony, an Alabama court, acting pursuant to state alimony statutes under which husbands but not wives may be required to pay alimony upon divorce, ordered appellant to make monthly alimony payments. Some two years thereafter appellee filed a petition seeking to have appellant adjudged in contempt for failing to maintain the alimony payments. At the hearing on the petition appellant, though not claiming that he was entitled to an alimony award from appellee, made the contention (advanced for the first time in that proceeding) that the Alabama statutes, by virtue of their reliance on a gender-based classification, violated the Equal Protection Clause of the Fourteenth Amendment. The trial court, ruling adversely to appellant on that issue, entered judgment against him, which was affirmed on appeal. *Held:*

1. This Court has jurisdiction over appellant's appeal. Pp. 271–278.

(a) Appellant's failure to ask for alimony for himself does not deprive him of standing to attack the constitutionality of the Alabama statutes for underinclusiveness. That attack holds the only promise of relief from the burden deriving from the challenged statutes, and appellant has therefore "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which th[is] court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204. Pp. 271–273.

(b) Had the courts below refused to entertain appellant's constitutional contention on the ground that it was not timely made under applicable state procedures this Court might have lacked jurisdiction to consider the contention; but no timeliness point was raised or considered below and the constitutional issue was decided on the merits. Under these circumstances it is irrelevant whether the decision below could have been based upon an adequate and independent state ground. Pp. 274–275.

(c) No point was raised or considered below that appellant by virtue of the stipulation was obliged to make the alimony payments under state contract law. "Where the state court does not decide

against [an] appellant upon an independent state ground, but deeming the federal question to be before it, actually . . . decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is . . . final . . . ." *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98. Pp. 275–278.

2. The Alabama statutory scheme of imposing alimony obligations on husbands but not wives violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 278–283.

(a) "To withstand scrutiny" under the Equal Protection Clause, " 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano* v. *Webster*, 430 U. S. 313, 316–317. Pp. 278–279.

(b) The statutes cannot be validated on the basis of the State's preference for an allocation of family responsibilities under which the wife plays a dependent role. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton* v. *Stanton*, 421 U. S. 7, 14–15. Pp. 279–280.

(c) Though it could be argued that the Alabama statutory scheme is designed to provide help for needy spouses, using sex as a proxy for need, and to compensate women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce, these considerations would not justify that scheme because under the Alabama statutes individualized hearings at which the parties' relative financial circumstances are considered *already* occur. Since such hearings can determine which spouses are needy as well as which wives were in fact discriminated against, there is no reason to operate by generalization. "Thus, the gender-based distinction is gratuitous . . . ." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 653. Pp. 280–282.

(d) Use of a gender classification, moreover, actually produces perverse results in this case because only a financially secure wife whose husband is in need derives an advantage from the Alabama scheme as compared to a gender-neutral one. Pp. 282–283.

3. The question remains open on remand whether appellant's stipulated agreement to pay alimony, or other grounds of gender-neutral state law, bind him to continue his alimony payments. Pp. 283–284.

351 So. 2d 904, reversed and remanded.

Brennan, J., delivered the opinion of the Court, in which Stewart, White, Marshall, Blackmun, and Stevens, JJ., joined. Blackmun,

J., *post*, p. 284, and STEVENS, J., *post*, p. 284, filed concurring opinions. POWELL, J., filed a dissenting opinion, *post*, p. 285. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 290.

John L. Capell III argued the cause and filed briefs for appellant.

W. F. Horsley argued the cause and filed a brief for appellee.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.[1]

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That decree directed appellant, Mr. Orr, to pay appellee, Mrs. Orr, $1,240 per month in alimony. On July 28, 1976, Mrs. Orr

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**Ruth Bader Ginsburg* and *Margaret Moses Young* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] The statutes, Ala. Code, Tit. 30 (1975), provide that:

"§ 30–2–51. . . . If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.

"§ 30–2–52. . . . If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

"§ 30–2–53. . . . If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife."

The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband. . . . The statutory scheme is to provide alimony only in favor of the wife." *Davis* v. *Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).

initiated a contempt proceeding in the Circuit Court of Lee County, Ala., alleging that Mr. Orr was in arrears in his alimony payments. On August 19, 1976, at the hearing on Mrs. Orr's petition, Mr. Orr submitted in his defense a motion requesting that Alabama's alimony statutes be declared unconstitutional because they authorize courts to place an obligation of alimony upon husbands but never upon wives. The Circuit Court denied Mr. Orr's motion and entered judgment against him for $5,524, covering back alimony and attorney fees. Relying solely upon his federal constitutional claim, Mr. Orr appealed the judgment. On March 16, 1977, the Court of Civil Appeals of Alabama sustained the constitutionality of the Alabama statutes, 351 So. 2d 904. On May 24, the Supreme Court of Alabama granted Mr. Orr's petition for a writ of certiorari, but on November 10, without court opinion, quashed the writ as improvidently granted. 351 So. 2d 906. We noted probable jurisdiction, 436 U. S. 924 (1978). We now hold the challenged Alabama statutes unconstitutional and reverse.

I

We first address three preliminary questions not raised by the parties or the Alabama courts below, but which nevertheless may be jurisdictional and therefore are considered of our own motion.

The first concerns the standing of Mr. Orr to assert in his defense the unconstitutionality of the Alabama statutes. It appears that Mr. Orr made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay.[2] It is therefore possible that his

[2] There is some uncertainty on this point. It may be that appellant's Circuit Court motion challenging the constitutionality of the statutes could be construed as constituting a claim for alimony. The Appeals Court opinion refers to one of Mr. Orr's arguments as challenging the failure of the statutes to "provide for an award of alimony to . . . males . . . ," 351

success here will not ultimately bring him relief from the judgment outstanding against him, as the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives. In that event, Mr. Orr would remain obligated to his wife. It is thus argued that the only "proper plaintiff" would be a husband who requested alimony for himself, and not one who merely objected to paying alimony.

This argument quite clearly proves too much. In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties (*e. g.*, by repealing the statute as a whole). In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia,* amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties. It is true that under the first disposition Mr. Orr might gain nothing from his success in this Court, although the hypothetical "requesting" plaintiff would. However, if instead the State takes the second course and denies alimony to both spouses, it is Mr. Orr and not the hypothetical plaintiff who would benefit. Because we have no way of knowing how the State will in fact respond, unless we are to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted, Mr. Orr must be held to have standing here. We have on several occasions considered this inherent problem of challenges to underinclusive statutes, *Stanton* v. *Stanton,* 421 U. S. 7, 17 (1975); *Craig* v. *Boren,* 429 U. S. 190, 210 n. 24 (1976), and have not denied a plaintiff standing on this ground.

So. 2d 904, 905 (1977), and, in oral argument, appellant's attorney characterized his motion as asserting a claim to such an award. Tr. of Oral Arg. 7–8. Of course, whether or not this was the proper way to assert a claim for alimony may be a question of state law, but the state courts did not challenge appellant's standing on this or any other ground.

There is no question but that Mr. Orr bears a burden he would not bear were he female. The issue is highlighted, although not altered, by transposing it to the sphere of race. There is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay. The burden alone is sufficient to establish standing. Our resolution of a statute's constitutionality often does "not finally resolve the controversy as between th[e] appellant and th[e] appellee," *Stanton* v. *Stanton,* 421 U. S., at 17. We do not deny standing simply because the "appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit." *Id.,* at 18. The holdings of the Alabama courts stand as a total bar to appellant's relief; his constitutional attack holds the only promise of escape from the burden that derives from the challenged statutes. He has therefore "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which th[is] court so largely depends for illumination of difficult constitutional questions," *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 616 (1973), quoting *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). Indeed, on indistinguishable facts, this Court has stated that a party's standing will be sustained. In *Linda R. S.* v. *Richard D., supra,* at 619 n. 5 (MARSHALL, J.), we stated that the parent of a legitimate child who must by statute pay child support has standing to challenge the statute on the ground that the parent of an illegitimate child is not equally burdened.[3]

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[3] Careful examination of appellant's allegations reveals that he may not need to rely upon these arguments to demonstrate his standing, for he alleges that he will receive some relief no matter which gender-neutral reform of the statutes Alabama chooses to make. Even if Alabama chooses to burden both men and women with alimony requirements in appropriate circumstances, Mr. Orr argues that a gender-neutral statute would result in lower payments on his part. He argues that the current statutes award alimony to wives based not solely upon need or comparative financial cir-

A second preliminary question concerns the timeliness of appellant's challenge to the constitutionality of the statutes. No constitutional challenge was made at the time of the original divorce decree; Mr. Orr did not interpose the Constitution until his ex-wife sought a contempt judgment against him for his failure to abide by the terms of the decree. This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear Mr. Orr's constitutional objection on that ground, we might have been without jurisdiction to consider it here. See C. Wright, Federal Courts 541–542 (3d ed. 1976).

But in this case neither Mrs. Orr nor the Alabama courts at any time objected to the timeliness of the presentation of the constitutional issue. Instead, the Alabama Circuit and Civil Appeals Courts both considered the issue to be properly presented and decided it on the merits. See 351 So. 2d, at 905; App. to Juris. Statement 22a. In such circumstances, the objection that Mr. Orr's complaint " 'comes too late' . . . is clearly untenable. . . . [S]ince the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question." *Beecher* v. *Alabama*, 389 U. S. 35, 37 n. 3 (1967). This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court

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cumstances, but also upon gender-related factors—*e. g.*, the State's view that a man must maintain his wife in the manner to which she has been accustomed, *Ortman* v. *Ortman*, 203 Ala. 167, 82 So. 417 (1919). He also argues that alimony agreements are not automatically incorporated into court decrees, but rather are usually first reviewed as to their fairness to the wife, but not to the husband, see *Russell* v. *Russell*, 247 Ala. 284, 286, 24 So. 2d 124, 126 (1945). Given our disposition of the case, we need not resolve these allegations, but they serve to render unassailable appellant's standing to assert the unconstitutionality of the statutes.

below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134 (1914). Accord, *Harlin* v. *Missouri,* 439 U. S. 459 (1979); *Jenkins* v. *Georgia,* 418 U. S. 153, 157 (1974); *Raley* v. *Ohio,* 360 U. S. 423, 436 (1959). See C. Wright, *supra,* at 542.[4]

The third preliminary question arises from indications in the record that Mr. Orr's alimony obligation was part of a stipulation entered into by the parties, which was then incorporated into the divorce decree by the Lee County Circuit Court. Thus, it may be that despite the unconstitutionality of the alimony statutes, Mr. Orr may have a continuing obligation to his former wife based upon that agreement—in essence a matter of state contract law.[5] If the Alabama

[4] This does not preclude any other State, or even Alabama in another case, from holding that contempt proceedings are too late in the process to challenge the constitutionality of a divorce decree already entered without constitutional objection—assuming, of course, that the State's prior proceedings permit fair opportunity to assert the federal right, see *NAACP* v. *Alabama,* 377 U. S. 288 (1964). Indeed, as our Brother POWELL points out, *post, at* 286, Alabama apparently has a similar rule. See *Hughes* v. *Hughes,* 362 So. 2d 910 (Ala. Civ. App.), cert. dismissed as improvidently granted, 362 So. 2d 918 (Ala. 1978), appeal docketed, No. 78–1071. There is, therefore, no reason for concern that today's decision might nullify existing alimony obligations. But the fact that state courts *can* decline to hear such tardily raised constitutional challenges does not mean that as a matter of federal law they *must* do so. And where they decide instead to reach the federal question, this Court has jurisdiction. See *Beecher* v. *Alabama,* 389 U. S. 35, 37 n. 3 (1967), and cases cited in text, *supra,* this page.

[5] Whether Mrs. Orr's contempt judgment would survive on the basis of the stipulation alone depends upon the resolution of somewhat knotty state-law problems. The foremost of these is the fact that the present suit is not a simple action for breach of contract, but rather a contempt proceeding for disobeying the court's divorce decree. Moreover, under Alabama law, the divorce court judge does not automatically approve stipulated settlements, but must review them for fairness. *Russell* v. *Russell, supra.* How the Alabama courts would treat Mr. Orr's stipulation

courts had so held, and had anchored their judgments in this case on that basis, an independent and adequate state ground might exist and we would be without power to hear the constitutional argument. See *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126 (1945); *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935). And if there were ambiguity as to whether the State's decision was based on federal or state grounds, it would be open to this Court not to determine the federal question, but to remand to the state courts for clarification as to the ground of the decision. See *California* v. *Krivda,* 409 U. S. 33 (1972).

But there is no ambiguity here. At no time did Mrs. Orr raise the stipulation as a possible alternative ground in support of her judgment. Indeed, her brief in the Alabama Court of Civil Appeals expressly stated that "[t]he appellee agrees that the issue before this Court is whether the Alabama alimony laws are unconstitutional because of the gender based classification made in the statutes." App. to Juris. Statement 25a. The Alabama Circuit and Civil Appeals Courts reached and decided the federal question without considering any state-law issues, the latter specifying that "[t]he sole issue before this court is whether Alabama's alimony statutes are unconstitutional. We find they are not unconstitutional and affirm." 351 So. 2d, at 905. While no reason was given by the State Supreme Court's majority for quashing the writ of certiorari, the concurring and dissenting opinions mention only the federal constitutional issue and do not mention the stipulation. See 351 So. 2d, at 906–910. And Mrs. Orr did not even raise the point in this Court. On this record, then, our course is clear and dictated by a long line of decisions.

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually

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after the invalidation of the gender-based alimony statutes is a matter which we cannot, and would not, predict.

> entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground." *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 98 (1938).

Accord, *United Air Lines, Inc.* v. *Mahin,* 410 U. S. 623, 630–631 (1973); *Poafpybitty* v. *Skelly Oil Co.,* 390 U. S. 365, 375–376 (1968); *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 197 n. 1 (1944); *International Steel & Iron Co.* v. *National Surety Co.,* 297 U. S. 657, 666 (1936); *Grayson* v. *Harris,* 267 U. S. 352, 358 (1925); *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120 (1924); *Rogers* v. *Hennepin County,* 240 U. S. 184, 188–189 (1916). See C. Wright, Federal Courts, at 544.[6]

Our analysis of these three preliminary questions, therefore, indicates that we do have jurisdiction over the constitutional challenge asserted by Mr. Orr.[7] As an Art. III "case or

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[6] The fact that the State Supreme Court merely quashed the petition for certiorari, so that the highest state court actually to decide the merits of the case was the Court of Appeals, does not alter this result. In *Cicenia* v. *Lagay,* 357 U. S. 504, 507–508, n. 2 (1958), overruled on other grounds, *Miranda* v. *Arizona,* 384 U. S. 436, 479 n. 48 (1966), for example, the New Jersey Superior Court decided the case on federal constitutional grounds, although state grounds might have been available, and the State Supreme Court denied certification without giving reasons—precisely the situation present here. In fact, the claim that an independent state ground existed was even stronger in *Cicenia* than here, because there the trial court, the Essex County Court, had rested its decision on state law. Nonetheless, *Cicenia* held:

"Since the Superior Court had dealt with petitioner's constitutional claims on the merits . . . jurisdiction exists. . . . [W]e shall not assume that the New Jersey Supreme Court's decision denying leave to appeal was based on th[e] nonfederal ground." 357 U. S., at 507–508, n. 2.

[7] Our Brother REHNQUIST's dissent contends that *Doremus* v. *Board of Education,* 342 U. S. 429 (1952), requires dismissal of Mr. Orr's appeal. The quotation from *Doremus* cited by our Brother REHNQUIST, *post,* at

controversy" has been properly presented to this Court, we now turn to the merits.[8]

II

In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme "provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause," *Reed* v.

299, merely confirms the obvious proposition that a state court cannot confer standing before this Court on a party who would otherwise lack it. But that proposition is wholly irrelevant to this case. Although a state court cannot confer standing in this Court, it can decline to place purely state-law obstacles in the way of an appellant's right to have this Court decide his federal claim. Our Brother REHNQUIST argues that a matter of state contract law, albeit unsettled, denies Orr his otherwise clear standing. But that could only be the case if the Alabama courts had construed the stipulation as continuing to bind Mr. Orr—something which the Alabama courts did not do. By addressing and deciding the merits of Mr. Orr's constitutional argument, the Alabama courts have declined to interpose this obstacle to Mr. Orr's standing.

[8] Our Brother POWELL's dissent makes two objections to our reaching the merits of this case. The first is that this Court should abstain from deciding the constitutional issue until the cause is remanded to afford the Alabama Supreme Court a second opportunity to consider the case. For authority he cites opinions applying the so-called "*Pullman* abstention" doctrine. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). But that doctrine is applicable only where the state court to be deferred to has not previously examined the case. Not one of the long string of opinions cited by our Brother POWELL, *post*, at 285–286, approved abstention in a situation like this one, where the court to which the question would be referred already considered the case.

The more surprising, indeed disturbing, objection made by our Brother POWELL is the suggestion that the parties may have colluded to bring the constitutional issue before this Court. *Post*, at 288–289, and n. 4. No evidence whatever, within or outside the record, supports that accusation. And our Brother POWELL suggests none. Indeed, it is difficult to imagine what possible interest Mrs. Orr could have in helping her ex-husband resist her demand for $5,524 in back alimony.

Reed, 404 U. S. 71, 75 (1971). The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. *Craig* v. *Boren,* 429 U. S. 190 (1976). "To withstand scrutiny" under the Equal Protection Clause, " 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977). We shall, therefore, examine the three governmental objectives that might arguably be served by Alabama's statutory scheme.

Appellant views the Alabama alimony statutes as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens. Cf. *Stern* v. *Stern,* 165 Conn. 190, 332 A. 2d 78 (1973). We agree, as he urges, that prior cases settle that this purpose cannot sustain the statutes.[9] *Stanton* v. *Stanton,* 421 U. S. 7, 10 (1975), held that the "old notio[n]" that "generally it is the man's primary responsibil-

[9] Appellee attempts to buttress the importance of this objective by arguing that while "[t]he common law stripped the married woman of many of her rights and most of her property, . . . it attempted to partially compensate by giving her the assurance that she would be supported by her husband." Brief for Appellee 11–12. This argument, that the "support obligation was imposed by the common law to compensate the wife for the discrimination she suffered at the hands of the common law," *id.,* at 11, reveals its own weakness. At most it establishes that the alimony statutes were part and parcel of a larger statutory scheme which invidiously discriminated against women, removing them from the world of work and property and "compensating" them by making their designated place "secure." This would be reason to invalidate the entire discriminatory scheme—not a reason to uphold its separate invidious parts. But appellee's argument is even weaker when applied to the facts of this case, as Alabama has long ago removed, by statute, the elements of the common law appellee points to as justifying further discrimination. See Ala. Const., Art. X, § 209 (married women's property rights).

ity to provide a home and its essentials," can no longer justify a statute that discriminates on the basis of gender. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas," *id.*, at 14–15. See also *Craig* v. *Boren, supra,* at 198. If the statute is to survive constitutional attack, therefore, it must be validated on some other basis.

The opinion of the Alabama Court of Civil Appeals suggests other purposes that the statute may serve. Its opinion states that the Alabama statutes were "designed" for "the wife of a broken marriage who needs financial assistance," 351 So. 2d, at 905. This may be read as asserting either of two legislative objectives. One is a legislative purpose to provide help for needy spouses, using sex as a proxy for need. The other is a goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce. We concede, of course, that assisting needy spouses is a legitimate and important governmental objective. We have also recognized "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women . . . as . . . an important governmental objective," *Califano* v. *Webster, supra,* at 317. It only remains, therefore, to determine whether the classification at issue here is "substantially related to achievement of those objectives." *Ibid.*[10]

Ordinarily, we would begin the analysis of the "needy spouse" objective by considering whether sex is a sufficiently "accurate proxy," *Craig* v. *Boren, supra,* at 204, for dependency to establish that the gender classification rests " 'upon

[10] Of course, if upon examination it becomes clear that there is no substantial relationship between the statutes and their purported objectives, this may well indicate that these objectives were not the statutes' goals in the first place. See Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155 (1978).

some ground of difference having a fair and substantial relation to the object of the legislation,'" *Reed* v. *Reed, supra,* at 76. Similarly, we would initially approach the "compensation" rationale by asking whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification, leaving the sexes "*not* similarly situated with respect to opportunities" in that sphere, *Schlesinger* v. *Ballard,* 419 U. S. 498, 508 (1975). Compare *Califano* v. *Webster, supra,* at 318, and *Kahn* v. *Shevin,* 416 U. S. 351, 353 (1974), with *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 648 (1975).[11]

But in this case, even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would "not adequately justify the salient features of" Alabama's statutory scheme, *Craig* v. *Boren, supra,* at 202–203. Under the statute, individualized hearings at which the parties' relative financial circumstances are considered *already* occur. See *Russell* v. *Russell,* 247 Ala. 284, 286, 24 So. 2d 124, 126 (1945); *Ortman* v. *Ortman,* 203 Ala. 167, 82 So. 417 (1919). There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy.[12] Similarly, since individualized hearings can

[11] We would also consider whether the purportedly compensatory "classifications in fact penalized women," and whether "the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination." *Califano* v. *Webster,* 430 U. S., at 317.

[12] It might be argued that Alabama's rule at least relieves the State of the administrative burden of actions by husbands against their wives for alimony. However, when the wife is also seeking alimony, no savings will occur, as a hearing will be required in any event. But even when the wife is willing to forgo alimony, it appears that under Alabama law savings will still not accrue, as Alabama courts review the financial circumstances

determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex. "Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids," *Weinberger* v. *Wiesenfeld, supra,* at 653, and the effort to help those women would not in any way be compromised.

Moreover, use of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation. Thus, "[t]he [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands," *Califano* v. *Goldfarb,* 430 U. S. 199, 221 (1977) (STEVENS, J., concurring in judgment). They are precisely those who are not "needy spouses" and who are "least likely to have been victims of . . . discrimination," *ibid.,* by the institution of marriage. A gender-based classification which, as compared to a

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of the parties to a divorce despite the parties' own views—even when settlement is reached. See *Russell* v. *Russell,* 247 Ala. 284, 286, 24 So. 2d 124, 126 (1945). Even were this not true, and some administrative time and effort were conserved, "[t]o give a mandatory preference to members of either sex . . . merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause," *Reed* v. *Reed,* 404 U. S. 71, 76 (1971).

gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. Cf. *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 173–174 (1977) (opinion concurring in part). Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound—if only indirectly—to the benefit of those without need for special solicitude.

III

Having found Alabama's alimony statutes unconstitutional, we reverse the judgment below and remand the cause for further proceedings not inconsistent with this opinion. That disposition, of course, leaves the state courts free to decide any questions of substantive state law not yet passed upon in this litigation. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 109 (1938); C. Wright, Federal Courts, at 544. See *South Dakota* v. *Opperman,* 428 U. S. 364, 396 (1976) (MARSHALL, J., dissenting); *United Air Lines, Inc.* v. *Mahin,* 410 U. S., at 632; *California* v. *Green,* 399 U. S. 149, 169–170 (1970); *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, 512 (1938); *Georgia R. & Elec. Co.* v. *Decatur,* 297 U. S. 620, 623–624 (1936). Therefore, it is open to the Alabama courts on remand to consider whether Mr. Orr's stipulated agreement to

pay alimony, or other grounds of gender-neutral state law, bind him to continue his alimony payments.[13]

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring.

On the assumption that the Court's language concerning discrimination "in the sphere" of the relevant preference statute, *ante,* at 281, does not imply that society-wide discrimination is always irrelevant, and on the further assumption that that language in no way cuts back on the Court's decision in *Kahn* v. *Shevin,* 416 U. S. 351 (1974), I join the opinion and judgment of the Court.

MR. JUSTICE STEVENS, concurring.

Whether Mr. Orr has a continuing contractual obligation to pay alimony to Mrs. Orr is a question of Alabama law that the Alabama courts have not yet decided. In Part I–B of his opinion, MR. JUSTICE REHNQUIST seems to be making one of two alternative suggestions:

(1) that we should decide the state-law issue; or

[13] *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 109 (1938), is dispositive to this effect. There, the Indiana state courts had available two potential grounds for upholding the actions of a public school in dismissing a teacher. One was a matter purely of state law; the other required holding that the dismissal had not violated the Contracts Clause of the Federal Constitution. The Indiana courts chose the latter course and did not pass upon the state question. While recognizing that the state ground could have been relied upon, *Anderson* held, as we have held here, that the decision of the state court to reach the merits of the constitutional question without relying on the potential state ground gave this Court jurisdiction. As we have done here, the Court in *Anderson* proceeded to decide the federal question against the State and reversed the judgment below. The case was remanded, the Court noting that the state-law ground was still available as a defense for the school and could be so considered by the state courts. Similarly, the effect of Mr. Orr's stipulation, and any other matter of substantive state law not yet passed upon, may now be considered by the Alabama courts on remand.

(2) that we should direct the Supreme Court of Alabama to decide that issue before deciding the federal constitutional issue.

In my judgment the Court has correctly rejected both of these alternatives. To accept either—or a rather confused blend of the two—would violate principles of federalism that transcend the significance of this case.* I therefore join the Court's opinion.

MR. JUSTICE POWELL, dissenting.

I agree with MR. JUSTICE REHNQUIST that the Court, in its desire to reach the equal protection issue in this case, has dealt too casually with the difficult Art. III problems which confront us. Rather than assume the answer to questions of state law on which the resolution of the Art. III issue should depend, and which well may moot the equal protection question in this case, I would abstain from reaching either of the constitutional questions at the present time.

This Court repeatedly has observed:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs Court* v. *Moore,* 420 U. S. 77, 83 (1975).

See *Elkins* v. *Moreno,* 435 U. S. 647 (1978); *Boehning* v. *Indiana State Employees Assn., Inc.,* 423 U. S. 6 (1975); *Askew* v. *Hargrave,* 401 U. S. 476 (1971); *Reetz* v. *Bozanich,*

*Even if I could agree with MR. JUSTICE REHNQUIST's view that Mr. Orr's probability of success on the state-law issue is so remote that we should deny him standing to argue the federal question decided by the Alabama Supreme Court, I still would not understand how he reached the conclusion that the litigation between Mr. and Mrs. Orr is not a "case or controversy" within the meaning of Art. III.

397 U. S. 82 (1970); *Aldrich* v. *Aldrich*, 378 U. S. 540 (1964); *Dresner* v. *Tallahassee*, 378 U. S. 539 (1964); *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207 (1960); *Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). The Court should follow this principle in the present case.

Here there are present two questions of state law, the resolution of which almost certainly will determine the outcome of this litigation, and at the least will substantially alter the issues presented. The Court concedes that Alabama properly might regard this challenge to the terms of the divorce decree as untimely, as it came for the first time—more than two years after the decree became final—in a contempt proceeding to enforce the alimony obligation. *Ante*, at 275 n. 4. Moreover, appellant had interposed no objection to the entry of the decree and the approval therein of the settlement agreement, nor had he questioned the validity of the Alabama statute. If, in these circumstances, provisions of a divorce decree are subject to collateral attack, grave questions will arise in Alabama and other States. It hardly need be said that the policy of repose embodied in a prohibition of collateral attack has especial importance with respect to divorce and alimony decrees. It is not surprising, therefore, that subsequent to its decision in this case the Alabama Court of Civil Appeals held that a claim identical to appellant's would not be considered, where the husband raised it for the first time on a motion for a new trial. *Hughes* v. *Hughes*, 362 So. 2d 910, cert. dismissed as improvidently granted, 362 So. 2d 918 (Ala. 1978), appeal docketed, No. 78–1071. This holding should apply *a fortiori* to a case where the constitutional claim was not raised until a contempt proceeding.

The second question of state law concerns the formal settlement agreement entered into between appellant and appellee, which deals in detail with the "property rights, alimony, and

other matters in dispute" between the parties, and which was approved by the divorce court. The agreement requires the husband to pay $1,240 per month for the "support and maintenance, use and comfort" of the wife for her life or until she remarries. It also specifies that the terms and provisions of the agreement "shall inure to and be binding upon the parties hereto and their respective heirs, assigns, executors, administrators and legal representatives." App. 7–15. Although the Court does not view this agreement as any obstacle to reaching the constitutional question, it does acknowledge that appellant "may have a continuing obligation to his former wife based upon that agreement"—as a matter of "state contract law" quite apart from the divorce decree. *Ante,* at 275.

If appellant's collateral attack on the terms of the divorce decree could not properly be entertained under Alabama law, or if the alimony obligation assumed by appellant in the settlement agreement remains enforceable under Alabama law, the question whether this Court constitutionally may exercise jurisdiction over the dispute would be close and difficult.[1] In addition, it would be unnecessary to consider the constitutionality of Alabama's divorce statute, as the adequate-and-independent-state-ground doctrine then would bar federal review of the judgment against appellant.[2]

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[1] The Court confuses the questions of the existence of a case or controversy under Art. III with the application of the adequate-and-independent-state-ground doctrine. It is true that the failure of the courts below to rest their decision on a state-law ground means that we are not without power to decide the case *for that reason.* Cf. *Murdock* v. *Memphis,* 20 Wall. 590 (1875). But this does not determine whether the presence in fact of state-law grounds for the decision below bars a federal court from considering this claim under *Supervisors* v. *Stanley,* 105 U. S. 305 (1882).

[2] The Court implies that principles of equitable abstention expressed in the *Pullman* decision never can apply when the court to which the unresolved question of state law will be referred already has considered the case. *Ante,* at 278 n. 8. But, as the unusual posture of this case illustrates, a state court may have considered a case without having had the

The Court, in order to find a case or controversy present here, necessarily assumes the answer to both of the state-law questions in this case. In some circumstances such assumptions might be appropriate. We cannot anticipate every state-law issue that ultimately could bar the realization of an otherwise substantial federal claim, and the failure of either the state courts or the parties to address an issue ordinarily might indicate that it does not present a problem. But here the Court concedes the substantiality of the identified but unanswered questions. Indeed, in light of *Hughes* v. *Hughes, supra,* it could not do otherwise.

The uncertainty and ambiguity surrounding this case is accentuated by the fact that appellant apparently does not contend that the entire divorce decree is invalid; he seeks relief only from so much of the decree as imposes an alimony obligation. But this obligation is only one element of the detailed and comprehensive agreement signed by the parties and witnessed by their respective attorneys. The agreement was not made subject to the approval of the divorce court. Apart from whether the contractual obligation to pay alimony remains binding on appellant, is there a question as to the binding effect of the divorce itself upon appellee? Would she have agreed to divorce appellant without a contest, and without making a record of her grounds for divorce, unless she had the assurance of a valid and enforceable court order providing support and maintenance for her lifetime?

Apparently none of these questions was raised in either of the Alabama courts. No explanation has been offered us as to why the case is presented here in this manner.[3] In view of

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relevant state-law questions presented to it. See n. 3, *infra.* Where this is true, the policies that underlie *Pullman* should apply with equal force.

[3] As the Court notes, in appellee's brief in the Alabama Court of Civil Appeals she stated that "[t]he appellee agrees that the issue before this Court is whether the Alabama alimony laws are unconstitutional because of the gender based classification made in the statutes." *Ante,* at 276. She

the substantiality of the unanswered questions, it must be conceded that serious doubts exist as to either the presence of a judicially cognizable case or controversy or to appellant's obtaining any advantage from his constitutional claim. The failure of the parties to raise the questions in the courts below, and of the courts to raise them *sua sponte*, cannot bind us. On the record before us it cannot be said with assurance that the interests of these parties before this Court are fully adversary or that they are not seeking—for reasons undisclosed—a purely advisory opinion on a constitutional issue of considerable importance.[4]

In these circumstances, I find the Court's insistence upon reaching and deciding the merits quite irreconcilable with the long-established doctrine that we abstain from reaching a federal constitutional claim that is premised on unsettled questions of state law without first affording the state courts

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made no reference to Alabama authority that already had held that constitutional attacks on the divorce statute would not be heard unless presented at the time the divorce is contested. See *Dale* v. *Dale*, 54 Ala. App. 505, 310 So. 2d 225 (1975). Even more inexplicable, appellee before this Court has made no reference to *Hughes* v. *Hughes*, 362 So. 2d 910 (Ala. App.), cert. dismissed as improvidently granted, 362 So. 2d 918 (Ala. 1978), appeal docketed, No. 78–1071, in spite of that decision's clear relevance to this case. It is pertinent that the initial decision in *Hughes* was handed down more than seven months before appellee filed her brief before us, and that the final decision of the Supreme Court of Alabama was announced a month before argument in this case.

[4] It is curious, to say the least, that neither party in this case has raised these questions. The competency of appellee's counsel is evidenced by the thoroughness of the settlement agreement he negotiated and witnessed. Moreover, the questions not raised are neither abstruse nor difficult. In view of the way in which this case has been presented, we cannot dismiss the possibility of some rapprochement between these parties that could affect the genuineness of a case or controversy. There may well be an innocent explanation for these most unusual circumstances, but the absence of any such explanation appearing from the record suggests the wisdom of not deciding the constitutional issue.

an opportunity to resolve such questions. I therefore would remand the case to the Supreme Court of Alabama.

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

In Alabama only wives may be awarded alimony upon divorce. In Part I of its opinion, the Court holds that Alabama's alimony statutes may be challenged in this Court by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife and did so without objection for over two years. I think the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the "case and controversy" requirement of Art. III of the Constitution.

I

The architects of our constitutional form of government, to assure that courts exercising the "judicial power of the United States" would not trench upon the authority committed to the other branches of government, consciously limited the Judicial Branch's "right of expounding the Constitution" to "cases of a Judiciary Nature" [1]—that is, to actual "cases" and "controversies" between genuinely adverse parties. Central to this Art. III limitation on federal judicial power is the concept of standing. The standing inquiry focuses on the party before the Court, asking whether he has " 'such a per-

[1] 2 M. Farrand, The Records of the Federal Convention of 1787, p. 430 (1911). Indeed, on four different occasions the Constitutional Convention rejected a proposal, contained in the "Virginia Plan," to associate Justices of the Supreme Court in a counsel of revision designed to render advice on pending legislation. 1 *id.*, at 21. Suggestions that the Chief Justice be a member of the Privy Council to assist the President, and that the President or either House of Congress be able to request advisory opinions of the Supreme Court were likewise rejected. 2 *id.*, at 328–329, 340–344.

sonal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin,* 422 U. S. 490, 498–499 (1975) (emphasis in original), quoting *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). Implicit in the concept of standing, are the requirements of injury in fact and causation. To demonstrate the "personal stake" in the litigation necessary to satisfy Art. III, the party must suffer "a distinct and palpable injury," *Warth* v. *Seldin, supra,* at 501, that bears a " 'fairly traceable' causal connection" to the challenged government action. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 72 (1978), quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 261 (1977). When a party's standing to raise an issue is questioned, therefore, "the relevant inquiry is whether . . . [he] has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U. S. 26, 38 (1976). Stated differently, a party who places a question before a federal court must "stand to profit in some personal interest" from its resolution, else the exercise of judicial power would be gratuitous. *Id.,* at 39.

The sole claim before this Court is that Alabama's alimony statutes, which provide that only husbands may be required to pay alimony upon divorce, violate the Equal Protection Clause of the Fourteenth Amendment. Statutes alleged to create an impermissible gender-based classification are generally attacked on one of two theories. First, the challenged classification may confer on members of one sex a benefit not conferred on similarly situated members of the other sex. Clearly, members of the excluded class—those who but for their sex would be entitled to the statute's benefits—have a sufficient "personal stake" in the outcome of an equal protection challenge to the statute to invoke the power of the federal judiciary. Thus, a widower has standing to question

the constitutionality of a state statute granting a property tax exemption only to widows. See *Kahn* v. *Shevin,* 416 U. S. 351 (1974). Likewise, this Court has reached the merits of a retired male wage earner's equal protection challenge to a federal statute granting higher monthly old-age benefits to similarly situated female wage earners. See *Califano* v. *Webster,* 430 U. S. 313 (1977). Standing to raise these constitutional claims was not destroyed by the fact that the State of Florida in *Kahn,* and Congress in *Webster,* were capable of frustrating a victory in this Court by merely withdrawing the challenged statute's benefits from the favored class rather than extending them to the excluded class. See *Stanton* v. *Stanton,* 421 U. S. 7, 17 (1975).

Second, the challenged statute may saddle members of one sex with a burden not borne by similarly situated members of the other sex. Standing to attack such a statute lies in those who labor under its burden. For example, in *Califano* v. *Goldfarb,* 430 U. S. 199 (1977), this Court sustained a widower's equal protection challenge to a provision of the Social Security Act that burdened widowers but not widows with the task of proving dependency upon the deceased spouse in order to qualify for survivor's benefits. A similar statute was invalidated in *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), at the instance of a female member of the uniformed services who, unlike her male counterparts, was required to prove her spouse's dependency in order to obtain increased quarters allowances and health benefits.

The statutes at issue here differ from those discussed above in that the benefit flowing to divorced wives derives from a burden imposed on divorced husbands. Thus, Alabama's alimony statutes in effect create two gender classifications: that between needy wives, who can be awarded alimony under the statutes, and needy husbands, who cannot; and that between financially secure husbands, who can be required to pay alimony under the statutes, and financially secure wives, who

cannot. Appellant Orr's standing to raise his equal protection claim must therefore be analyzed in terms of both of these classifications.

A

This Court has long held that in order to satisfy the injury-in-fact requirement of Art. III standing, a party claiming that a statute unconstitutionally withholds a particular benefit must be in line to receive the benefit if the suit is successful. In *Supervisors* v. *Stanley,* 105 U. S. 305 (1882), shareholders of a national bank attacked the validity of a state property tax statute that did not, contrary to federal law, permit deduction of personal debts from the assessed value of their bank stock. With respect to the constitutional claim of shareholders who had failed to allege the existence of personal debts that could be deducted under a valid statute, the Court reasoned:

> "What is there to render the [state statute] void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?
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> ". . . If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void, is an assumption of authority uncalled for by the merits

of the case, and unnecessary to the assertion of the rights of any party to the suit." *Id.*, at 311–312.

It is undisputed that the parties now before us are "a needy wife who qualifies for alimony and a husband who has the property and earnings from which alimony can be paid." 351 So. 2d 906, 907 (1977) (Jones, J., dissenting). Under the statute pertinent to the Orrs' divorce, alimony may be awarded against the husband only "[i]f the wife has no separate estate or if it be insufficient for her maintenance." Ala. Code § 30–2–51 (1975). At the time of their divorce, Mr. Orr made no claim that he was not in a position to contribute to his needy wife's support, much less that she should be required to pay alimony to him.[2] On the contrary, the amount of alimony awarded by the Alabama trial court was agreed to by the parties, and appellant has never sought a reduction in his ali-

[2] The Court suggests that "[i]t may be that appellant's Circuit Court motion challenging the constitutionality of the statutes could be construed as constituting a claim for alimony." *Ante*, at 271–272, n. 2. The Court further notes that in any event, "the state courts did not challenge appellant's standing on this or any other ground." *Ibid.*

Appellant's motion, made in response to the court's order to show cause why he should not be judged in contempt, provides in pertinent part:

"WHEREFORE, your Respondent moves the Court for an order decreeing that:

"1. *Code of Alabama*, Title 34, §§ 31–33 arbitrarily discriminate against male spouses and thus are in violation of the equal protection clause of the United States Constitution and thereby are unconstitutional.

"2. A permanent injunction be issued against the continued enforcement of these statutes.

"3. The decree ordering your Respondent to pay the Complainant alimony be rendered null and void." App. to Juris. Statement 24a. How this can be construed as constituting a claim for alimony is beyond me. That the state courts did not challenge appellant's standing on his failure to claim entitlement to alimony is wholly irrelevant. We are not here concerned with the question whether Mr. Orr lacked standing under state law to bring this suit in an Alabama court. The Case and Controversy Clause of Art. III is a constitutional limitation on the jurisdiction of *federal* courts. See *Doremus* v. *Board of Education*, 342 U. S. 429 (1952).

mony obligation on the ground of changed financial circumstances. See *Davis* v. *Davis,* 274 Ala. 277, 147 So. 2d 828 (1962); *Garlington* v. *Garlington,* 246 Ala. 665, 22 So. 2d 89 (1945). On these facts, it is clear that appellant is not in a position to benefit from a sex-neutral alimony statute.[3] His standing to raise the constitutional question in this case, therefore, cannot be founded on a claim that he would, but for his sex, be entitled to an award of alimony from his wife under the Alabama statutes.

B

The Court holds that Mr. Orr's standing to raise his equal protection claim lies in the burden he bears under the Alabama statutes. He is required to pay alimony to his needy former spouse while similarly situated women are not. That

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[3] The Court states that appellant's standing is rendered "unassailable" by his allegations (1) that under Alabama law a man must maintain his wife in a manner to which she has been accustomed, and (2) that alimony stipulations are reviewed as to their fairness to the wife before being incorporated into court decrees. *Ante,* at 273–274, n. 3. The Court interprets these allegations as an argument by appellant "that a gender-neutral statute would result in lower payments on his part." *Ibid.*

First, appellant nowhere argues that his alimony obligation would have been less under a sex-neutral statute. The allegations cited by the Court are made in support of appellant's contention that the Alabama alimony statutes were inspired by "archaic notions" about the proper role of women—a contention going to the merits of his equal protection claim rather than his standing to raise it. Second, since his alimony obligation was fixed by an agreement between the parties, appellant could not have seriously made such an argument in any event. Third, even if he had made the argument attributed to him by the Court, it is patently meritless. A gender-neutral alimony statute, by definition, treats husbands and wives the same. Presumably, therefore, a husband claiming under such a statute would be entitled to an amount sufficient to support him in the manner to which he had been accustomed and would be entitled to judicial review of the fairness of any alimony stipulation before its incorporation into the court decree. Far from rendering Mr. Orr's standing "unassailable," the allegations seized upon by the Court are utterly beside the point.

the State may render Mr. Orr's victory in this Court a hollow one by neutrally extending alimony rights to needy husbands does not, according to the Court, destroy his standing, for the State may elect instead to do away with alimony altogether. The possibility that Alabama will turn its back on the thousands of women currently dependent on alimony checks for their support [4] is, as a practical matter, nonexistent. But my conclusion that appellant lacks standing in this Court does not rest on the strong likelihood that Alabama will respond to today's decision by passing a sex-neutral statute. Appellant has simply not demonstrated that either alternative open to the State—even the entire abrogation of alimony—will free him of his burden.

The alimony obligation at issue in this case was fixed by an agreement between the parties, and appellant makes no claim that the contract is unenforceable under state law. Indeed, the Court itself concedes that "despite the unconstitutionality of the alimony statutes, Mr. Orr may have a continuing obligation to his former wife based upon [their] agreement." *Ante,* at 275. The Court casually dismisses the matter, however, as one "which we cannot, and would not, predict." *Ante,* at 276 n. 5.

I cannot accede to the Court's offhand dismissal of so serious an obstacle to the exercise of our jurisdiction. It is not our duty to establish Orr's standing to have his claim decided on the merits. On the contrary, the burden is on him "to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the [uncon-

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[4] The Court suggests that because the Alabama courts are free to hold that the constitutionality of a divorce decree entered without constitutional objection cannot be challenged in contempt proceedings, there is no reason for concern that today's decision will nullify existing alimony obligations. Alabama males currently under court order to pay alimony, however, need not wait until contempt proceedings are lodged against them to raise their constitutional challenge. Rather, they may simply petition the court for relief from the unconstitutional divorce decree.

stitutional statute], or that prospective relief will remove the harm." *Warth* v. *Seldin,* 422 U. S., at 505; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S., at 72; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 260–261; *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U. S., at 38; *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). That appellant has not carried this burden is clearly demonstrated by the Court's acknowledgment that his alimony obligation may well be enforced under state contract law.

The Court's analysis of Mr. Orr's standing is not aided by its attempt to transform the instant case into one involving race discrimination. See *ante,* at 273. Of course, a state law imposing alimony obligations on blacks but not whites could be challenged by a black required, by operation of the statute, to pay alimony. Invalidation of the discriminatory alimony statute would relieve him of his burden. If, however, his alimony obligation was enforceable under state *contract* law independent of the challenged alimony statute, he could hardly argue that his injury was *caused* by the challenged statute. Invalidation of the statute would bring him no relief. Accordingly, the exercise of federal judicial power on his behalf "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* at 38.

Nor is the Court's conclusion supported by *Linda R. S.* v. *Richard D., supra.* At issue in *Linda R. S.* was a state statute subjecting to criminal prosecution any "parent" failing to support his "children." State courts had consistently construed the statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. The mother of an illegitimate child, claiming that the "discriminatory application" of the statute violated the Equal Protection Clause, sought an injunction directing the local district attorney to prosecute the father of her child for violating the statute. This Court held that she lacked stand-

ing to raise her claim. While she "no doubt suffered an injury stemming from the failure of her child's father to contribute support payments," she had made "no showing that her failure to secure support payments result[ed] from the nonenforcement, as to her child's father, of [the child-support statute]." 410 U. S., at 618.

> "Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case." *Ibid.*

Like appellant in *Linda R. S.*, Mr. Orr has failed to show a "substantial likelihood" [5] that the requested relief will result in termination of his alimony obligation. Thus, far from supporting the Court's finding of standing in appellant Orr, *Linda R. S.* leads inescapably to the opposite conclusion.[6]

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[5] "Our recent cases have required no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 75 n. 20 (1978).

[6] The Court seizes on our gratuitous observation in *Linda R. S.* that " 'the proper party to challenge the constitutionality of [the child-support statute] would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.' 335 F. Supp., at 806." 410 U. S., at 619 n. 5. As a statement on standing to challenge a discriminatory criminal statute, the quoted passage cannot be faulted. Clearly, a parent prosecuted under such a statute would satisfy both the injury-in-fact and the causation requirements of standing—invalidation of the statute would totally remove the prosecuted parent's harm. In the instant case, however, the Court itself admits that today's decision may well be gratuitous insofar as appellant Orr is concerned.

II

Nor is appellant's lack of standing somehow cured by the fact that the state courts reached and decided the merits of his constitutional claim. Article III is a jurisdictional limitation on federal courts, and a state court cannot transform an abstract or hypothetical question into a "case or controversy" merely by ruling on its merits. In *Doremus* v. *Board of Education,* 342 U. S. 429 (1952), this Court held that a taxpayer lacked the requisite financial interest in the outcome of a First Amendment challenge to a state statute requiring Bible reading in public schools. In dismissing the taxpayer's appeal from an adverse ruling in the State's highest court, this Court held:

> "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." *Id.,* at 434.

Appellant's case, having come to us on appeal rather than on writ of certiorari, is much like Marbury's case in that Congress conferred upon each litigant the right to have his claim heard in this Court. But here, as in *Marbury* v. *Madison,* 1 Cranch 137 (1803), and *Doremus, supra,* we are, in my opinion, prevented by Art. III of the Constitution from exercising the jurisdiction which Congress has sought to confer upon us.

III

Article III courts are not commissioned to roam at large, gratuitously righting perceived wrongs and vindicating claimed rights. They must await the suit of one whose advocacy is inspired by a "personal stake" in victory. The Fram-

ers' wise insistence that those who invoke the power of a federal court personally stand to profit from its exercise ensures that constitutional issues are not decided in advance of necessity and that the complaining party stand in the shoes of those whose rights he champions. Obedience to the rules of standing—the "threshold determinants of the propriety of judicial intervention" [7]—is of crucial importance to constitutional adjudication in this Court, for when the parties leave these halls, what is done cannot be undone except by constitutional amendment.

Much as "Caesar had his Brutus; Charles the First his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it. While our "right of expounding the Constitution" is confined to "cases of a Judiciary Nature," we are empowered to determine for ourselves when the requirements of Art. III are satisfied. Thus, "the only check upon our own exercise of power is our own sense of self-restraint." *United States* v. *Butler,* 297 U. S. 1, 79 (1936) (Stone, J., dissenting). I do not think the Court, in deciding the merits of appellant's constitutional claim, has exercised the self-restraint that Art. III requires in this case. I would therefore dismiss Mr. Orr's appeal on the authority of *Doremus* v. *Board of Education, supra.*

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[7] *Warth* v. *Seldin,* 422 U. S. 490, 518 (1975).

Syllabus

DETROIT EDISON CO. *v.* NATIONAL LABOR RELATIONS BOARD

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

No. 77–968. Argued November 6, 1978—Decided March 5, 1979

Petitioner employer, in response to a request made by a Union in connection with arbitration of a grievance filed on behalf of employees in a bargaining unit, supplied the Union with certain information pertaining to petitioner's employee psychological aptitude testing program under which certain unit employees had been rejected for certain job openings because of their failure to receive "acceptable" test scores. However, petitioner refused to release the actual test questions, the actual employee answer sheets, and the scores linked with the names of the employees who received them, maintaining that complete confidentiality of these materials was necessary to insure the future integrity of the tests and to protect the examinees' privacy interests. Petitioner did offer to turn over the scores of any employee who signed a waiver releasing petitioner's psychologist from his pledge of confidentiality, but the Union declined to seek such releases. In unfair labor practice proceedings against petitioner—based on the Union's charge that petitioner had violated its duty to bargain collectively under § 8 (a) (5) of the National Labor Relations Act by refusing to provide relevant information needed by the Union for the proper performance of its duties as the employees' bargaining representative—the National Labor Relations Board concluded that all the requested items were relevant to the grievance and ordered petitioner to turn over all of the materials directly to the Union, subject to certain restrictions on the Union's use of the information. The Board rejected petitioner's request that, in order to preserve test secrecy, the tests and answer sheets be turned over to an industrial psychologist selected by the Union. The Board and the Court of Appeals, in its decision enforcing the Board's order, both rejected petitioner's claim that employee privacy and the professional obligations of petitioner's industrial psychologists should outweigh the Union's request for the employee-linked scores. *Held:*

1. The Board abused its remedial discretion in ordering petitioner to turn over the test battery and answer sheets directly to the Union. Pp. 312–317.

(a) A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the

information in the manner requested. The duty to supply information under § 8 (a) (5) turns upon "the circumstances of the particular case," *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149, 153, and much the same may be said for the type of disclosure that will satisfy that duty. Pp. 314–315.

(b) Petitioner's interest in test secrecy has been abundantly demonstrated on the record, which established petitioner's freedom under the collective-bargaining contract to use aptitude tests as a criterion for promotion, the empirical validity of the tests, and the relationship between secrecy and test validity. The Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this interest. P. 315.

(c) The remedy selected by the Board, barring the Union from taking any action that might cause the tests to fall into the hands of employees who have taken or are likely to take them, does not adequately protect the security of the tests. There is substantial doubt whether the Union, which was not a party to the enforcement proceeding in the Court of Appeals, would be subject to a contempt citation were it to ignore the restrictions. Moreover, the Union clearly would not be accountable in either contempt or unfair labor practice proceedings for the most realistic vice inherent in the Board's remedy—the danger of inadvertent leaks. Pp. 315–316.

2. Petitioner's willingness to disclose test scores linked with the employee names only upon receipt of consents from the examinees satisfied petitioner's statutory obligations under § 8 (a) (5). In light of the sensitive nature of testing information, the minimal burden that compliance with petitioner's offer would have placed on the Union, and the total absence of evidence that petitioner had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, the Board's conclusion that petitioner, in resisting an unconsented-to disclosure of individual test results, violated the statutory obligation to bargain in good faith cannot be sustained. Accordingly, the order requiring petitioner unconditionally to disclose the employee scores to the Union was erroneous. Pp. 317–320.

560 F. 2d 722, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in all but Part II–A of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 320. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Part I of which STEVENS, J., joined, *post*, p. 320.

John A. McGuinn argued the cause for petitioner. With him on the briefs was *Leon S. Cohan.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General McCree, Louis F. Claiborne, John S. Irving, Carl L. Taylor,* and *David S. Fishback.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The duty to bargain collectively, imposed upon an employer by § 8 (a)(5) of the National Labor Relations Act,[1] includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative. *NLRB* v. *Truitt Mfg. Co.,* 351 U. S. 149; *NLRB* v. *Acme Industrial Co.,* 385 U. S. 432. In this case an employer was brought before the National Labor Relations Board to answer a complaint that it had violated this statutory duty when it refused to disclose certain information about employee aptitude tests requested by a union in order to prepare for arbitration of a grievance. The employer supplied the union with much of the information requested, but refused to disclose three items: the actual test questions, the actual employee answer sheets, and the scores linked with the names of the employees who received them.[2] The Board, concluding that all the items requested were relevant to the grievance and would be useful to the union in processing it,

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*Briefs of *amici curiae* urging reversal were filed by *Bruce L. Montgomery* for the American Psychological Assn.; by *Thaddeus Holt, William J. Kilberg,* and *Lawrence Z. Lorber* for the American Society for Personnel Administration et al.; and by *William J. Rodgers* and *Stephen A. Bokat* for the Chamber of Commerce of the United States.

Burt Pines, Cecil W. Marr, and *John W. Witt* filed a brief for the city of Los Angeles et al. as *amici curiae.*

[1] 29 U. S. C. §§ 151–158.

[2] The arbitration was subsequently held without the benefit of this information, subject to the stipulation that the union could reopen the award if a court ordered disclosure of these materials. See *infra,* at 308.

ordered the employer to turn over all of the materials directly to the union, subject to certain restrictions on the union's use of the information. 218 N. L. R. B. 1024 (1975). A divided Court of Appeals for the Sixth Circuit ordered enforcement of the Board's order without modification. 560 F. 2d 722 (1977).

We granted certiorari to consider an important question of federal labor law. 435 U. S. 941. This is apparently the first case in which the Board has held that an employer's duty to provide relevant information to the employees' bargaining representative includes the duty to disclose tests and test scores achieved by named employees in a statistically validated psychological aptitude testing program administered by the employer. Psychological aptitude testing is a widely used employee selection and promotion device in both private industry and government. Test secrecy is concededly critical to the validity of any such program, and confidentiality of scores is undeniably important to the examinees. The underlying question is whether the Board's order, enforced without modification by the Court of Appeals, adequately accommodated these concerns.

I

The petitioner, Detroit Edison Co. (hereinafter Company), is a public utility engaged in the generation and distribution of electric power in Michigan. Since about 1943, the Utility Workers Union of America, Local 223, AFL–CIO (Union) has represented certain of the Company's employees. At the time of the hearing in this case, one of the units represented by the Union was a unit of operating and maintenance employees at the Company's plant in Monroe, Mich. The Union was certified as the exclusive bargaining agent for employees in that unit in 1971, and it was agreed that these employees would be covered by a pre-existing collective-bargaining agreement, one of the provisions of which specified that promotions within a given unit were to be based on seniority "whenever reasonable qualifications and abilities of the employees being considered

are not significantly different." Management decisions to bypass employees with greater seniority were subject to the collective agreement's grievance machinery, including ultimate arbitration, whenever a claim was made that the bypass had been arbitrary or discriminatory.

The aptitude tests at issue were used by the Company to screen applicants for the job classification of "Instrument Man B." An Instrument Man is responsible for installing, maintaining, repairing, calibrating, testing, and adjusting the powerplant instrumentation. The position of Instrument Man B, although at the lowest starting grade under the contract and usually requiring on-the-job training, was regarded by the Company as a critical job because it involved activities vital to the operation of the plant.

The Company has used aptitude tests as a means of predicting job performance since the late 1920's or early 1930's.[3] In the late 1950's, the Company first began to use a set of standardized tests (test battery) as a predictor of performance on the Instrument Man B job. The battery, which had been "validated" for this job classification,[4] consisted of the

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[3] Aptitude tests are not designed to measure current knowledge and skills relevant to a job, but, instead, to measure the examinee's ability to acquire such knowledge and skills.

[4] The Company used the empirical method of establishing validity; that is, it analyzed the requirements of the Instrument Man B job and developed objective measures by which supervisors were to rate the performance of employees in this job classification. Incumbents were given the preselected tests, and their scores were then compared with the supervisory ratings. A statistically significant correlation between the scores and the ratings was demonstrated.

Both the Company and the Union were named defendants in a lawsuit in which various Company employment practices, including aptitude tests used for other job classifications, were found to violate Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* See *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87, 118–119 (ED Mich. 1973), rev'd as to remedy, *EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301 (CA6 1975), vacated and remanded, *Detroit Edison* v. *EEOC*, 431 U. S. 951 (1977), superseding

Wonderlic Personnel Test, the Minnesota Paper Form Board (MPFB), and portions of the Engineering and Physical Science Aptitude Test (EPSAT). All employees who applied for acceptance into the Instrument Man classification were required to take this battery. Three adjective scores were possible: "not recommended," "acceptable," and "recommended." [5]

In the late 1960's, the technical engineers responsible for the Company's instrumentation department complained that the test battery was not an accurate screening device. The Company's industrial psychologists, accordingly, performed a revalidation study of the tests. As a result, the Personnel Test was dropped, and the scoring system was changed. Instead of the former three-tier system, two scores were possible under the revised battery: "not recommended" and "acceptable." The gross test score required for an "acceptable" rating was raised to 10.3, a figure somewhat lower than the former score required for a "recommended" but higher than the "acceptable" score used previously.

The Company administered the tests to applicants with the express commitment that each applicant's test score would remain confidential. Tests and test scores were kept in the offices of the Company's industrial psychologists who, as members of the American Psychological Association, deemed themselves ethically bound not to disclose test information to

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order entered, *EEOC* v. *Detroit Edison Co.*, 17 E. P. D. ¶ 8583 (ED Mich. 1978), notice of appeal filed, Aug. 24, 1978. The issues in the present unfair labor practice litigation are distinct, and nothing in this opinion, particularly use of such words as "valid" or "validate," is to be understood as bearing in any way on possible Title VII questions. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425–436.

[5] During the decade or so that this test battery was in use, only one grievance involving it was filed. In that instance, a senior employee who had received an "acceptable" score was bypassed for acceptance in favor of a junior employee who had received a higher "recommended" score. The grievance was upheld.

unauthorized persons.[6] Under this policy, the Company's psychologists did not reveal the tests or report actual test numerical scores to management or to employee representatives. The psychologists would, however, if an individual examinee so requested, review the test questions and answers with that individual.

The present dispute had its beginnings in 1971 when the Company invited bids from employees to fill six Instrument Man B openings at the Monroe plant. Ten Monroe unit employees applied. None received a score designated as "acceptable," and all were on that basis rejected. The jobs were eventually filled by applicants from outside the Monroe plant bargaining unit.

The Union filed a grievance on behalf of the Monroe applicants, claiming that the new testing procedure was unfair and that the Company had bypassed senior employees in violation of the collective-bargaining agreement. The grievance was rejected by the Company at all levels, and the Union took it to arbitration. In preparation for the arbitration, the Union requested the Company to turn over various materials related to the Instrument Man B testing program. The Company furnished the Union with copies of test-validation studies performed by its industrial psychologists and with a report by an outside consultant on the Company's entire testing program. It refused, however, to release the actual test battery, the applicants' test papers, and their scores,

[6] See American Psychological Assn., Standards for Educational and Psychological Tests (1974). Standard J–2 prohibits disclosure of aptitude tests and test scores to unauthorized individuals. See also Ethical Standards of Psychologists (1977 rev.). Principle 5 of the Ethical Standards imposes an obligation on the psychologist to safeguard "information about an individual that has been obtained . . . in the course of . . . teaching, practice, or investigation." Subsection (b) of the Principle permits the psychologist to discuss evaluative data concerning employees but only if the "data [is] germane to the purposes of the evaluation" and "every effort" has been made to "avoid undue invasion of privacy."

maintaining that complete confidentiality of these materials was necessary in order to insure the future integrity of the tests and to protect the privacy interests of the examinees.

The Union then filed with the Board the unfair labor practice charge involved in this case. The charge alleged that the information withheld by the Company was relevant and necessary to the arbitration of the grievance, "including the ascertainment of promotion criteria, the veracity of the scoring and grading of the examination and the testing procedures, and the job relatedness of the test(s) to the Instrument Man B classification."

After filing the unfair labor practice charge, the Union asked the arbitrator to order the Company to furnish the materials at issue. He declined on the ground that he was without authority to do so. In view of the pendency of the charges before the Board, the parties proceeded with the arbitration on the express understanding that the Union could reopen the case should it ultimately prevail in its claims. During the course of the arbitration, however, the Company did disclose the raw scores of those who had taken the test, with the names of the examinees deleted. In addition, it provided the Union with sample questions indicative of the types of questions appearing on the test battery and with detailed information about its scoring procedures. It also offered to turn over the scores of any employee who would sign a waiver releasing the Company psychologist from his pledge of confidentiality. The Union declined to seek such releases.

The arbitrator's decision found that the Company was free under the collective agreement to establish minimum reasonable qualifications for the job of Instrument Man and to use aptitude tests as a measure of those qualifications; that the Instrument Man B test battery was a reliable and fair test in the sense that its administration and scoring had been standardized; and that the test had a "high degree of validity" as

a predictor of performance in the job classification for which it was developed. He concluded that the 10.3 score created a "presumption of significant difference under the contract." [7] He also expressed the view that the Union's position in the arbitration had not been impaired because of lack of access to the actual test battery.

Several months later the Board issued a complaint based on the Union's unfair labor practice charge. At the outset of the hearing before the Administrative Law Judge, the Company offered to turn over the test battery and answer sheets to an industrial psychologist selected by the Union for an independent evaluation, stating that disclosure to an intermediary obligated to preserve test secrecy would satisfy its concern that direct disclosure to the Union would inevitably result in dissemination of the questions. The Union rejected this compromise.

The Administrative Law Judge found that notwithstanding the conceded statistical validity of the test battery, the tests and scores would be of probable relevant help to the Union in the performance of its duties as collective-bargaining agent. He reasoned that the Union, having had no access to the tests, had been "deprived of any occasion to check the tests for built-in bias, or discriminatory tendency, or any opportunity to argue that the tests or the test questions are not well suited to protect the employees' rights, or to check the accuracy of the scoring." The Company's claim that employees' privacy might be abused by disclosure to the Union of the scores he rejected as insubstantial. Accordingly, he recommended that

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[7] The arbitrator did conclude, however, that the 10.3 cutoff score was too high because it eliminated some applicants who would probably succeed in the Instrument Man job. Based on the Company's validation statistics, he concluded that seniority would be undermined unless those applicants who had received scores of between 9.3 and 10.3 were given an opportunity to demonstrate that they had other qualifications that might offset their somewhat lower scores. Three applicants were in this group. As a result of the evaluation ordered by the arbitrator, one was promoted.

the Company be ordered to turn over the test scores directly to the Union. He did, however, accept the Company's suggestion that the test battery and answer sheets be disclosed to an expert intermediary. Disclosure of these materials to lay Union representatives, he reasoned, would not be likely to produce constructive results, since the tests could be properly analyzed only by professionals.[8] The Union was to be given "the right to see and study the tests," and to use the information therein "to the extent necessary to process and arbitrate the grievances," but not to disclose the information to third parties other than the arbitrator.

The Company specifically requested the Board "to adopt that part of the order which requires that tests be turned over to a qualified psychologist," but excepted to the requirement that the employee-linked scores be given to the Union. It contended that the only reason asserted by the Union in support of its request for the scores—to check their arithmetical accuracy—was not sufficient to overcome the principle of confidentiality that underlay its psychological testing program. The Union filed a cross exception to the requirement that it select a psychologist, arguing that it should not be forced to "employ an outsider for what is normal grievance and Labor-Management work."

The Board, and the Court of Appeals for the Sixth Circuit in its decision enforcing the Board's order, ordered the Company to turn over all the material directly to the Union. They concluded that the Union should be able to determine for itself whether it needed a psychologist to interpret the test battery and answer sheets. Both recognized the Company's interest in maintaining the security of the tests, but both

[8] The Company had consistently maintained that disclosure to the Union would serve no purpose. It contended that the validity of the tests depended upon a statistical determination that they were accurate predictors of future job performance. Lay examination of the questions, it asserted, could only determine whether the questions were on their face related to the job.

reasoned that appropriate restrictions on the Union's use of the materials would protect this interest.[9] Neither was receptive to the Company's claim that employee privacy and the professional obligations of the Company's industrial psychologists should outweigh the Union request for the employee-linked scores.

II

Because of the procedural posture of this case, the questions that have been preserved for our review are relatively narrow. The Company has presented a lengthy argument designed to demonstrate that the Board and the Court of Appeals misunderstood the premises of its aptitude testing program and thus erred in concluding that the information requested by the Union would be of any actual or potential relevance to the performance of its duties. This basic challenge, insofar as it concerns the test battery and answer sheets, is foreclosed, however, by § 10 (e) of the Act because of the Company's failure to raise it before the Board.[10]

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[9] The Board, although it ordered the Company to supply the tests and answer sheets directly to the Union, incorporated by reference the Administrative Law Judge's restrictions on the Union's use of the materials. Under those restrictions, the Union was given the right "to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests."

After the conclusion of the arbitration, the Union was required to return "all copies of the battery of tests" to the Company. The Court of Appeals, in enforcing the Board's order, stated that the "restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce." 560 F. 2d 722, 726.

[10] 29 U. S. C. § 160 (e). Section 10 (e) precludes a reviewing court from considering an objection that has not been urged before the Board, "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Board enforces a similar procedural

Two issues, then, are presented on this record. The first concerns the Board's choice of a remedy for the Company's failure to disclose copies of the test battery and answer sheets. The second, and related, question concerns the propriety of the Board's conclusion that the Company committed an unfair labor practice when it refused to disclose, without a written consent from the individual employees, the test scores linked with the employee names.

A

We turn first to the question whether the Board abused its remedial discretion when it ordered the Company to deliver

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limitation through a rule providing that any exception to a finding of the Administrative Law Judge not specifically urged before the Board "shall be deemed to have been waived." 29 CFR § 102.46 (b) (1978). The rule serves a sound purpose, and unless a party's neglect to press an exception before the Board is excused by the statutory "extraordinary circumstances" exception or unless the Board determination at issue is patently in excess of its authority, we are bound by it. See, *e. g.*, *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U. S. 318, 322.

The Company has justified its failure to object on the ground that it had "no practical reason" to challenge the portion of the Administrative Law Judge's recommendation adopting its suggestion that the tests and answer sheets be disclosed to an intermediary. If this ground were accepted as an "extraordinary circumstance," however, little would be left of the statutory exception. In any case, the Company's "practical" reason disappeared when it again failed to challenge the finding of relevance after the Union had filed a cross exception urging that direct disclosure be ordered.

Moreover, much of the Company's challenge to relevancy is based upon the arbitrator's findings and conclusion that examination of these materials would prove little. We do not question the arbitrator's interpretation of the collective agreement. Nonetheless, the parties agreed not to be bound by the arbitrator's determination of relevance, the arbitrator accepted this condition, and the Board concluded that the Union could properly invoke its jurisdiction on these terms. This is not to say that the arbitral award itself is irrelevant to this controversy. The arbitration record and award were before the Administrative Law Judge, and we do not understand the Board to have disturbed the arbitrator's resolution of the contract issues peculiarly within his competence. Cf. *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 436–437.

directly to the Union the copies of the test battery and answer sheets. The Company's position, stripped of the argument that it had no duty at all to disclose these materials, is as follows: It urges that disclosure directly to the Union would carry with it a substantial risk that the test questions would be disseminated. Since it spent considerable time and money validating the Instrument Man B tests and since its tests depend for reliability upon the examinee's lack of advance preparation, it contends that the harm of dissemination would not be trivial. The future validity of the tests is tied to secrecy, and disclosure to employees would not only threaten the Company's investment but would also leave the Company with no valid means of measuring employee aptitude. The Company also maintains that its interest in preserving the security of its tests is consistent with the federal policy favoring the use of validated, standardized, and nondiscriminatory employee selection procedures reflected in the Civil Rights Act of 1964.[11]

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[11] 42 U. S. C. § 2000e *et seq.* The Company places particular emphasis on § 703 (h) of Title VII, 42 U. S. C. § 2000e–2 (h), and the agency guidelines promulgated thereunder. Indeed, it has argued that the guidelines are violated by the Board's order directing disclosure to the employee representative. With this we cannot agree. Section 703 (h) permits an employer to "give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin." Pursuant to § 703 (h), specific guidelines on employee testing programs have been issued. See Equal Employment Opportunity Comm'n, Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1977). The guidelines state that "properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies." § 1607.1 (a). In another section of the guidelines, it is stated that evidence of test validity must be based on "studies employing generally accepted procedures for determining criterion-related validity, such as those described in the 'Standards for Educational and Psychological Tests and Manuals' published by the

In his brief on behalf of the Board, the Solicitor General has acknowledged the existence of a strong public policy against disclosure of employment aptitude tests and, at least in the context of civil service testing, has conceded that "[g]overnmental recruitment would be seriously disputed and public confidence eroded if the integrity of . . . tests were compromised." Indeed, he has also acknowledged that the United States Civil Service Commission "has been zealous to guard against undue disclosure and has successfully contended for protective orders which limit exposure of the tests to attorneys and professional psychologists with restrictions on copying or disseminating test materials." He urges, however, that the Board's order can be justified on the grounds that the Union's institutional interests militate against improper disclosure, and that the specific protective provisions in the Board's order will safeguard the integrity of the tests.[12] He emphasizes the deference generally accorded to "the considered judgment of the Board, charged by Congress with special responsibility for effectuating labor policy." We do not find these justifications persuasive.

A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8 (a)(5) turns upon "the circumstances of the particular case," *NLRB* v. *Truitt Mfg. Co.*, 351 U. S., at 153, and much the same may be said for

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American Psychological Association." § 1607.5. The guidelines further provide that "[t]ests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of tests scores." § 1607.5 (b)(2). Contrary to the Company's assertion, these provisions, although they do recognize the relationship between test security and test validity, do not insulate testing materials from the employer's duty under the Act to disclose relevant information. At most, they provide evidence of the employer's interest in maintaining the security of properly validated tests.

[12] See n. 9, *supra*.

the type of disclosure that will satisfy that duty. See, *e. g., American Cyanamid Co.,* 129 N. L. R. B. 683, 684 (1960). Throughout this proceeding, the reasonableness of the Company's concern for test secrecy has been essentially conceded. The finding by the Board that this concern did not outweigh the Union's interest in exploring the fairness of the Company's criteria for promotion did not carry with it any suggestion that the concern itself was not legitimate and substantial.[13] Indeed, on this record—which has established the Company's freedom under the collective contract to use aptitude tests as a criterion for promotion, the empirical validity of the tests, and the relationship between secrecy and test validity—the strength of the Company's concern has been abundantly demonstrated. The Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this interest, and we are unable to identify one.

It is obvious that the remedy selected by the Board does not adequately protect the security of the tests. The restrictions barring the Union from taking any action that might cause the tests to fall into the hands of employees who have taken or are likely to take them are only as effective as the sanctions available to enforce them. In this instance, there is substantial doubt whether the Union would be subject to a contempt citation were it to ignore the restrictions. It was not a party to the enforcement proceeding in the Court of Appeals, and the scope of an enforcement order under § 10 (e) is limited by Fed. Rule Civ. Proc. 65 (d) making an injunction binding only "upon the parties to the action . . . and

[13] The Board limited discussion of its reasons for eliminating the intermediary requirement to the statement that "it is reasonable to assume that, having requested the papers, the Union intends effectively to utilize them." Consequently, it said, it "would not condition the Union's access to the information on the retention of a psychologist but rather would have [the Company] submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required."

upon those persons in active concert or participation with them . . . ." See *Regal Knitwear Co.* v. *NLRB,* 324 U. S. 9, 14. The Union, of course, did participate actively in the Board proceedings, but it is debatable whether that would be enough to satisfy the requirement of the Rule. Further, the Board's regulations contemplate a contempt sanction only against a respondent, 29 CFR §§ 101.9, 101.14–101.15 (1978), and the initiation of contempt proceedings is entirely within the discretion of the Board's General Counsel. *Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 269. Effective sanctions at the Board level are similarly problematic. To be sure, the Board's General Counsel could theoretically bring a separate unfair labor practice charge against the Union, but he could also in his unreviewable discretion refuse to issue such a complaint. See 29 U. S. C. § 153 (d); *Vaca* v. *Sipes,* 386 U. S. 171, 182. Moreover, the Union clearly would not be accountable in either contempt or unfair labor practice proceedings for the most realistic vice inherent in the Board's remedy—the danger of inadvertent leaks.

We are mindful that the Board is granted broad discretion in devising remedies to undo the effects of violations of the Act, *NLRB* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 346; *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203, 216, and of the principle that in the area of federal labor law "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 194. Nonetheless, the rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action. The role that Congress in § 10 (e) has entrusted to the courts in reviewing the Board's petitions for enforcement of its orders is not that of passive conduit. See *Fibreboard Corp.* v. *NLRB, supra,* at 216. The Board in this case having identified no justification for a remedy granting such scant protection to the Company's undisputed and important interests in test secrecy, we hold that the Board abused its dis-

cretion in ordering the Company to turn over the test battery and answer sheets directly to the Union.

B

The dispute over Union access to the actual scores received by named employees is in a somewhat different procedural posture, since the Company did on this issue preserve its objections to the basic finding that it had violated its duty under § 8 (a)(5) when it refused disclosure. The Company argues that even if the scores were relevant to the Union's grievance (which it vigorously disputes), the Union's need for the information was not sufficiently weighty to require breach of the promise of confidentiality to the examinees, breach of its industrial psychologists' code of professional ethics, and potential embarrassment and harassment of at least some of the examinees. The Board responds that this information does satisfy the appropriate standard of "relevance," see *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, and that the Company, having "unilaterally" chosen to make a promise of confidentiality to the examinees, cannot rely on that promise to defend against a request for relevant information. The professional obligations of the Company's psychologists, it argues, must give way to paramount federal law. Finally, it dismisses as speculative the contention that employees with low scores might be embarrassed or harassed.

We may accept for the sake of this discussion the finding that the employee scores were of potential relevance to the Union's grievance, as well as the position of the Board that the federal statutory duty to disclose relevant information cannot be defeated by the ethical standards of a private group. Cf. *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235, 239. Nevertheless we agree with the Company that its willingness to disclose these scores only upon receipt of consents from the examinees satisfied its statutory obligations under § 8 (a)(5).

The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established,[14] and we decline to adopt such a rule here.[15] There are situations in which an employer's conditional offer to disclose may be warranted. This we believe is one.

The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.[16] There is nothing in this record to

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[14] See *Emeryville Research Center, Shell Development Co.* v. *NLRB*, 441 F. 2d 880 (CA9 1971) (refusal to supply relevant salary information in precise form demanded did not constitute violation of § 8 (a) (5) when company's proposed alternatives were responsive to union's need); *Shell Oil Co.* v. *NLRB*, 457 F. 2d 615 (CA9 1975) (refusal to supply employee names without employee consent not unlawful when company had well-founded fear that nonstriking employees would be harassed); cf. *Kroger Co.* v. *NLRB*, 399 F. 2d 455 (CA6 1968) (no disclosure of operating ratio data when, under circumstances, interests of employer predominated); *United Aircraft Corp.*, 192 N. L. R. B. 382, 390 (1971) (employer acted reasonably in refusing to honor generalized request for employee medical records without employee's permission), modified on other grounds, *Machinists* v. *United Aircraft Corp.*, 534 F. 2d 422 (CA2 1975).

[15] *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, relied upon by the Solicitor General, is not to the contrary. The interests at stake and the legal issues involved in that case, in which the Board ordered the company to disclose the names and addresses of employees to a union in the process of an organizing campaign, were far different from those involved here.

[16] A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the recordkeeping activities of public employers and agencies. See, *e. g.*, Privacy Act of 1974, 5 U. S. C. § 552a (written consent required before information in individual records may be disclosed, unless the request falls within an explicit statutory exception); Colo. Rev. Stat. § 24–72–204 (3) (a) (1973) (regulating disclosure of medical, psychological, and scholastic achievement data in public records); Iowa Code Ann. §§ 68A.7 (10)–(11) (West 1973) (regulating disclosure of personal information in public

suggest that the Company promised the examinees that their scores would remain confidential in order to further parochial concerns or to frustrate subsequent Union attempts to process employee grievances. And it has not been suggested at any point in this proceeding that the Company's unilateral promise of confidentiality was in itself violative of the terms of the collective-bargaining agreement. Indeed, the Company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower scoring examinees who had, as a result, left the Company.

Under these circumstances, any possible impairment of the function of the Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed. The burden on the Union in this instance is minimal. The Company's interest in preserving employee confidence in the testing program is well founded.

In light of the sensitive nature of testing information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of

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employee records); N. Y. Pub. Off. Law §§ 89 (2)(b)(i)–(c)(ii) (McKinney Supp. 1978) (disapproving unconsented-to release of employment and medical information in public records). See also U. S. Privacy Protection Study Comm'n, Personal Privacy in an Information Society (1977) (recommending that all employers should be under a duty to safeguard the confidentiality of employee records). Cf. Family Educational Rights and Privacy Act of 1974, 20 U. S. C. § 1232g (explicitly recognizing, in the context of education, the interest of the individual in maintaining the confidentiality of test scores). Indeed, the federal Privacy Act ban on unconsented-to disclosure of employee records without written consent has been construed to provide a valid defense to a union request for certain employee personnel data made pursuant to the terms of a public employee collective-bargaining agreement. See *American Federation of Govt. Employees* v. *Defense General Supply Center*, 423 F. Supp. 481 (ED Va. 1976), aff'd *per curiam*, 573 F. 2d 184 (CA4 1978).

evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, we are unable to sustain the Board in its conclusion that the Company, in resisting an unconsented-to disclosure of individual test results, violated the statutory obligation to bargain in good faith. See *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149. Accordingly, we hold that the order requiring the Company unconditionally to disclose the employee scores to the Union was erroneous.

The judgment is vacated, and the case remanded to the Court of Appeals for the Sixth Circuit for further proceedings consistent with this opinion.

It is so ordered.

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

This is a close case on both issues. With respect to the test battery and answer sheets, I agree with MR. JUSTICE WHITE that we should respect the Board's exercise of its broad remedial discretion. On the other hand, I agree with the Court that the Union should not be permitted to invade the individual employees' interest in the confidentiality of their test scores without their consent. Accordingly, I join all but Part II–A of the Court's opinion and also join Part I of MR. JUSTICE WHITE's dissent.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, and with whom MR. JUSTICE STEVENS joins as to Part I, dissenting.

The Court today disapproves enforcement of an order of the National Labor Relations Board essentially on the theory that the order fails to accommodate properly the competing interests of the Union, individual employees, and the employer. We have formerly stressed, however, that " 'balancing . . . conflicting legitimate interests . . . to effectuate na-

tional labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *Beth Israel Hospital* v. *NLRB,* 437 U. S. 483, 501 (1978), quoting *NLRB* v. *Truck Drivers,* 353 U. S. 87, 96 (1957). Because I perceive no warrant to disturb the balance the Board has struck in this case, I dissent.

I

As the Court holds, the relevance of the test questions and answer sheets to the performance of the Union's statutory duties is established for present purposes by the Company's failure to press the issue properly before the Board. The Court, moreover, does not explicitly upset the Board's determination that the Company's failure to release those materials to the Union amounted to an unfair labor practice. The only issue here regarding the test questions and answer sheets is "whether the Board abused its *remedial* discretion when it ordered the Company to deliver directly to the Union the copies of the test battery and answer sheets." *Ante,* at 312–313 (emphasis added). If, however, the basic impropriety of the Company's failure to divulge the materials to the Union is settled, the Board's *remedial* authority to compel conditional disclosure is abundantly clear. The Court is quite wrong in holding that the Board's order exceeded the agency's "broad discretionary [remedial power]." *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203, 216 (1964). For it is too well established that a decree fashioned by the Board to remedy violations of the Act "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Ibid.,* quoting *Virginia Elec. & Power Co.* v. *NLRB,* 319 U. S. 533, 540 (1943).

The Court nevertheless asserts that the Board erred in directing the Company to release the test questions and

answer sheets directly to the Union with no more formal assurance that secrecy will be preserved than that afforded by the Board's protective order. Release to the Union, it is said, risks imminent general disclosure without any apparent justification. Presumably, the test questions and answer sheets ought to be divulged to a psychologist instead. In so concluding, the majority—in my view—unduly discounts the Board's own appraisal of the jeopardy to the Company's interests and of the substantiality of countervailing concerns.

A

The Board ordered release of the test questions and answer sheets only on condition that the Union preserve their secrecy. Specifically, the Union was admonished not to copy the materials or to make them available to potential test takers or to others who might advise the employees of their content. The Court scoffs at the order, however, on the ground that "there is substantial doubt whether the Union would be subject to a contempt citation were it to ignore the restrictions." *Ante*, at 315.[1] But the Board placed no reliance on contempt sanc-

[1] The Court suggests that the Court of Appeals' order cannot reach the Union because the order as it affects the Union is not literally within the compass of Fed. Rule Civ. Proc. 65 (d). But the policy underlying Rule 65 (d) is that of not having " 'order[s] or injunction[s] so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.' " *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 180 (1973), quoting *Regal Knitwear Co.* v. *NLRB*, 324 U. S. 9, 13 (1945); see *United States* v. *Hall*, 472 F. 2d 261 (CA5 1972). Cf. *United States* v. *New York Tel. Co.*, 434 U. S. 159, 171–178 (1977). Here, the Union was a party to the administrative proceedings, the Union's rights were adjudicated therein, it had the opportunity to secure judicial review of the terms subsequently enforced, it had notice that enforcement would be requested, it doubtless has notice of the terms of the enforcement order itself, and extension of the order to reach the Union is urged to ensure that the Court of Appeals' determination of the cognizability and scope of the Union's right of access will be fully respected. Thus, the Union is in practical effect as much a party as any typical de-

tions when it directed release, and there is scant reason for rejecting the Board's judgment that sanctions of that sort are unnecessary. The Board, in my view, had forceful and independent grounds for concluding that the Union would respect the confidentiality of the materials and take due precautions against inadvertent exposure.

The Union has enjoyed a long and extensive relationship with the employer [2] that it would be loath to jeopardize by intentionally breaching the conditions of release. Cf. *Fawcett Printing Corp.*, 201 N. L. R. B. 964, 974 (1973). Even if the Union had any incentive to publicize the examination questions, its ardor would be dampened by the likely long-term consequences of that course; the Board exercises continuing authority over the Union's affairs, and it may well approve the Company's future insistence on rigorous secrecy, thus delimiting the Union's subsequent latitude in grievance processing.[3] Moreover, dissemination of test materials to potential test takers might impair the interests of those employees who qualify fairly for a desired position, thus inviting their disapprobation.[4]

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fendant who has been given an opportunity to be heard but who has declined to avail itself of that opportunity.

The Court speculates, however, that the Board would not initiate contempt proceedings in the event of Union disclosure. That observation assumes without basis that the Board would acquiesce in the Union's disregard of the Board's own directives.

[2] The Union has been the certified representative of the Company's employees since about 1943, in approximately 28 different bargaining units. The Union was first certified by the Board in 1971 as the representative of operating and maintenance employees of the production department of the Monroe Power Plant, wherefrom this controversy arose.

[3] The Union's disregard of the conditions of release may also violate the Union's duty to bargain in good faith under § 8 (b) (3) of the Act, 29 U. S. C. § 158 (b) (3), Comment, Psychological Aptitude Tests and the Duty to Supply Information: *NLRB v. Detroit Edison Co.*, 91 Harv. L. Rev. 869, 876 n. 49 (1978), subjecting the Union to appropriate sanctions.

[4] By prejudicing the interests of such employees and by eroding its bargaining relationship with the employer, the Union may provoke its own

The Company acknowledges, in any event, see Tr. of Oral Arg. 12, and the Court agrees, see *ante,* at 316, that the real concern is with inadvertent disclosure. Yet there is no basis for assuming that the Union would handle the materials so cavalierly as to chance accidental disclosure, given the gravity with which the issue has been treated by all concerned. Thus, in the circumstances of this case, the Board had ample grounds to expect Union cooperation. And this Court is ill-equipped to fault the Board on a matter so plainly summoning the Board's keen familiarity with industrial behavior.

B

Besides overrating the hazards of direct release to the Union of the test questions, the Court undervalues the interests vindicated by that procedure. The Court asserts simply that the "Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve [the Company's interest in maintaining secrecy], and we are unable to identify one." *Ante,* at 315. The Board observed in its decision, however, that "[a]s the bargaining agent of the employees involved, it is the Union which is entitled to information which is necessary to its role as bargaining agent in the administration of the collective-bargaining agreement." 218 N. L. R. B. 1024 (1975). The employer's "accommodation"—releasing the test questions solely to a psychologist—which the Court tacitly endorses, is fundamentally at odds with the basic structure of the bargaining process. Congress has conferred paramount representational responsibilities and obligations on the employees' freely chosen bargaining agent. Yet the Company's alternative would install a third-party psychologist as a partner, if not primary actor, in promotion-related grievance proceedings.

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ouster by disgruntled members of the bargaining unit. In certain circumstances, the Union's action might also invite unfair-representation suits by employees who are clearly disadvantaged by the disclosure.

The services of a professional psychologist, furthermore, may be totally unnecessary. Suspected difficulties with the test questions may necessitate consultation with a psychologist, but resort to such assistance is not so foreordained as to justify compulsory retention of a psychologist as a condition to availability of materials pertinent to the processing of a grievance. In fact, the attendant expense may well encourage the Union to forgo requesting the information, despite its potential utility. Confronted with these concerns, the Board reasonably undertook to ensure that primary responsibility for grievance evaluation and processing remains where Congress put it, and that the Union's access to pertinent information remains unimpeded by cumbersome or prohibitive obstacles.

II

The Court further concludes that the Company properly declined to disclose the examinees' test scores, associated with the employees' names, absent consent by the examinees themselves.[5] In the majority's view, the Board accorded too little

[5] The Court assumes for the sake of discussion that the identified test scores are relevant to the performance of the Union's statutory duties. I think that assumption is well founded. The test of relevance for purposes of the duty to disclose is a liberal "discovery-type standard." *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 437 (1967). The scores unquestionably satisfy that standard, as they possess a substantial bearing on the issue whether the employer's reliance on test performance denied the aggrieved employees their contractual right to be appointed as Instrument Man unless outshone by less senior applicants with significantly superior qualifications.

As the Administrative Law Judge noted, the Union needs access to the test scores, identified by the examinees' names, in order to police the contract, 218 N. L. R. B. 1024, 1034 (1975). The information would enable the Union to detect abuses in the administration of the tests and, because the examination papers—eliciting multiple-choice responses—were graded manually, grading errors are not improbable and are susceptible of detection by a Union representative. See *id.*, at 1027, 1034.

Moreover, inspection of the examinees' results might disclose unacceptable biases in the tests themselves. Inspection of test scores and the

weight to the interests of individual employees in the confidentiality of their test results and too much significance to the "minimal" burden on the Union that would result from a consent requirement. In this respect, too, the Court inappropriately substitutes its judgment for the reasonable determination of the Board.

Preliminarily, it is notable that the confidentiality of the test results was significantly compromised by circumstances

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personal characteristics of the employees tested might reveal that certain employees are encountering difficulties with the tests for reasons unrelated to job aptitude. Put another way, the margin of error inhering in the examination may be assignable to test biases identifiable with the aid of the examinees' answer sheets. See Comment, 91 Harv. L. Rev., *supra* n. 3, at 873–874.

The utility of such information in determining whether the test battery fairly measures job aptitude in particular instances is illustrated by the following colloquy between the arbitrator and an expert witness in the Company's employ:

"THE ARBITRATOR: I guess what I am wondering about in this kind of a test is when you grade these, you are just . . . taking the raw score and not looking at what might be the elements in the test. Is that right?

"THE WITNESS: No. We would look at the elements of the test. We always look at the parts of the test because sometimes a performance on a particular kind of segment of any test might indicate that we have a bad testing situation; this person really didn't have an opportunity to do what he is capable of doing, and you then can find out that, for example, a person's native language might not be English and that might account for the peculiar thing and you would then not even perhaps score the test.

"THE ARBITRATOR: How would you see that? How would you find that data?

"THE WITNESS: Well, you would see it because this particular test has, for example, several different elements tapping different kinds of abilities, some based on verbal use of language and some not so heavily weighted in that direction, and you would see a pronounced difference which is completely out of character. It just doesn't fit.

"This is what normally happens when given the test. A test is an overall look at engineering and physical science aptitudes. That is a rather closely-knit set, and if one of the tests were way off, one might then legitimately ask whether or not you had a good test overall." App. 324–325.

independent of the Board's disclosure order at issue herein. The Union, and the employees generally, were aware that the 10 aggrieved job applicants received scores below 10.3—the cutoff point. Moreover, in consequence of the arbitrator's ruling, it became generally evident that 3 of the 10 applicants had earned scores falling between 9.3 and 10.3 and that the remaining 7 had scored below 9.3. See 218 N. L. R. B., at 1032. Thus, the real question here is whether the Board was unreasonable in concluding that the marginal intrusion on confidentiality accompanying full disclosure to the Union was so profound as to require the withholding of that information from the statutory bargaining representative.

Significantly, the employer has presented no evidence that the employees involved actually oppose disclosure. Nor has the Company demonstrated any palpable basis for believing that release will result in harassment or ridicule of the examinees. Cf. *United Aircraft Corp.* v. *NLRB,* 434 F. 2d 1198, 1207 (CA2 1970), cert. denied, 401 U. S. 993 (1971). The Court notes that "the Company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower scoring examinees who had, as a result, left the Company." *Ante,* at 319. But that evidence consisted of an isolated representation by a Company psychologist concerning events occurring "many, many years ago." App. 84. And the Administrative Law Judge evidently dismissed the account in concluding that the Company had "produced no probative evidence that the employees' sensitivities are likely to be abused by disclosure of the scores." 218 N. L. R. B., at 1035.[6] When an employer resists the

[6] There is no reason to believe, moreover, that release of the scores to the Union will result in dissemination to the employees generally. The Union has no incentive, and indeed would be foolish, to publicize test information against the wishes of an actual or potential member of the bargaining unit. Furthermore, the Board's order may reasonably be read to restrict the divulgence and use of the test scores as well as the test questions.

divulgence of materials relevant to employee grievances, I would think that the employer has the burden of establishing any justification for nondisclosure. The Court, however, presumes what yet remains to be shown.

Moreover, there is no basis in the governing statute or regulations for attributing ascendant importance to the employees' confidentiality interests. Whether confidentiality considerations should prevail in the circumstances of this case is, as the Company and majority agree, principally a matter of policy. But it cannot be gainsaid that the Board is the body charged in the first instance with the task of discerning and effectuating congressional policies in the labor-management area. Its judgments in that regard should not be lightly overturned. Yet the Court strikes its own balance according decisional weight to concerns having no asserted or apparent foundation in the statute it purports to construe or in other applicable legislation.

The Court lightly dismisses the Union's interest in receipt of the examinees' identified scores, with or without consent, by declaring the burdens involved as "minimal." *Ante,* at 319. The Administrative Law Judge noted, however, that the "Union's obligation is to represent the unit of employees as a whole[; the Company] may not frustrate this by requiring the Union to secure the consent of individuals in the unit in order to secure information relevant and reasonably necessary to the enforcement of the collective-bargaining agreement which exists for the benefit of all." 218 N. L. R. B., at 1036.[7]

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[7] Even an individual employee cannot press his own grievance in such a way as to frustrate the Union's responsibility to ensure fairness to all members of the bargaining unit. Although an individual employee has the statutory right to present a grievance at any time to his employer, "the bargaining representative [must be] given opportunity to be present at such adjustment." § 9 (a) of the Act, 29 U. S. C. § 159 (a). The Company's policy to have its psychologist explain an examinee's score to him when the examinee has failed to make the cutoff, see *ante,* at 307, but

Were individual examinees to withhold consent, and thus prevent the Union from scrutinizing their scores in light of their demographic and occupational characteristics, the Union might be inhibited in its efforts to discern patterns or anomalies indicating bias in the operation of the tests.[8] Thus, the Board directed divulgence of the scores to the employees' statutory bargaining representative to enable it effectively to fulfill its vital statutory functions. Such a limited intrusion, cf. *Whalen* v. *Roe,* 429 U. S. 589, 602 (1977), for the purpose of vindicating grave statutory policies, hardly signals an occasion for judicial intervention.[9]

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not to disclose the same information to the Union, is directly inconsistent with the mandate of § 9 (a). As the Administrative Law Judge observed:

"In essence, [the employer] here contends that, having voluntarily chosen a particular form or mechanism to determine the right of bargaining unit employees to be promoted, [the employer] is now precluded by the very devices which it adopted from dealing with the employees' bargaining representative about critical elements of the promotion process, and will deal only with the individual. Such a program, which freezes out the bargaining representative from participation in significant elements of the promotion process, and seeks to substitute individual bargaining therefor constitutes a complete negation of the bargaining process . . . ." 218 N. L. R. B., at 1035.

[8] Release of the information to a psychologist alone would be unsatisfactory. See *supra,* at 324–325. The Union would be relegated " 'to play[ing] a game of blind man's bluff.' " *NLRB* v. *Acme Industrial Co.,* 385 U. S., at 438 n. 8, quoting *Fafnir Bearing Co.* v. *NLRB,* 362 F. 2d 716, 721 (CA2 1966).

[9] In other contexts, the courts have generally rejected claims of confidentiality as a basis for withholding relevant information. See *General Electric Co.* v. *NLRB,* 466 F. 2d 1177 (CA6 1972) (wage data); *NLRB* v. *Frontier Homes Corp.,* 371 F. 2d 974 (CA8 1967) (selling-price lists); *Curtiss-Wright Corp.* v. *NLRB,* 347 F. 2d 61 (CA3 1965) (job evaluation and wage data); *NLRB* v. *Item Co.,* 220 F. 2d 956 (CA5) (wage data), cert. denied, 350 U. S. 836 (1955); cf. *United Aircraft Corp.,* 192 N. L. R. B. 382, 390 (1971) (company physician's records not disclosable without employee's permission unless needed for a particular grievance), modified on other issues *sub nom. Machinists* v. *United Aircraft Corp.,* 534 F. 2d 422 (CA2 1975), cert. denied, 429 U. S. 825 (1976); *Shell Oil Co.* v. *NLRB,*

III

In sum, I think the Board's resolution is sound and that the Sixth Circuit's judgment enforcing it should be sustained. I do not mean to suggest that the considerations advanced by the Company are without substance or that this case does not present a "difficult and delicate" task of balancing competing claims. Cf. *Beth Israel Hospital* v. *NLRB*, 437 U. S., at 501. But, by virtue of that, this is precisely the kind of case in which "considerable deference" is owed the Board. *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978); see *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960); *NLRB* v. *Truck Drivers*, 353 U. S., at 96. Importantly, "[h]ere, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from

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457 F. 2d 615, 619 (CA9 1972) (refusal to furnish employees' names without consent was proper when it was "establish[ed] beyond cavil that there was a clear and present danger of harassment and violence"). See also *Cowles Communications, Inc.*, 172 N. L. R. B. 1909 (1968) (employees' salaries and other particularized data about employees); *Electric Auto-Lite Co.*, 89 N. L. R. B. 1192 (1950) (wage data); R. Gorman, Labor Law 417–418 (1976); Comment, 91 Harv. L. Rev., *supra* n. 3, at 873–874, and n. 35. In *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), in another setting, a plurality of this Court observed:

"The disclosure requirement [imposed by the Board and concerning employees' names and addresses] furthers [statutory objectives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." *Id.*, at 767.

American Federation of Govt. Employees v. *Defense General Supply Center*, 573 F. 2d 184 (CA4 1978), from which the majority seeks support, *ante*, at 319 n. 16, involved a federal employer not subject to the National Labor Relations Act and a construction of the federal Privacy Act.

its special understanding of 'the actualities of industrial relations.'" *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221, 236 (1963), quoting *NLRB* v. *Steelworkers,* 357 U. S. 357, 362–363 (1958). I think it unjustified to depart from our accustomed mode of review. Accordingly, I respectfully dissent.

QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN

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

No. 77–841. Argued November 8, 1978—Decided March 5, 1979

In *Edelman* v. *Jordan,* 415 U. S. 651, it was held that retroactive welfare benefits awarded by a Federal District Court to the plaintiff class, by reason of wrongful denial of benefits by Illinois officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment, and that in an action under 42 U. S. C. § 1983 "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman, supra,* at 677. On remand, the District Court ordered the state officials to send to each member of the plaintiff class a notice informing him that he was denied public assistance to which he was entitled, together with a "Notice of Appeal" by which the recipient could request a hearing on the denial of benefits. The Court of Appeals reversed on the ground that the proposed form of notice would have been barred by the Eleventh Amendment, but stated that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits," and that a returnable notice of appeal could also be provided. *Held:*

1. Neither *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, the legislative history cited in that decision, nor this Court's Eleventh Amendment cases subsequent to *Edelman* cast any doubt on *Edelman*'s holding that § 1983 does not abrogate the Eleventh Amendment immunity of the States. Section 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability or shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Hutto* v. *Finney,* 437 U. S. 678, distinguished. Nor does this Court's reaffirmance of *Edelman* in this case render § 1983 meaningless insofar as States are concerned. Pp. 338–345.

2. The modified notice contemplated by the Court of Appeals constitutes permissible prospective relief and not a "retroactive award which requires payment of funds from the state treasury." Such notice in effect simply informs plaintiff class members that there are existing administrative procedures by which they may receive a determination of eligibility for past benefits, that their federal suit is at an end, and that the federal court can provide them with no further relief. Whether a recipient of the notice decides to take advantage of the available procedures is left completely to the discretion of that particular class member, the federal court playing no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court. Pp. 346–349.

563 F. 2d 873, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in Parts I, II, and III of which MARSHALL, J., joined, *post,* p. 349. MARSHALL, J., filed an opinion concurring in the judgment, *post,* p. 366.

William A. Wenzel III, Special Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs was *William J. Scott,* Attorney General.

Sheldon Roodman argued the cause for respondent. With him on the brief was *James D. Weill.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case is a sequel to *Edelman* v. *Jordan,* 415 U. S. 651 (1974), which we decided five Terms ago. In *Edelman* we held that retroactive welfare benefits awarded by a Federal District Court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the

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**Theodore L. Sendak,* Attorney General, *William G. Mundy,* Deputy Attorney General, and *Donald P. Bogard* filed a brief for the State of Indiana as *amicus curiae* urging reversal.

Eleventh Amendment.[1] The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits. We granted certiorari to resolve an apparent conflict between the decision of the United States Court of Appeals for the Seventh Circuit in this case and that of the Court of Appeals for the Third Circuit in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (1977).[2] 435 U. S. 904 (1978). We believe that the case as it now comes to us involves little, if any, unbroken ground in this area, and affirm the judgment of the Seventh Circuit.

Following our remand in *Edelman,* the United States District Court for the Northern District of Illinois, upon motion of the plaintiff, ordered the state officials to send to each

[1] The history of this case is set forth in greater detail in *Edelman* v. *Jordan,* 415 U. S. 651 (1974).

[2] In *Fanty,* the plaintiff class alleged that the manner in which the defendant state officials had collected class members' federal benefits in reimbursement of amounts granted under state welfare laws violated this Court's decision in *Philpott* v. *Essex County Welfare Board,* 409 U. S. 413 (1973). The District Court agreed, and while it denied retroactive relief against the State on the basis of *Edelman* v. *Jordan, supra,* it did require the defendant state officials to notify plaintiff class members that under *Philpott* they have no legal obligation to make reimbursement out of their federal disability benefits and that as a matter of state law they may have a cause of action against the Department of Public Welfare for refund of prior payments. The Court of Appeals, in three separate opinions, reversed. Chief Judge Seitz was of the opinion that the notice relief was barred by the Eleventh Amendment. Judge Garth, concurring in the result, believed that the Eleventh Amendment issue was "borderline," 551 F. 2d, at 6, but voted to reverse on the basis that there was no case or controversy. Judge Hunter dissented on grounds not relevant here. However, he disagreed with Chief Judge Seitz that the Eleventh Amendment prohibited the notice relief.

member of the plaintiff class a notice informing the recipient: "[Y]ou were denied public assistance to which you were entitled in the amount of $———." *Jordan* v. *Trainor,* 405 F. Supp. 802, 809 (1975).[3] Enclosed with the required mailing was to be a "Notice of Appeal," which when signed and returned to the Illinois Department of Public Aid, requested a hearing on the denial of benefits. That notice stated: "The department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." *Id.,* at 810.

The Court of Appeals, en banc, found that this proposed form of notice would have been barred by the Eleventh Amendment, since it at least purported to decide that Illinois public funds should be used to satisfy the claims of plaintiff class members without the consent of the State by its appropriate officials. *Jordan* v. *Trainor,* 563 F. 2d 873, 875 (1977).[4] The

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[3] Because this was a class action qualifying under Fed. Rule Civ. Proc. 23 (b)(2), the class members had never received notice of the complaint, the original lower court judgment, this Court's decision or its effect on them. See *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156, 177 n. 14 (1974); Fed. Rule Civ. Proc. 23 (e). Under Rule 23 (d)(2), however, a court may require appropriate notice "for the protection of the members of the class or otherwise for the fair conduct of the action."

Prior to ordering notice, the District Court requested the parties to submit information with respect to the number of persons in the plaintiff class, the cost of notifying them, the amounts involved, and other issues affecting the equities of sending notice. Respondent filed his response to the court's request but the state officials submitted no response. Respondent indicated that there were approximately 20,000 to 33,500 members in the plaintiff class. App. 34a. The cost of identifying class members was stated to be simply the cost of running the department's computer for a period necessary to cull out the names of the plaintiff class members. Respondent claimed that there would be no additional cost of notifying class members because the notice could be included in one of the regular mailings to the members of the plaintiff class. Petitioner has not disputed respondent's allegations either below or before this Court.

[4] A panel of the Seventh Circuit originally had reversed the District Court's order requiring notice on the ground that the Eleventh Amend-

court reversed the District Court's order for this reason, but stated that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided." *Ibid.* In the court's view, such a notice would not violate the distinction set forth in *Edelman* between prospective relief, which is permitted by the Eleventh Amendment, and retrospective relief, which is not:

> "The form of notice we envisage would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. The defendant makes no issue out of any incidental administrative expense connected with the preparation or mailing of the notice. It has suggested in the record that the notice could be included in the regular monthly mailing. The necessary information comes from a computer. There is no indication that the administrative expense would be substantial." 563 F. 2d, at 876.

Under the contemplated modified notice procedure, the court stated, members of the plaintiff class would be given no more than "they would have gathered by sitting in the courtroom or by reading and listening to news accounts had the case attracted any attention." *Id.*, at 877–878.[5] Three judges dis-

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ment was a "jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program." *Jordan* v. *Trainor*, 551 F. 2d 152, 155 (1977).

[5] In reaching its decision, the Seventh Circuit relied in part on our summary affirmance of *Grubb* v. *Sterrett*, 315 F. Supp. 990 (ND Ind.),

sented on the ground that the majority's revised notice form was barred by the Eleventh Amendment.

In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 415 U. S., at 663; see *Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47 (1944). We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the landmark decision in *Ex parte Young,* 209 U. S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. 415 U. S., at 667–668; see *Milliken* v. *Bradley,* 433 U. S. 267, 289 (1977); *Scheuer* v. *Rhodes,* 416 U. S. 232, 237 (1974). The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other.[6]

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aff'd, 400 U. S. 922 (1970), in which the District Court had ordered Indiana public assistance officials to send to plaintiff class members a notice similar to the one at issue here. As the Court of Appeals recognized, the list of summary affirmances overruled in *Edelman* was not necessarily intended to be exhaustive. See *Jordan* v. *Trainor,* 563 F. 2d, at 876. However, we prefer to rest our affirmance of the judgment of the Court of Appeals in this case on our conclusion that it is consistent with *Edelman.*

[6] As we stated in *Edelman:*

"[T]hat portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than [*Ex parte*

Petitioner state official devotes a significant part of his brief to an attack on the proposed notice which the District Court required the state officials to send. It is, however, the decision of the Court of Appeals, and not that of the District Court, which we review at the behest of petitioner. And just as petitioner insists on tilting at windmills by attacking the District Court's decision, respondent suggests that our decision in *Edelman* has been eviscerated by later decisions such as *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978). Brief for Respondent 55 n. 37. See also *Aldridge* v. *Turlington,* No. TCA–78–830 (ND Fla., Nov. 17, 1978); but see *Skehan* v. *Board of Trustees of Bloomsburg State College,* 590 F. 2d 470 (CA3 1978). As we have noted above, we held in *Edelman* that in "a [42 U. S. C.] § 1983 action . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*" 415 U. S., at 677. We disagree with respondent's suggestion. This Court's holding in *Monell* was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes," 436 U. S., at 690 n. 54, and our Eleventh Amendment decisions subsequent to *Edelman* and to *Monell* have cast no doubt on our holding in *Edelman.* See *Alabama* v. *Pugh,* 438 U. S. 781 (1978);

Young and the cases that had followed it]. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. . . . It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U. S., at 668.

Hutto v. *Finney*, 437 U. S. 678 (1978); *Milliken* v. *Bradley*, *supra*; *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976); *Scheuer* v. *Rhodes*, *supra*.[7]

While the separate opinions in *Hutto* v. *Finney*, *supra*,[8] debated the continuing soundness of *Edelman* after our decision in *Monell*, any doubt on that score was largely dispelled by *Alabama* v. *Pugh*, *supra*, decided just 10 days after *Hutto*. In *Pugh* the Court held, over three dissents, that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment, even though the complaint was based on 42 U. S. C. § 1983 and the claim was a violation of

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[7] MR. JUSTICE BRENNAN's opinion concurring in the judgment states that "*Edelman* v. *Jordan*, *supra*, had held that § 1983 did not override state immunity, for the reason, as the Court later stated in *Fitzpatrick*, that '[t]he Civil Rights Act of 1871, 42 U. S. C. § 1983, had been held in *Monroe* v. *Pape*, 365 U. S. 167, 187–191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.'" *Post*, at 351. Since *Monell* overruled *Monroe*'s holding that cities and other municipal corporations are not "persons" within the meaning of § 1983, MR. JUSTICE BRENNAN's opinion argues that the "premise" of *Edelman* has been "undercut." *Post*, at 351. The fallacy of this line of reasoning was aptly demonstrated last Term by MR. JUSTICE POWELL in his concurring opinion in *Hutto*, where he stated: "The language in question from *Fitzpatrick* was not essential to the Court's holding in that case. Moreover, this position ignores the fact that *Edelman* rests squarely on the Eleventh Amendment immunity, without adverting in terms to the treatment of the legislative history in *Monroe* v. *Pape* . . . ." 437 U. S., at 708–709, n. 6. In fact, *Monroe* v. *Pape* is not even cited in *Edelman*.

[8] In *Hutto* v. *Finney* there were three separate opinions in addition to that of the Court. Two opinions expressed the view that the Court had misapplied the rule laid down in *Edelman*. 437 U. S., at 704 (POWELL, J., concurring and dissenting); *id.*, at 710 (REHNQUIST, J., dissenting). MR. JUSTICE BRENNAN, though joining the opinion of the Court, wrote separately to suggest that the Court's opinions in *Monell* and *Fitzpatrick* v. *Bitzer* had rendered "the essential premise of our *Edelman* holding . . . no longer true." 437 U. S., at 703. The Court itself in *Hutto*, however, recognized and applied *Edelman*'s distinction between retrospective and prospective relief.

the Eighth and Fourteenth Amendments similar to that made in *Hutto*. The Court said:

> "There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945); *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937)." 438 U. S., at 782.[9]

The decision in *Pugh* was consistent both with *Monell*, which was limited to "local government units," 436 U. S., at 690 n. 54, and with *Fitzpatrick* v. *Bitzer*, *supra*. In the latter case we found that " 'threshold fact of congressional authorization,' " which had been lacking in *Edelman*, to be present in the express language of the congressional amendment making Title VII of the Civil Rights Act of 1964 applicable to state and local governments. 427 U. S., at 452, quoting *Edelman* v. *Jordan*, 415 U. S., at 672.

MR. JUSTICE BRENNAN in his opinion concurring in the judgment argues that our holding in *Edelman* that § 1983 does not abrogate the States' Eleventh Amendment immunity is "most likely incorrect." *Post*, at 354. To reach this conclu-

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[9] Our Brother BRENNAN in his opinion concurring in the judgment curiously suggests that the language quoted from *Pugh* in the text could not mean what it, on its face, says, because the briefs in the case were filed before our decision in *Monell* was announced. *Post*, at 352–354. But while the parties in *Pugh* were "without the benefit of *Monell*'s major re-evaluation of the legislative history of § 1983," *post*, at 352–353, the Members of this Court labored under no similar disability. The decision in *Pugh* was handed down nearly one month after *Monell* and 10 days after *Hutto*, where separate opinions debated this precise point. If, after *Monell* and *Hutto*, this Court harbored any doubts about the continued validity of *Edelman*'s conclusion that § 1983 does not constitute a waiver of the Eleventh Amendment immunity of the States, it is inconceivable that the Court would have taken the extraordinary action of summarily reversing a lower court on the basis of *Edelman*.

sion he relies on "assum[ptions]" drawn from the Fourteenth Amendment, *post,* at 355, on "occasional remarks" found in a legislative history that contains little debate on § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983, *post,* at 358 n. 15,[10] on the reference to "bodies politic" in the Act of Feb. 25, 1871, 16 Stat. 431, the "Dictionary Act," *post,* at 355–357,[11] and, finally on the general language of § 1983 itself, *post,* at 356. But, unlike our Brother BRENNAN, we simply are unwilling to believe, on the basis of such slender "evidence," that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States. We therefore conclude that neither the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edelman,* nor the additional legislative history or arguments set forth in MR. JUSTICE BRENNAN's opinion, justify a conclusion different from that which we reached in *Edelman.*[12]

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[10] There was only limited debate on § 1 of the Civil Rights Act of 1871, and it passed without amendment. *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 665. The sections that drew most of the debate were those that created certain federal crimes, permitted the President to send the militia to any State with widespread Ku Klux Klan violence, and authorized suspension of the writ of habeas corpus in certain circumstances. *Id.,* at 665 n. 11.

[11] The Dictionary Act was intended to provide a "few general rules for the construction of statutes." Cong. Globe, 41st Cong., 3d Sess., 1474 (1871) (remarks of Rep. Poland). While it was enacted two months before the enactment of the 1871 Civil Rights Act, it came more than five years *after* passage of § 2 of the Civil Rights Act of 1866, 14 Stat. 27, which served as the model for the language of § 1 of the 1871 Act. Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (remarks of Rep. Shellabarger); see *Monroe* v. *Pape,* 365 U. S. 167, 183–185 (1961); *post,* at 362 n. 17.

[12] MR. JUSTICE BRENNAN's opinion characterizes this conclusion as "gratuitous" and "paten[t] dicta." *Post,* at 350. But we cannot think of a more "gratuitous" or useless exercise of this Court's discretionary jurisdiction than to decide which of two conflicting interpretations of *Edelman* v. *Jordan* is correct, if in truth we believed that *Edelman* itself no longer were valid. The question does not arise out of the blue; it was extensively discussed in our Brother BRENNAN's concurrence in *Hutto* v. *Finney* last

There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States.[13] Many of the remarks from the legislative history of the Act quoted in MR. JUSTICE BRENNAN's opinion amply demonstrate this point. *Post,* at 359–365. See also *Monroe* v. *Pape,* 365 U. S. 167, 173–176 (1961). But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.[14] In *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), the Court rejected a simi-

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Term. We therefore fail to see how our reaffirmance of *Edelman* can be characterized as "dicta."

[13] For example, the Act was attacked as an attempt to strip States of the power to punish and proscribe offenses within their borders, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., 396 (1871) (remarks of Rep. Rice); *id.,* at App. 112 (remarks of Rep. Moore); *id.,* at App. 117 (remarks of Sen. Blair), and of their authority to decide when the militia of the United States should be called into their territory to quell domestic disturbances, *e. g., id.,* at 647 (remarks of Sen. Davis); *id.,* at App. 139 (remarks of Rep. McCormick).

[14] Indeed the *Prigg-Dennison-Day* line of cases, relied on so heavily in *Monell,* would surely militate against such a conclusion. 436 U. S., at 672–683; see *Prigg* v. *Pennsylvania,* 16 Pet. 539 (1842); *Kentucky* v. *Dennison,* 24 How. 66 (1861); *Collector* v. *Day,* 11 Wall. 113 (1871). Our Brother BRENNAN's concurrence in the judgment today relies on *Ex parte Virginia,* 100 U. S. 339 (1880), and on *Virginia* v. *Rives,* 100 U. S. 313 (1880). But these cases were decided nearly a decade after the enactment of the Civil Rights Act of 1871, and as noted in *Monell,* substantially undercut the *Prigg-Dennison-Day* line of cases for purposes of enforcement of the Fourteenth Amendment. 436 U. S., at 676. But (as was noted in *Monell*) it was the *Prigg-Dennison-Day* line of cases that was "the reigning constitutional theory of [the] day" when the Civil Rights Act of 1871 was debated and enacted. 436 U. S., at 676.

lar attempt to interpret the word "person" in § 1983 as a withdrawal of the historic immunity of state legislators. The Court's words bear repeating here:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? . . . The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47 (3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U. S., at 376.

Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother BRENNAN is able to marshal. In *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279 (1973), the Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938, 29 U. S. C. §§ 201–219, because of

the absence of any indication "by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." 411 U. S., at 285.[15] In *Fitzpatrick* v. *Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, the "threshold fact of congressional authorization" to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments in the event the Equal Employment Opportunity Commission or the Attorney General failed to bring suit or effect a conciliation agreement. 427 U. S., at 448 n. 1, 449 n. 2, 452; see Equal Opportunity Employment Act of 1972, 86 Stat. 105, 42 U. S. C. § 2000e–5 (f)(1); H. R. Rep. No. 92–238, pp. 17–19 (1971); S. Rep. No. 92–415, pp. 9–11 (1971); S. Conf. Rep. No. 92–681, pp. 17–18 (1972); H. R. Conf. Rep. No. 92–899, pp. 17–18 (1972). Finally, in *Hutto* v. *Finney*, decided just last Term, the Court held that in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, Congress intended to override the Eleventh Amendment immunity of the States and authorize fee awards payable by the States when their officials are sued in their official capacities. 437 U. S., at 693–694. Although the statutory language in *Hutto* did not separately impose liability on States in so many words,[16] the statute had

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[15] The Court in *Employees* "found not a word in the history of the [statute] to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." 411 U. S., at 285. The Court also added that its interpretation of the law did not render the statute's inclusion of state institutions meaningless. *Id.*, at 285–286.

[16] While *Hutto*, unlike *Fitzpatrick* and *Employees*, did not require an express statutory waiver of the State's immunity, 437 U. S., at 695, 698 n. 31, the Court was careful to emphasize that it was concerned only with

"a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards." *Id.*, at 698 n. 31. Also, the Court noted that the statute would have been rendered meaningless with respect to States if the Act did not impose liability for attorney's fees on the States. *Ibid.;* see *Employees* v. *Missouri Public Health Dept., supra,* at 285–286. By contrast, § 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. Nor does our reaffirmance of *Edelman* render § 1983 meaningless insofar as States are concerned. See *Ex parte Young,* 209 U. S. 123 (1908).[17]

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expenses incurred in litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct. *Id.,* at 695. The Court also noted that it was not concerned with a statute that imposed " 'enormous fiscal burdens on the States' " and that if it were, it might require a formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity, as did *Employees* and *Fitzpatrick.* 437 U. S., at 697 n. 27. Extending § 1983 liability to States obviously *would* place "enormous fiscal burdens on the States." But we need not reach the question whether an express waiver is required because neither the language of the statute nor the legislative history discloses an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them.

[17] The arguments in MR. JUSTICE BRENNAN'S opinion regarding *Osborn* v. *Bank of the United States,* 9 Wheat. 738 (1824), are similarly unpersuasive. *Post,* at 359–361, n. 16. Mr. Chief Justice Marshall's opinion in *Osborn* makes it clear that in determining whether a court can grant relief the key inquiry is whether the state officer was in fact the real party in interest or whether he was only a nominal party. 9 Wheat., at 858. See also *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat. 904, 907 (1824). Mr. Chief Justice Marshall emphasized this precise point just four years later in his opinion for the Court in *Governor of Georgia* v. *Madrazo,* 1 Pet. 110 (1828). In *Madrazo,* a vessel carrying slaves was seized and the

We turn, then, to the question which has caused disagreement between the Courts of Appeals: does the modified notice contemplated by the Seventh Circuit constitute per-

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slaves were delivered into the possession of the Governor of Georgia. The slaves were sold and the proceeds were placed in the state treasury. Madrazo filed a libel in the Federal District Court, naming the Governor of Georgia, among others, as a defendant. Restitution was ordered by the lower courts, but this Court reversed because although the demand for relief nominally was against the Governor of the State, it was clear that the action in fact sought relief directly from the state treasury, relief that was forbidden by the Eleventh Amendment.

"The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.

"The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, *where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made.* No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as a defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced." *Id.*, at 123–124 (emphasis added).

To similar effect see *Kentucky* v. *Dennison*, 24 How., at 97–98, which reaffirmed these principles of *Madrazo* and which, as the Court in *Monell* emphasized, was "well known to Members of Congress" at the time of the passage of the 1871 Act. 436 U. S., at 679. To the extent that *Davis* v. *Gray*, 16 Wall. 203 (1873), which did no more than affirm an injunctive decree against a state official, is inconsistent with the rule applied in *Edelman*, it suffices to say that it was repudiated long before the latter decision. In *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945), the Court stated:

"[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, at 464.

missible prospective relief or a "retroactive award which requires the payment of funds from the state treasury"? We think this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side.[18] Petitioner makes no issue of the incidental administrative expense connected with preparing and mailing the notice.[19] Instead, he argues that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award. But the chain of causation which petitioner seeks to establish is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever adminis-

[18] In addition to petitioner's Eleventh Amendment arguments, he contends that the Court of Appeals' notice violates the law of the case as established in *Edelman* v. *Jordan,* 415 U. S. 651 (1974). We disagree. The doctrine of law of the case comes into play only with respect to issues previously determined. *In re Sanford Fork & Tool Co.,* 160 U. S. 247 (1895). On remand, the "Circuit Court may consider and decide any matters left open by the mandate of this court." *Id.,* at 256. Accord, *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175 (1920). The Court in *Edelman* considered the constitutionality only of the relief before it. 415 U. S., at 665. It was not presented with the question of the propriety of notice relief. Petitioner also claims that the District Court lacked power to order notice under the terms of this Court's remand. The simple answer to this contention is that we remanded the matter in *Edelman* "for further proceedings consistent with this opinion," and we hold today that the award of notice relief, as fashioned by the Court of Appeals, is not inconsistent with either the spirit or express terms of our decision in *Edelman.* "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, 168 (1939), citing *In re Sanford Fork & Tool Co., supra.*

[19] It appears from respondent's answers to a District Court request that any expense associated with the preparation and mailing of the notice would be *de minimis.* See n. 3, *supra.*

trative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. The notice of appeal, we are told, is virtually identical to the notice sent by the Department of Public Aid in every case of a denial or reduction of benefits. The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court.[20]

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[20] As of January 1, 1974, the Aid to the Aged, Blind, and Disabled program was replaced by a completely federal-funded Supplemental Security Income program. Pub. L. 92–603, Title III, § 301, 86 Stat. 1465. Petitioner argues that the notice relief is impermissible because if retroactive benefits ultimately are awarded to the plaintiff class members, there is little likelihood that the Federal Government will reimburse the State for assistance payments made relating to a now defunct program. Thus, Illinois would have to bear the total cost of such retroactive payments. This fact may well be relevant to the state agency's or court's determination of whether to award retroactive benefits. But since the notice relief does not constitute a money judgment, it is not at all relevant to the question of the propriety of the notice fashioned by the Court of Appeals.

Petitioner also states that even if the Department of Public Aid determines to grant retroactive relief, it may not request the Comptroller to draw, or the Treasurer to make payments from, funds appropriated for a current fiscal year for an outstanding obligation incurred during a prior fiscal year without the express authorization from the legislature. See Reply Brief for Petitioner 5. Thus, as a result of the lapse of Public Aid appropriations for fiscal years 1968, 1969, 1970, and 1971, petitioner claims that members of the plaintiff class would be required to resort to filing claims against the State in the Illinois Court of Claims. These facts may influence a plaintiff class member in deciding whether to pursue existing state remedies or the legislature in determining whether to give its approval to a payment of retroactive benefits, but they do not affect

The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court. See *Milliken* v. *Bradley,* 433 U. S., at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue. Petitioner raises no objection to the expense of preparing or sending it. The class members are "given no more . . . than what they would have gathered by sitting in the courtroom." *Jordan* v. *Trainor,* 563 F. 2d, at 877–878. The judgment of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins as to Parts I, II, and III, concurring in the judgment.

For the reasons set forth in my dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 687 (1974), I concur in the judgment of the Court.[1]

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our conclusion that the notice relief awarded here is permissible under the Eleventh Amendment.

[1] In *Edelman* v. *Jordan,* 415 U. S., at 687–688, I stated:

"This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to respondent's claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 298 (1973): the States surrendered that immunity in Hamilton's words, 'in the plan of the Convention,' that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.,* at 319 n. 7; *Parden* v. *Terminal R. Co.,* 377 U. S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U. S. C. §§ 1381–1385 (now replaced by similar provisions in 42 U. S. C. §§ 801–804

I

It is deeply disturbing, however, that the Court should engage in today's gratuitous departure from customary judicial practice and reach out to decide an issue unnecessary to its holding. The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is "properly viewed as ancillary to . . . prospective relief." *Ante*, at 349. This is sufficient to sustain the Court's holding that such notice is not barred by the Eleventh Amendment. But the Court goes on to conclude, in what is patently dicta, that a State is not a "person" for purposes of 42 U. S. C. § 1983, Rev. Stat. § 1979.[2]

This conclusion is significant because, only three Terms ago, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), held that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.*, at 456. If a State were a "person" for purposes of § 1983, therefore, its immunity under the Eleventh

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(1970 ed., Supp. II), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that 'because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver,' 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which sustained judgments ordering retroactive payments."

[2] Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Amendment would be abrogated by the statute.[3] *Edelman* v. *Jordan, supra,* had held that § 1983 did not override state immunity, for the reason, as the Court later stated in *Fitzpatrick,* that "[t]he Civil Rights Act of 1871, 42 U. S. C. § 1983, had been held in *Monroe* v. *Pape,* 365 U. S. 167, 187–191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant." 427 U. S., at 452.[4] The premise of this reasoning was undercut last Term, however, when *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), upon re-examination of the legislative history of § 1983, held that a municipality was indeed a "person" for purposes of that statute.[5] As I stated in my concurrence in *Hutto* v. *Finney,* 437 U. S. 678, 703 (1978), *Monell* made it "surely at least an open question whether § 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment."

The Court's dicta today would close that open question on the basis of *Alabama* v. *Pugh,* 438 U. S. 781 (1978). In that case the State of Alabama had been named as a party defendant in a suit alleging unconstitutional conditions of confine-

[3] There is no question but that § 1983 was enacted by Congress under § 5 of the Fourteenth Amendment. Section 1983 was originally the first section of an Act entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States . . . ." 17 Stat. 13.

[4] This reasoning had been employed by several lower courts which had considered this question. See, *e. g., United States ex rel. Gittlemacker* v. *County of Philadelphia,* 413 F. 2d 84, 86 n. 2 (CA3 1969) ("In view of the Supreme Court's holding in Monroe v. Pape . . . that a municipal corporation is not a 'person' subject to suit within the meaning of the Civil Rights Act, the conclusion that states are not persons within the meaning of the Act is inescapable"); *Williford* v. *California,* 352 F. 2d 474, 476 (CA9 1965).

[5] For a discussion of the implications of *Monell* for this question, see *Aldridge* v. *Turlington,* Civ. Act. No. TCA–78–830 (ND Fla., Nov. 17, 1978).

ment. The question presented was "[w]hether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U. S. C. § 1983." *Id.*, at 782–783, n. 2. The Court held that the State should not have been named as a party defendant.

Pugh, however, does not stand for the proposition that a State is not a "person" for purposes of § 1983. Not only does the Court's opinion in that case fail even to mention § 1983, it frames the issue addressed as whether Alabama had "consented to the filing of such a suit." 438 U. S., at 782. Since Alabama's consent would have been irrelevant if Congress had intended States to be encompassed within the reach of § 1983, the Court apparently decided the first half of the question presented—"[w]hether the mandatory injunction issued against the State of Alabama . . . violates the State's Eleventh Amendment immunity"—without considering or deciding the second half—whether the mandatory injunction "exceeds the jurisdiction granted federal courts by 42 U. S. C. § 1983." [6]

This parsing of *Pugh* is strengthened by a consideration of the circumstances surrounding that decision. *Pugh*, a short *per curiam*, was issued on the last day of the Term without the assistance of briefs on the merits or argument. Alabama's petition for certiorari and respondents' brief in opposition were filed on February 6, 1978, and April 6, 1978, respectively, months before *Monell* was announced. They were thus necessarily without the benefit of *Monell*'s major re-evaluation of

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[6] This is what I take to be the significance of the observation of my Brother STEVENS in *Pugh:*

"Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in *Hutto* v. *Finney*, 437 U. S. 678, 700 (BRENNAN, J., concurring), and 708–709, n. 6 (POWELL, J., concurring in part and dissenting in part)." 438 U. S., at 783 n. * (1978) (STEVENS, J., dissenting). Cf. The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 325–326 (1978).

the legislative history of § 1983.[7] Respondents did not even raise the possibility that Alabama might be a "person" for purposes of § 1983.[8] Since the issue is not, as the Court now

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[7] Indeed, the entire discussion of the issue in the petition for certiorari is as follows:

"The grant of an injunction against the State and the Board of Corrections in an action based upon 42 U. S. C. § 1983 is in direct conflict with decisions of other courts of appeal which hold that neither a State nor a State agency is a 'person' within the meaning of the statute and amenable to suit under it. *Meredith* v. *Arizona,* 523 F. 2d 481 (9th Cir. 1975); *Curtis* v. *Everette,* 489 F. 2d 516 (3rd Cir. 1973). The decisions below conflict, at least in principle, with this Court's holding in *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), that municipalities are not 'persons' under 42 U. S. C. § 1983." Pet. for Cert. in *Alabama* v. *Pugh,* O. T. 1977, No. 77–1107, pp. 11–12.

[8] The discussion of the issue by the respondents in *Pugh* was unilluminating:

"Supreme Court Rule 19 (1) states that certiorari will only be 'granted where there are special and important reasons therefor.' The second issue raised by the Petitioners challenges the injunction against the State of Alabama and the Alabama Board of Corrections alleging: (1) each is immune from suit under the Eleventh Amendment; (2) neither is a 'person' subject to 42 U. S. C. 1983 jurisdiction; and (3) *Edelman* v. *Jordan,* 415 U. S. 651 (1974) and *Ex Parte Young,* 209 U. S. 123 (1908) bar judgments against the State for prospective costs of compliance with an order. Under the facts of these cases, the questions presented are not only unimportant but are essentially irrelevant.

"First, additional defendants enjoined include all members of the Alabama Board of Corrections and numerous other prison officials who would clearly remain bound by the injunction issued, *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974); *Edelman* v. *Jordan,* 415 U. S. 651 (1974) and have the authority in their official capacity to carry out the court's orders. Second, the State of Alabama and the Board of Corrections were only named defendants in the *Pugh* case and not the *James* case. Therefore, any action taken on this issue in *Pugh* would not affect the same relief granted in *James.* Third, this issue was never thought important enough by counsel for the petitioners to raise, brief or argue in the trial court. Fourth, the Court of Appeals did not see fit to speak to this issue at all. Fifth, whether the State of Alabama and/or the Board of Corrections are enjoined in addition to the members of the Board of Corrections has absolutely no practical effect on what has happened or will happen under the

phrases it, whether the Members of this Court were then aware of *Monell, ante,* at 340 n. 9, but rather whether they had before them briefs and arguments detailing the implications of *Monell* for the question of whether a State is a "person" for purposes of § 1983, it is not anomalous that the Court's opinion in *Pugh* failed to address or consider this issue.

The Court's reliance on *Pugh* is particularly significant because the question whether a State is a "person" for purposes of § 1983 is neither briefed nor argued by the parties in the instant case. Indeed, petitioner states flatly that "the *en banc* decision of the Seventh Circuit does not rest upon a conclusion that the term 'person' for purposes of § 1983 includes sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on Petitioner's Writ for Certiorari." Reply Brief for Petitioner 14. Respondent concurs, stating that "it is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in § 1983 to provide for relief directly against States, as it did against municipalities." Brief for Respondent 55 n. 37.

Thus, the Court today decides a question of major significance without ever having had the assistance of a considered presentation of the issue, either in briefs or in arguments. The result is pure judicial fiat.

II

This fiat is particularly disturbing because it is most likely incorrect. Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. The Act was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment.[9] That Amendment exemplifies the "vast transformation" worked on the structure of federalism in this Nation by the Civil War. *Mitchum* v. *Foster,* 407 U. S. 225, 242 (1972).

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court's order." Brief in Opposition in *Alabama* v. *Pugh,* O. T. 1977, No. 77–1107, pp. 9–10.

[9] See n. 3, *supra.*

The prohibitions of that Amendment "are directed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia,* 100 U. S. 339, 346–347 (1880).[10] The fifth section of the Amendment provides Congress with the power to enforce these prohibitions "by appropriate legislation." "Congress, by virtue of the fifth section . . . , may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion." *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880).

The prohibitions of the Fourteenth Amendment and Congress' power of enforcement are thus directed at the States themselves, not merely at state officers. It is logical to assume, therefore, that § 1983, in effectuating the provisions of the Amendment by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights," *Mitchum* v. *Foster, supra,* at 242, is also addressed to the States themselves. Certainly Congress made this intent plain enough on the face of the statute.

Section 1 of the Civil Rights Act of 1871 created a federal cause of action against "any person" who, "under color of any law, statute, ordinance, regulation, custom, or usage of any State," deprived another of "any rights, privileges, or immunities secured by the Constitution of the United States." On

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[10] "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.' " 100 U. S., at 346.

"It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ibid.*

February 25, 1871, less than two months before the enactment of the Civil Rights Act, Congress provided that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."[11] § 2, 16 Stat. 431. *Monell,* held that "[s]ince there is nothing in the 'context' of the Civil Rights Act calling for a restricted interpretation of the word 'person,' the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued." 436 U. S., at 689–690, n. 53. Even the Court's opinion today does not dispute the fact that in 1871 the phrase "bodies politic and corporate" would certainly have referred to the States.[12] See *Heim* v. *McCall,* 239 U. S. 175, 188 (1915); *McPherson* v. *Blacker,* 146 U. S. 1, 24 (1892); *Poin-*

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[11] *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), held that the word "may" in the Act was to be interpreted as the equivalent of "shall": "Such a mandatory use of the extended meanings of the words defined by the Act is . . . required for it to perform its intended function—to be a guide to 'rules of construction' of Acts of Congress. See [Cong. Globe, 41st Cong., 3d Sess., 775 (1871)] (remarks of Sen. Trumbull)." *Id.,* at 689 n. 53.

[12] The phrase would also have referred to the United States. As Mr. Chief Justice Marshall stated: "The United States is a government, and, consequently, a body politic and corporate . . . ." *United States* v. *Maurice,* 2 Brock. 96, 109 (CC Va. 1823). See *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 154 (1886); *Dugan* v. *United States,* 3 Wheat. 172, 178 (1818) (argument of Attorney General William Wirt).

In construing the meaning of the term "person" in a Texas law creating a statute of limitations for suits to recover real estate "as against any person in peaceable and adverse possession thereof," this Court stated:

"Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate. Sayles, Art. 3140; *Martin* v. *State,* 24 Texas, 61, 68." *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 517 (1893).

See *United States* v. *Shirey,* 359 U. S. 255, 257 n. 2 (1959); *Ohio* v. *Helvering,* 292 U. S. 360, 370 (1934); cf. *Pfizer Inc.* v. *India,* 434 U. S. 308, 315–316, n. 15 (1978).

dexter v. *Greenhow,* 114 U. S. 270, 288 (1885); *Cotton* v. *United States,* 11 How. 229, 231 (1851); *Chisholm* v. *Georgia,* 2 Dall. 419, 447 (Iredell, J.), 468 (Cushing, J.) (1793); *Utah State Building Comm'n* v. *Great American Indemnity Co.,* 105 Utah 11, 16, 140 P. 2d 763, 766 (1943); *Board of Comm'rs of Hamilton County* v. *Noyes,* 3 Am. L. Rec. 745, 748 (Super. Ct. Cincinnati 1874); 1 J. Wilson, Works 305 (1804); cf. *Keith* v. *Clark,* 97 U. S. 454, 460–461 (1878); *Munn* v. *Illinois,* 94 U. S. 113, 124 (1877); *Georgia* v. *Stanton,* 6 Wall. 50, 76–77 (1868); *Butler* v. *Pennsylvania,* 10 How. 402, 416–417 (1851); *Penhallow* v. *Doane's Administrators,* 3 Dall. 54, 92–93 (1795) (Iredell, J.); Mass. Const., Preamble. Indeed, during the very debates surrounding the enactment of the Civil Rights Act, States were referred to as bodies politic and corporate. See, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., 661–662 (1871) (hereinafter Globe) (Sen. Vickers) ("What is a State? Is it not a body politic and corporate?"); cf. *id.,* at 696 (Sen. Edmunds). Thus the expressed intent of Congress, manifested virtually simultaneously with the enactment of the Civil Rights Act of 1871, was that the States themselves, as bodies corporate and politic, should be embraced by the term "person" in § 1 of that Act.

The legislative history of the Civil Rights Act of 1871 reinforces this conclusion. The Act was originally reported to the House as H. R. 320 by Representative Shellabarger. At that time Representative Shellabarger stated that the bill was meant to be remedial "in aid of the preservation of human liberty and human rights," and thus to be "liberally and beneficently construed." [13] Globe App. 68. The bill

[13] *Monell, supra,* stated that "there can be no doubt that § 1 of the Civil Rights Act was intended . . . to be broadly construed . . . ." 436 U. S., at 700. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, post,* at 399–400, and n. 17. Senator Thurman of Ohio, who opposed the Act, stated with respect to § 1 that "there is no limitation whatsoever upon the terms that are employed, and *they are as comprehensive as can be used.*" Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871) (hereinafter Globe App.) (emphasis added).

was meant to give "[f]ull force and effect . . . to section five" of the Fourteenth Amendment, Globe 322 (Rep. Stoughton),[14] see *id.*, at 800 (Rep. Perry); *Monell*, 436 U. S., at 685 n. 45, and therefore, like the prohibitions of that Amendment, to be addressed against the States themselves.[15] See, *e. g.*,

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[14] One of the reasons given by the Court in *Hutto* v. *Finney*, 437 U. S. 678 (1978), for not requiring an "express statutory waiver of the State's immunity," *ante*, at 344 n. 16, before applying to the States the Civil Rights Attorney's Fees Award Act of 1976, 42 U. S. C. § 1988, was that the Act had been "enacted to enforce the Fourteenth Amendment." 437 U. S., at 698 n. 31.

[15] It was common ground, at least after the Fourteenth Amendment, that Congress could "dea[l] with States and with citizens." Globe 777 (Sen. Frelinghuysen). See *id.*, at 793 (Rep. Poland). Representative Willard of Vermont, for example, who voted for H. R. 320, opposed the Sherman amendment, which would have held a municipal corporation liable for damages to its inhabitants by private persons " 'riotously and tumultuously assembled,' " *Monell*, *supra*, at 664, on the grounds that the Fourteenth Amendment imposed liability directly on the States and not on such municipal corporations:

"I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State." Globe 791.

See *id.*, at 756–757 (Sen. Edmunds).

There was general agreement, however, that just as Congress could not impose affirmative obligations on municipalities, *Monell*, *supra*, at 681 n. 40, so it could not "command a State officer to do any duty whatever, as such." Globe 795 (Rep. Blair). See *id.*, at 799 (Rep. Farnsworth); *Collector* v. *Day*, 11 Wall. 113 (1871); *Kentucky* v. *Dennison*, 24 How. 66 (1861); *Prigg* v. *Pennsylvania*, 16 Pet. 539 (1842). Contrary to the suggestion of the Court, *ante*, at 341 n. 14, however, the *Prigg-Dennison-Day* line of cases, which stands for the principle that "the Federal Gov-

Globe 481–482 (Rep. Wilson); 696 (Sen. Edmunds).[16] It was, as Representative Kerr who opposed the bill instantly recognized, "against the rights of the States of this Union."

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ernment . . . has no power to impose on a State officer, as such, any duty whatever," 24 How., at 107, no more "militate[s] against" the conclusion that States are "persons" for purposes of § 1983, than it militates against the conclusion that municipalities are such persons. Everyone agreed, after all, that state officers, as such, would be subject to liability for violations of § 1983. The doctrine of coordinate sovereignty, relied on in the *Prigg-Dennison-Day* line of cases, would not have distinguished between such liability and the liability of the State itself. See *Monell,* 436 U. S., at 682.

[16] A view of the reach of § 1 suggested by occasional remarks in the legislative history of H. R. 320 to the effect that "[t]he Government can act only upon individuals," Globe App. 251 (Sen. Morton), was rejected last Term when *Monell* held that municipalities were "persons" for purposes of § 1983. It was a view colored by the belief that, since a "State always acts through instrumentalities," Globe 334 (Rep. Hoar), State violations of the Fourteenth Amendment could most effectively be reached through imposing liability on the state officials through whom States acted. As Representative Burchard stated:

"In the enforcement of the observance of duties imposed directly upon the people by the Constitution, the General Government applies the law directly to persons and individual acts. It may punish individuals for interference with its prerogatives and infractions of the rights it is authorized to protect. For the neglect or refusal of a State to perform a constitutional duty, the remedies and power of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State. If a State fails to appoint presidential electors, or its Legislature to choose Senators, or its people to elect Representatives, Congress cannot act for them. Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require State officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the

Globe App. 46. Representative Shellabarger, in introducing the bill, made this explicit, stressing the need for "necessary affirmative legislation to enforce the personal rights which the

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State can only be consummated through the officers by whom it acts." Globe App. 314.

It is noteworthy that, even under this view, § 1983 would abrogate the Eleventh Amendment immunity of States to the extent necessary to provide full relief for any plaintiff suing a state officer. Cf. Globe 365–366 (Rep. Arthur); 385 (Rep. Lewis); Globe App. 217 (Sen. Thurman). Thus, even if this limited approach had emerged out of concern for the Eleventh Amendment immunity of States, the distinction "between prospective relief on one hand and retrospective relief on the other," *ante*, at 337, which was drawn by *Edelman* v. *Jordan*, 415 U. S. 651 (1974), would be eliminated by the congressional enactment of § 1983. This is not anomalous, however, since the 42d Congress would have had no way to anticipate *Edelman*'s distinction, and would much more probably have had in mind the decision of Mr. Chief Justice Marshall in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), which held:

"It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

"The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." *Id.*, at 857–858.

Four years later the Court, again per Mr. Chief Justice Marshall, stated that a suit against the office, as opposed to the person, of the Governor of a State had the effect of making the State a party of record, *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828), but the essential principle remained unaltered, as evidenced by *Davis* v. *Gray*, 16 Wall. 203 (1873), a case decided two years after the Civil Rights Act of 1871:

"In deciding who are parties to the suit the court will not look beyond

Constitution guaranties, as between persons in the State and the State itself." *Id.*, at 70. See, *e. g., id.*, at 80 (Rep. Perry); Globe 375 (Rep. Lowe); 481–482 (Rep. Wilson); 568 (Sen. Edmunds). Representative Bingham elaborated the point:

> "The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to *protect the rights of citizens against States,* and individuals in States, never before granted.
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> . . . . .
>
> "Why not in advance provide *against the denial of rights by States,* whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?
>
> "The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of

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the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." *Id.*, at 220.

For the legislators of the 42d Congress, therefore, an action under § 1983 directed at state officers, regardless of the effect of the suit on the State itself, would preserve the Eleventh Amendment immunity of States, so long as States themselves were not named parties. To the extent subsequent decisions of this Court have introduced an Eleventh Amendment bar to such suits when "the action is in essence one for the recovery of money from the state," *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 464 (1945), this bar would be eliminated by the congressional enactment of § 1983. Since in the instant case neither the State of Illinois nor the office of the Governor of Illinois are parties "on the record," even a limited reading of the reach of § 1983 should therefore hold the Eleventh Amendment inapplicable.

> the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States *and by States,* or combination of persons?" Globe App. 83, 85 (emphasis added).[17]

H. R. 320 was necessary, as Senator Edmunds stated, to protect citizens "in the rights that the Constitution gave

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[17] Section 1 of H. R. 320 was modeled after § 2 of the Civil Rights Act of 1866, 14 Stat. 27, which imposed criminal penalties on "any person" who, "under color of any law, statute, ordinance, regulation, or custom," deprived "any inhabitant of any State or Territory" of "any right secured . . . by this act." As Representative Shellabarger stated: "That section [§ 2] provides a criminal proceeding in identically the same case as this one [§ 1] provides a civil remedy . . . ." Globe App. 68. Representative Bingham noted the limited application of the remedy provided by § 2:

"It is clear that if Congress do so provide by penal laws for the protection of these rights [guaranteed by the Fourteenth Amendment], those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law." Globe App. 85–86.

Representative Bingham was thus able to distinguish, as apparently the Court is not, *ante,* at 341 n. 11, between the reach of the word "person" in § 2 of the Civil Rights Act of 1866, and its reach in § 1 of the Civil Rights Act of 1871.

them . . . against any assault by any State or under any State or through the neglect of any State . . . ," Globe 697, and by a "State," Edmunds meant "a corporation . . . an organized thing . . . manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved." *Id.*, at 696. See *id.*, at 607–608 (Sen. Pool).

It was common ground, therefore, that, as Representative Wilson argued, the prohibitions of the Fourteenth Amendment were directed against the State, meaning "the government of the State . . . the legislative, the judicial, and the executive"; that the fifth section of the Amendment had given Congress the power to enforce it by "appropriate legislation," meaning "legislation adequate to meet the difficulties to be encountered, to suppress the wrongs existing, to furnish remedies and inflict penalties adequate to the suppression of all infractions of the rights of the citizens"; and that H. R. 320 was such legislation. Globe 481–483. Those who opposed the bill were fully aware of the major implications of such a statute. Representative Blair, for example, rested his opposition on the fact that the bill, including § 1, was aimed at the States in their "corporate and legislative capacity":

> "The inhibitions in the [Thirteenth, Fourteenth, and Fifteenth] amendments against the United States and the States are against them in their corporate and legislative capacities, for the thing or acts prohibited can alone be performed by them in their corporate or legislative capacities.
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> . . . . . .
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> "As the States have the power to violate them and not individuals, we must presume that the legislation provided for is against the States in their corporate and legislative capacity or character and those acting under their laws, and not against the individuals, as such, of the

States. I am sustained in this view of the case by the tenth section of the first article of the Constitution of the United States. In it are a number of inhibitions against the States, which it is evident are against them in their corporate and legislative capacity; and to which I respectfully call the attention of the gentlemen who favor this bill." Globe App. 208.[18]

See *id.*, at 209. This conclusion produced an anguished outcry from those committed to unrevised notions of state sovereignty. Representative Arthur, for example, complained that § 1

> "reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were." Globe 365.

The answer to such arguments was, of course, that the Civil War had irrevocably and profoundly altered the balance of power between Federal and State Governments:

> "If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities.
>
> "We must remember that it was State rights, perverted I admit from their true significance, that arrayed them-

[18] Representative Blair reached this conclusion after reasoning that if the bill were interpreted as applicable only to individuals, it would not be able to fulfill the purposes of the Reconstruction Amendments.

> selves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution; and that Federal laws and Federal rights must be protected whether domestic laws or their administration are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land. We are not making a constitution, we are enacting a law, and its virtue can be tested without peril by the experiment." *Id.*, at 502 (Sen. Frelinghuysen).

In the reconstructed union, national rights would be guaranteed federal protection even from the States themselves.

III

The plain words of § 1983, its legislative history and historical context, all evidence that Congress intended States to be embraced within its remedial cause of action. The Court today pronounces its conclusion in dicta by avoiding such evidence. It chooses to hear, in the eloquent and pointed legislative history of § 1983, only "silence." Such silence is in fact deafening to those who have ears to listen. But without reason to reach the question, without briefs, without argument, relying on a precedent that was equally ill-informed and in any event not controlling, the Court resolutely opines that a State is not a "person" for purposes of § 1983. The 42d Congress, of course, can no longer pronounce its meaning with unavoidable clarity. *Fitzpatrick,* however, cedes to the

present Congress the power to rectify this erroneous misinterpretation. It need only make its intention plain.

MR. JUSTICE MARSHALL, concurring in the judgment.

I concur in the judgment of the Court, for the reasons expressed in my dissenting opinion in *Edelman* v. *Jordan,* 415 U. S. 651, 688 (1974), and my concurring opinion in *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 287 (1973). Moreover, I agree that an affirmance here follows logically from the Court's decision in *Edelman,* because the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief. But given that basis for deciding the present case, it is entirely unnecessary for the Court to address the question whether a State is a "person" within the meaning of § 1983. Accordingly, I join Parts I, II, and III of my Brother BRENNAN'S opinion.

SCOTT *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 77–1177. Argued December 4, 1978—Decided March 5, 1979

Petitioner, an indigent, was convicted of shoplifting and was fined $50 after a bench trial in an Illinois state court. The applicable Illinois statute set the maximum penalty for such an offense at a $500 fine, one year in jail, or both. Petitioner's conviction was ultimately affirmed by the Illinois Supreme Court, over the petitioner's contention that a line of cases culminating in *Argersinger* v. *Hamlin,* 407 U. S. 25, requires state provision of counsel whenever imprisonment is an authorized penalty. *Held:* The Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense, but do not require a state trial court to appoint counsel for a criminal defendant, such as petitioner, who is charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed. Pp. 369–374.

(a) *Argersinger* v. *Hamlin, supra,* limits the constitutional right to appointed counsel in state criminal proceedings to a case that actually leads to imprisonment. P. 373.

(b) Even were the matter *res nova, Argersinger*'s central premise—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. P. 373.

68 Ill. 2d 269, 369 N. E. 2d 881, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 374. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post,* p. 375. BLACKMUN, J., filed a dissenting opinion, *post,* p. 389.

John S. Elson argued the cause and filed briefs for petitioner.

Gerri Papushkewych, Assistant Attorney General of Illinois, argued the cause for respondent. With her on the brief were

William J. Scott, Attorney General, and *Donald B. Mackay* and *Melbourne A. Noel, Jr.,* Assistant Attorneys General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to resolve a conflict among state and lower federal courts regarding the proper application of our decision in *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).[1] 436 U. S. 925. Petitioner Scott was convicted of theft and fined $50 after a bench trial in the Circuit Court of Cook County, Ill. His conviction was affirmed by the state intermediate appellate court and then by the Supreme Court of Illinois, over Scott's contention that the Sixth and Fourteenth Amendments to the United States Constitution required that Illinois provide trial counsel to him at its expense.

Petitioner Scott was convicted of shoplifting merchandise valued at less than $150. The applicable Illinois statute set the maximum penalty for such an offense at a $500 fine or one year in jail, or both.[2] The petitioner argues that a line of this Court's cases culminating in *Argersinger* v. *Hamlin, supra,* requires state provision of counsel whenever imprisonment is an authorized penalty.

**Howard B. Eisenberg* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging reversal.

[1] Compare, *e. g., Potts* v. *Estelle,* 529 F. 2d 450 (CA5 1976); *State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), with *Sweeten* v. *Sneddon,* 463 F. 2d 713 (CA10 1972); *Rollins* v. *State,* 299 So. 2d 586 (Fla.), cert. denied, 419 U. S. 1009 (1974).

[2] Ill. Rev. Stat., ch. 38, § 16–1 (1969). The penalty provision of the statute, at the time in question, provided in relevant part:

"A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. . . ."

The Supreme Court of Illinois rejected this contention, quoting the following language from *Argersinger:*

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U. S., at 37.
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." *Id.*, at 40.

The Supreme Court of Illinois went on to state that it was "not inclined to extend *Argersinger*" to the case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed upon the defendant. 68 Ill. 2d 269, 272, 369 N. E. 2d 881, 882 (1977). We agree with the Supreme Court of Illinois that the Federal Constitution does not require a state trial court to appoint counsel for a criminal defendant such as petitioner, and we therefore affirm its judgment.

In his petition for certiorari, petitioner referred to the issue in this case as "the question left open in *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972)." Pet. for Cert. 5. Whether this question was indeed "left open" in *Argersinger* depends upon whether one considers that opinion to be a point in a moving line or a holding that the States are required to go only so far in furnishing counsel to indigent defendants. The Supreme Court of Illinois, in quoting the above language from *Argersinger,* clearly viewed the latter as *Argersinger*'s holding.

Additional support for this proposition may be derived from the concluding paragraph of the opinion in that case:

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy." 407 U. S., at 40.

Petitioner, on the other hand, refers to language in the Court's opinion, responding to the opinion of MR. JUSTICE POWELL, which states that the Court "need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . . for here petitioner was in fact sentenced to jail." *Id.*, at 37.

There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense. W. Beaney, The Right to Counsel in American Courts 27–30 (1955). In *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Court held that Alabama was obligated to appoint counsel for the Scottsboro defendants, phrasing the inquiry as "whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment." *Id.*, at 52. It concluded its opinion with the following language:

> "The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous

> accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right." *Id.*, at 73.

Betts v. *Brady,* 316 U. S. 455 (1942), held that not every indigent defendant accused in a state criminal prosecution was entitled to appointment of counsel. A determination had to be made in each individual case whether failure to appoint counsel was a denial of fundamental fairness. *Betts* was in turn overruled in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). In *Gideon, Betts* was described as holding "that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment . . . ." 372 U. S., at 339.

Several Terms later the Court held in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), that the right to jury trial in federal court guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth Amendment. The Court held, however: "It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses . . . ." *Id.,* at 159 (footnote omitted). In *Baldwin* v. *New York,* 399 U. S. 66, 69 (1970), the controlling opinion of MR. JUSTICE WHITE concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

In *Argersinger* the State of Florida urged that a similar dichotomy be employed in the right-to-counsel area: Any offense punishable by less than six months in jail should not

require appointment of counsel for an indigent defendant.[3] The *Argersinger* Court rejected this analogy, however, observing that "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." 407 U. S., at 29.

The number of separate opinions in *Gideon, Duncan, Baldwin,* and *Argersinger,* suggests that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another. The process of incorporation creates special difficulties, for the state and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind. The range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the "petty" offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. We have now in our decided cases departed from the literal meaning of the Sixth Amendment. And we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors. See *Powell* v. *Alabama, supra,* at 60.

In *Argersinger* the Court rejected arguments that social cost or a lack of available lawyers militated against its holding, in some part because it thought these arguments were factually incorrect. 407 U. S., at 37 n. 7. But they were rejected in much larger part because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent

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[3] Brief for Respondent in *Argersinger* v. *Hamlin,* O. T. 1971, No. 70–5015, p. 12.

defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty," *id.*, at 32, and to "a case that actually leads to imprisonment even for a brief period," *id.*, at 33. THE CHIEF JUSTICE in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." *Id.*, at 41.

Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings.[4] Even were the matter *res nova,* we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.[5] We therefore hold that the Sixth

[4] We note that the line drawn in *Argersinger* was with full awareness of the various options. Both the petitioner in that case and the Legal Aid Society of New York, as *amicus curiae,* argued that the right to appointed counsel should pertain in any case in which imprisonment was an authorized penalty for the underlying offense. Brief for Petitioner in *Argersinger* v. *Hamlin,* O. T. 1971, No. 70–5015, p. 4; Brief for Legal Aid Society of New York as *Amicus Curiae* in *Argersinger* v. *Hamlin* 5–11. Respondent Florida and the *amici* States urged that the line be drawn as it had been in *Baldwin* for purposes of the jury trial guarantee. See, *e. g.,* Brief for Respondent in *Argersinger* v. *Hamlin* 12. The Solicitor General argued for the standard that was finally adopted—that of actual imprisonment. Brief for United States as *Amicus Curiae* in *Argersinger* v. *Hamlin* 22–24.

[5] Unfortunately, extensive empirical work has not been done. That which exists suggests that the requirements of *Argersinger* have not proved to be unduly burdensome. See, *e. g.,* Ingraham, The Impact of Argersinger—One Year Later, 8 Law & Soc. Rev. 615 (1974). That some

and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. The judgment of the Supreme Court of Illinois is accordingly

Affirmed.

MR. JUSTICE POWELL, concurring.

For the reasons stated in my opinion in *Argersinger* v. *Hamlin,* 407 U. S. 25, 44 (1972), I do not think the rule adopted by the Court in that case is required by the Constitution. Moreover, the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences. The *Argersinger* rule also tends to impair the proper functioning of the criminal justice system in that trial judges, in advance of hearing any evidence and before knowing anything about the case except the charge, all too often will be compelled to forgo the legislatively granted option to impose a sentence of imprisonment upon conviction. Preserving this option by providing counsel often will be impossible or impracticable—particularly in congested urban courts where scores of cases are heard in a single sitting, and in small and rural communities where lawyers may not be available.

Despite my continuing reservations about the *Argersinger* rule, it was approved by the Court in the 1972 opinion and four Justices have reaffirmed it today. It is important that this Court provide clear guidance to the hundreds of courts across the country that confront this problem daily. Accordingly, and mindful of *stare decisis,* I join the opinion of the

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jurisdictions have had difficulty implementing *Argersinger* is certainly not an argument for extending it. S. Krantz, C. Smith, D. Rossman, P. Froyd & J. Hoffman, Right to Counsel in Criminal Cases 1–18 (1976).

Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice.

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

The Sixth Amendment provides: "In *all criminal* prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (Emphasis supplied.) *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), extended the Sixth Amendment right to counsel to the States through the Fourteenth Amendment and held that the right includes the right of the indigent to have counsel provided. *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), held that the right recognized in *Gideon* extends to the trial of any offense for which a convicted defendant is likely to be incarcerated.

This case presents the question whether the right to counsel extends to a person accused of an offense that, although punishable by incarceration, is actually punished only by a fine. Petitioner Aubrey Scott was charged with theft in violation of Ill. Rev. Stat., ch. 38, § 16–1 (1969), an offense punishable by imprisonment for up to one year or by a fine of up to $500, or by both. About four months before *Argersinger* was decided, Scott had a bench trial, without counsel, and without notice of entitlement to retain counsel or, if indigent,[1] to have counsel provided. He was found guilty as charged and sentenced to pay a $50 fine.

The Court, in an opinion that at best ignores the basic principles of prior decisions, affirms Scott's conviction without

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[1] Scott was found to be indigent at the time of his initial appeal, and an attorney was therefore appointed for him and he was provided a free transcript of his trial for use on the appeal. The Illinois courts and the parties have assumed his indigency at the time of trial for purposes of this case. See 68 Ill. 2d 269, 270–272, 369 N. E. 2d 881, 881–882 (1977); 36 Ill. App. 3d 304, 307–308, 343 N. E. 2d 517, 520 (1976).

counsel because he was sentenced only to pay a fine. In my view, the plain wording of the Sixth Amendment and the Court's precedents compel the conclusion that Scott's uncounseled conviction violated the Sixth and Fourteenth Amendments and should be reversed.

I

The Court's opinion intimates that the Court's precedents ordaining the right to appointed counsel for indigent accuseds in state criminal proceedings fail to provide a principled basis for deciding this case. That is demonstrably not so. The principles developed in the relevant precedents are clear and sound. The Court simply chooses to ignore them.

Gideon v. *Wainwright* held that, because representation by counsel in a criminal proceeding is "fundamental and essential to a fair trial," 372 U. S., at 342, the Sixth Amendment right to counsel was applicable to the States through the Fourteenth Amendment:

> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed

> fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.*, at 344.

Earlier precedents had recognized that the assistance of appointed counsel was critical, not only to equalize the sides in an adversary criminal process,[2] but also to give substance to other constitutional and procedural protections afforded criminal defendants.[3] *Gideon* established the right to appointed counsel for indigent accuseds as a categorical

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[2] "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938).

[3] "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932).

requirement, making the Court's former case-by-case due process analysis, cf. *Betts* v. *Brady,* 316 U. S. 455 (1942), unnecessary in cases covered by its holding. *Gideon* involved a felony prosecution, but that fact was not crucial to the decision; its reasoning extended, in the words of the Sixth Amendment, to "*all* criminal prosecutions." [4]

Argersinger v. *Hamlin* took a cautious approach toward implementing the logical consequences of *Gideon*'s rationale. The petitioner in *Argersinger* had been sentenced to jail for 90 days after conviction—at a trial without counsel—of carrying a concealed weapon, a Florida offense carrying an authorized penalty of imprisonment for up to six months and a fine of up to $1,000. The State, relying on *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and *Baldwin* v. *New York,* 399 U. S. 66 (1970), urged that the Sixth Amendment right to counsel, like the right to jury trial, should not apply to accuseds charged with "petty" offenses punishable by less than six months' imprisonment. But *Argersinger* refused to extend the "petty" offense limitation to the right to counsel. The Court pointed out that the limitation was contrary to the express words of the Sixth Amendment, which guarantee its enumerated rights "[i]n all criminal prosecutions"; that the right to jury trial was the only Sixth Amendment right applicable to the States that had been held inapplicable to "petty offenses"; [5] that this

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[4] See *Argersinger* v. *Hamlin,* 407 U. S. 25, 31 (1972).

[5] " 'It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf.' " *Id.,* at 28, quoting Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 705 (1968). Cf. *In re Oliver,* 333 U. S. 257 (1948) (right to a public trial); *Pointer* v. *Texas,* 380 U. S. 400 (1965) (right to confrontation); *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967) (right to a speedy trial); *Washington* v. *Texas,* 388 U. S. 14 (1967) (right to compulsory process of witnesses); *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971) (right to an impartial jury).

limitation had been based on historical considerations peculiar to the right to jury trial; [6] and that the right to counsel was more fundamentally related to the fairness of criminal prosecutions than the right to jury trial and was in fact essential to the meaningful exercise of other Sixth Amendment protections.[7]

Although its analysis, like that in *Gideon* and other earlier cases, suggested that the Sixth Amendment right to counsel should apply to all state criminal prosecutions, *Argersinger* held only that an indigent defendant is entitled to appointed counsel, even in petty offenses punishable by six months of incarceration or less, if he is likely to be sentenced to incarceration for any time if convicted. The question of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved.[8]

II

In my view petitioner could prevail in this case without extending the right to counsel beyond what was assumed to exist in *Argersinger*. Neither party in that case questioned

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[6] "While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel . . . .

. . . . . .

"The Sixth Amendment . . . extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided." *Argersinger* v. *Hamlin*, 407 U. S., at 30 (footnote and citations omitted).

[7] *Id.*, at 31; see *supra*, at 377, and n. 3.

[8] "MR. JUSTICE POWELL suggests that these problems [requiring the presence of counsel to insure the accused a fair trial] are raised even in situations where there is no prospect of imprisonment. . . . We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U. S., at 37.

the existence of the right to counsel in trials involving "nonpetty" offenses punishable by more than six months in jail.[9] The question the Court addressed was whether the right applied to some "petty" offenses to which the right to jury trial did not extend. The Court's reasoning in applying the right to counsel in the case before it—that the right to counsel is more fundamental to a fair proceeding than the right to jury trial and that the historical limitations on the jury trial right are irrelevant to the right to counsel—certainly cannot support a standard for the right to counsel that is more restrictive than the standard for granting a right to jury trial. As my Brother POWELL commented in his opinion concurring in the result in *Argersinger*, 407 U. S., at 45–46: "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." *Argersinger* thus established a "two dimensional" test for the right to counsel: the right attaches to any "nonpetty" offense punishable by more than six months in jail and in addition to any offense where actual incarceration is likely regardless of the maximum authorized penalty. See Duke, The Right to Appointed Counsel: *Argersinger* and Beyond, 12 Am. Crim. L. Rev. 601 (1975).

The offense of "theft" with which Scott was charged is certainly not a "petty" one. It is punishable by a sentence of up to one year in jail. Unlike many traffic or other "regulatory" offenses, it carries the moral stigma associated with common-law crimes traditionally recognized as indicative of moral depravity.[10] The State indicated at oral argument that the

[9] See, *e. g.*, *id.*, at 27, 30–31, 36, and n. 5; *id.*, at 45, and n. 2, 63 (POWELL, J., concurring in result).

[10] Because a theft conviction implies dishonesty, it may be a basis for impeaching petitioner's testimony in a court proceeding. *People* v. *Stufflebean*, 24 Ill. App. 3d 1065, 1068–1169, 322 N. E. 2d 488, 491–492 (1974). Because jurors must be of "fair character" and "approved integrity," Ill. Rev. Stat., ch. 78, § 2 (1975), petitioner may be excluded

services of a professional prosecutor were considered essential to the prosecution of this offense. Tr. of Oral Arg. 39; cf. *Argersinger* v. *Hamlin*, 407 U. S., at 49 (POWELL, J., concurring in result). Likewise, nonindigent defendants charged with this offense would be well advised to hire the "best lawyers they can get." [11] Scott's right to the assistance of appointed counsel is thus plainly mandated by the logic of the Court's prior cases, including *Argersinger* itself.[12]

III

But rather than decide consonant with the assumption in regard to nonpetty offenses that was both implicit and explicit

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from jury duty as a result of his theft conviction. Twelve occupations licensed under Illinois law and 23 occupations licensed under city of Chicago ordinances require the license applicant to have "good moral character" or some equivalent background qualification that could be found unsatisfied because of a theft conviction. See Chicago Council of Lawyers, Study of Licensing Restrictions on Ex-Offenders in the City of Chicago and the State of Illinois 8, A–17 (1975). Under federal law petitioner's theft conviction would bar him from working in any capacity in a bank insured by the Federal Deposit Insurance Corporation, 12 U. S. C. § 1829, or possibly in any public or private employment requiring a security clearance. 32 CFR §§ 155.5 (h) and (i), and 156.7 (b)(1)(iii) (1977).

[11] *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963); see Junker, *supra* n. 5, at 713–714.

[12] My Brother POWELL's concurrence in *Argersinger*, 407 U. S., at 44, joined by my Brother REHNQUIST, also supports petitioner's right to appointed counsel in this case. The concurrence explicitly stated that the right to counsel should extend at least as far as the right to jury trial, *id.*, at 45–46, and its preference for a case-by-case approach was repeatedly limited to "petty" offenses. See, *e. g.*, *id.*, at 45, and n. 2, 47, 63. Even in petty offenses, the *Argersinger* concurrence would have mandated the following procedures:

"The determination [whether counsel must be appointed] should be made before the accused formally pleads; many petty cases are resolved by guilty pleas in which the assistance of counsel may be required. If the trial court should conclude that the assistance of counsel is not required in any case, it should state its reasons so that the issue could be preserved for review." *Id.*, at 63.

in *Argersinger,* the Court today retreats to the indefensible position that the *Argersinger* "actual imprisonment" standard is the *only* test for determining the boundary of the Sixth Amendment right to appointed counsel in state misdemeanor cases, thus necessarily deciding that in many cases (such as this one) a defendant will have no right to appointed counsel even when he has a constitutional right to a jury trial. This is simply an intolerable result. Not only is the "actual imprisonment" standard unprecedented as the exclusive test, but also the problems inherent in its application demonstrate the superiority of an "authorized imprisonment" standard that would require the appointment of counsel for indigents accused of any offense for which imprisonment for any time is authorized.

First, the "authorized imprisonment" standard more faithfully implements the principles of the Sixth Amendment identified in *Gideon.* The procedural rules established by state statutes are geared to the nature of the potential penalty for an offense, not to the actual penalty imposed in particular cases. The authorized penalty is also a better predictor of the stigma and other collateral consequences that attach to conviction of an offense.[13] With the exception of *Argersinger,* authorized penalties have been used consistently by this Court as the true measures of the seriousness of offenses. See, *e. g., Baldwin* v. *New York,* 399 U. S., at 68–70; *Frank* v. *United States,* 395 U. S. 147, 149 (1969); *United States* v. *Moreland,* 258 U. S. 433 (1922). Imprisonment is a sanction particularly associated with criminal offenses; trials of offenses punishable by imprisonment accordingly possess the characteris-

[13] See n. 10, *supra.* The scope of collateral consequences that would be constitutionally permissible under the "actual imprisonment" standard remains unsettled, and this uncertainty is another source of confusion generated by this standard. See, *e. g.,* Tr. of Oral Arg. 35–37; *United States* v. *White,* 529 F. 2d 1390 (CA8 1976); Note, Argersinger v. Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial, 35 Ohio St. L. J. 168 (1974).

tics found by *Gideon* to require the appointment of counsel. By contrast, the "actual imprisonment" standard, as the Court's opinion in this case demonstrates, denies the right to counsel in criminal prosecutions to accuseds who suffer the severe consequences of prosecution other than imprisonment.

Second, the "authorized imprisonment" test presents no problems of administration. It avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias. These problems with the "actual imprisonment" standard were suggested in my Brother POWELL's concurrence in *Argersinger,* 407 U. S., at 52–55, which was echoed in scholarly criticism of that decision.[14] Petitioner emphasizes these defects, arguing with considerable force that implementation of the "actual imprisonment" standard must assuredly lead to violations of both the Due Process and Equal Protection Clauses of the Constitution. Brief for Petitioner 47–59.

Finally, the "authorized imprisonment" test ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense. Under the "actual imprisonment" standard,

> "[t]he judge will . . . be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability

[14] See, *e. g.,* S. Krantz, C. Smith, D. Rossman, P. Froyd & J. Hoffman, Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* 69–117 (1976); Duke, The Right to Appointed Counsel: *Argersinger* and Beyond, 12 Am. Crim. L. Rev. 601 (1975).

The case-by-case approach advocated by my Brother POWELL in *Argersinger* has also been criticized as unworkable because of the administrative burden it would impose. See, *e. g.,* Uniform Rules of Criminal Procedure, Rule 321 (b), Comment, 10 U. L. A. 69 (1974).

> of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel." *Argersinger* v. *Hamlin, supra,* at 53 (POWELL, J., concurring in result).

The "authorized imprisonment" standard, on the other hand, respects the allocation of functions between legislatures and courts in the administration of the criminal justice system.

The apparent reason for the Court's adoption of the "actual imprisonment" standard for all misdemeanors is concern for the economic burden that an "authorized imprisonment" standard might place on the States. But, with all respect, that concern is both irrelevant and speculative.

This Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments. A unanimous Court made that clear in *Mayer* v. *Chicago,* 404 U. S. 189, 196–197 (1971), in rejecting a proposed fiscal justification for providing free transcripts for appeals only when the appellant was subject to imprisonment:

> "This argument misconceives the principle of *Griffin* [v. *Illinois,* 351 U. S. 12 (1956)] . . . . *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant." [15]

In any event, the extent of the alleged burden on the States is, as the Court admits, *ante,* at 373–374, n. 5, speculative. Al-

[15] See also *Bounds* v. *Smith,* 430 U. S. 817, 825 (1977).

though more persons are charged with misdemeanors punishable by incarceration than are charged with felonies, a smaller percentage of persons charged with misdemeanors qualify as indigent, and misdemeanor cases as a rule require far less attorney time.[16]

Furthermore, public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically.[17] The public defender system alternative also answers the argument that an "authorized imprisonment" standard would clog the courts with inexperienced appointed counsel.

Perhaps the strongest refutation of respondent's alarmist prophecies that an "authorized imprisonment" standard would wreak havoc on the States is that the standard has not produced that result in the substantial number of States that already provide counsel in all cases where imprisonment is

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[16] See Uniform Rules of Criminal Procedure, Rule 321 (b), Comment, 10 U. L. A. 70 (1974) (estimates that only 10% of misdemeanor defendants, as opposed to 60%–65% of felony defendants, meet the necessary indigency standard); National Legal Aid and Defender Assn., The Other Face of Justice, Note I, pp. 82–83 (1973) (survey indicates national average is 65% indigency in felony cases and only 47% in misdemeanor cases).

The National Advisory Commission on Criminal Justice Standards and Goals adopted a maximum caseload standard of 150 felony cases or 400 misdemeanor cases per attorney per year. National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 13.12, pp. 276–277 (1973). See also The Other Face of Justice, *supra,* Table 109, p. 73.

[17] A study conducted in the State of Wisconsin, which introduced a State Public Defender System after the Wisconsin Supreme Court in *State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 249 N. W. 2d 791 (1977), extended the right to counsel in the way urged by petitioner in this case, indicated that the average cost of providing counsel in a misdemeanor case was reduced from $150–$200 to $90 by using a public defender rather than appointing private counsel. Brief for National Legal Aid and Defender Assn. as *Amicus Curiae* 10–12.

authorized—States that include a large majority of the country's population and a great diversity of urban and rural environments.[18] Moreover, of those States that do not yet

[18] See, *e. g.*, Alaska: Alaska Const., Art. 1, § 11; Alaska Stat. Ann. § 18.85.100 (1974) (any offense punishable by incarceration; or which may result in loss of valuable license or heavy fine); *Alexander* v. *Anchorage,* 490 P. 2d 910 (Alaska 1971); Arizona: Ariz. Rule Crim. Proc. 6.1 (b) (any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires); California: Cal. Penal Code Ann. § 987 (West Supp. 1978) (all criminal cases); Connecticut: Conn. Gen. Stat. §§ 51–296 (a), 51–297 (f) (1979) (all criminal actions); Delaware: Del. Code Ann., Tit. 29, § 4602 (1974) (all indigents under arrest or charged with crime if defendant requests or court orders); Hawaii: Haw. Rev. Stat. § 802–1 (1976) (any offense punishable by confinement in jail); Indiana: Ind. Const., Art. I, § 13 (all criminal prosecutions); *Bolkovac* v. *State,* 229 Ind. 294, 98 N. E. 2d 250 (1951); Kentucky: Ky. Rule Crim. Proc. 8.04 (offenses punishable by a fine of more than $500 or by imprisonment); Louisiana: La. Code Crim. Proc., Art. 513 (West Supp. 1978) (offenses punishable by imprisonment); Massachusetts: Mass. Sup. Jud. Ct. Rule 3:10 (any crime for which sentence of imprisonment may be imposed); Minnesota: Minn. Stat. §§ 609.02, 611.14 (1978) (felonies and "gross misdemeanors"; statute defines "petty" misdemeanors as those not punishable by imprisonment or fine over $100); New Hampshire: N. H. Rev. Stat. Ann. §§ 604–A:2, 625:9 (1974 and Supp. 1977) (offenses punishable by imprisonment); New Mexico: N. M. Stat. Ann. § 41–22A–12 (Supp. 1975) (offense carrying a possible sentence of imprisonment); New York: N. Y. Crim. Proc. Law § 170.10 (3) (McKinney 1971) (all misdemeanors except traffic violations); *People* v. *Weinstock,* 80 Misc. 2d 510, 363 N. Y. S. 2d 878 (1974) (traffic violations subject to possible imprisonment); Oklahoma: Okla. Stat., Tit. 22, § 464 (1969) (all criminal cases); *Stewart* v. *State,* 495 P. 2d 834 (Crim. App. 1972); Oregon: *Brown* v. *Multnomah County Dist. Ct.,* 29 Ore. App. 917, 566 P. 2d 522 (1977) (all criminal cases); South Dakota: S. D. Comp. Laws Ann. § 23–2–1 (Supp. 1978) (any criminal action); Tennessee: Tenn. Code Ann. §§ 40–2002, 40–2003 (1975) (persons accused of any crime or misdemeanor whatsoever); Texas: Tex. Code Crim. Proc. Ann., Art. 26.04 (Vernon 1966) (any felony or misdemeanor punishable by imprisonment); Virginia: Va. Code §§ 19.2–157, 19.2–160 (Supp. 1978) (misdemeanors the penalty for which may be confinement in jail); Washington: Wash. Justice Court Crim. Rule 2.11 (a)(1) (all criminal offenses punishable by loss of liberty); West Virginia: W. Va. Code

provide counsel in all cases where *any* imprisonment is authorized, many provide counsel when periods of imprisonment longer than 30 days,[19] 3 months,[20] or 6 months [21] are author-

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§ 62–3–1a (1977) (persons under indictment for a crime); Wisconsin: Wis. Const., Art. I, § 7; *State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 249 N. W. 2d 791 (1977) (all offenses punishable by incarceration).

Respondent claims that the statutes and case law in some of these States "need not be read as requiring appointment of counsel for all imprisonable cases." Brief for Respondent 33 n. 28. Although the law is not unambiguous in every case, ambiguities in the laws of other States suggest that the list is perhaps too short, or at least that other States provide counsel in all but the most trivial offenses. *E. g.,* Colorado: Colo. Rev. Stat. § 21–1–103 (1973) (all misdemeanors and all municipal code violations at the discretion of the public defender); Georgia: Ga. Code § 27–3203 (1978) (any violation of a state law or local ordinance which may result in incarceraton); Missouri: Mo. Op. Atty. Gen. No. 207 (1963) (counsel should be appointed in misdemeanor cases of "more than minor significance" and "when prejudice might result"); Montana: Mont. Rev. Codes Ann. § 95–1001 (1969) (court may assign counsel in misdemeanors "in the interest of justice"); Nevada: Nev. Rev. Stat. § 178.397 (1977) (persons accused of "gross misdemeanors" or felonies); New Jersey: N. J. Stat. Ann. § 2A:158A–2 (West 1971); N. J. Crim. Rule 3:27–1 (any offense which is indictable); Pennsylvania: Pa. Rules Crim. Proc. 316 (a)–(c) (in all but "summary cases"); Wyoming: Wyo. Stat. §§ 7–1–110 (a) (entitled to appointed counsel in "serious crimes"), 7–1–108 (a)(v) (serious crimes are those for which incarceration is a "practical possibility"), 7–9–105 (all cases where accused shall or may be punished by imprisonment in penitentiary) (1977).

In addition, Alabama, Florida, Georgia, and Mississippi were until today covered by the Fifth Circuit's adoption of the "authorized imprisonment" standard. See *Potts* v. *Estelle,* 529 F. 2d 450 (CA5 1976); *Thomas* v. *Savage,* 513 F. 2d 536 (CA5 1975).

Several States that have not adopted the "authorized imprisonment" standard give courts discretionary authority to appoint counsel in cases where it is perceived to be necessary (*e. g.,* Maryland, Missouri, Montana, North Dakota, Ohio, and Pennsylvania).

[19] Iowa: Iowa Rules Crim. Proc. 2, § 3; 42, § 3.

[20] Maryland: Md. Ann. Code, Art. 27A, §§ 2 (f) and (h), 4 (1976); Mississippi: Miss. Code Ann. § 99–15–15 (1972).

[21] Idaho: Idaho Code § 19–851 (Supp. 1978); *Mahler* v. *Birnbaum,* 95 Idaho 14, 501 P. 2d 282 (1972); Maine: *Newell* v. *State,* 277 A. 2d 731

ized. In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 States.[22]

It may well be that adoption by this Court of an "authorized imprisonment" standard would lead state and local governments to re-examine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view this re-examination is long overdue.[23] In any

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(1971); Ohio: Ohio Rules Crim. Proc. 2, 44 (A) and (B); Rhode Island: R. I. Rule Crim. Proc. 44 (Super. Ct.); R. I. Rule Crim. Proc. 44 (Dist. Ct.); *State* v. *Holliday,* 109 R. I. 93, 280 A. 2d 333 (1971); Utah: Utah Code Ann. § 77–64–2 (1978); *Salt Lake City Corp.* v. *Salt Lake County,* 520 P. 2d 211 (1974).

[22] See nn. 18–21, *supra.* The actual figure may be closer to 40 States. The following States appear to be governed only by the "likelihood of imprisonment" standard: Arkansas: Ark. Rule Crim. Proc. 8.2 (b) (all criminal offenses except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment); Florida: Fla. Rule Crim. Proc. 3.111 (b) (any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment); North Carolina: N. C. Gen. Stat. § 7A–451 (a) (Supp. 1977) (any case in which imprisonment or a fine of $500 or more is likely to be adjudged); North Dakota: N. D. Rule Crim. Proc. 44 (all nonfelony cases unless magistrate determines that sentence upon conviction will not include imprisonment); Vermont: Vt. Stat. Ann., Tit. 13, §§ 5201, 5231 (1974 and Supp. 1977) (any misdemeanor punishable by any period of imprisonment or fine over $1,000 unless prior determination that imprisonment or fine over $1,000 will not be imposed). Two States require appointment of counsel for indigents in cases where it is "constitutionally required": Alabama: Ala. Code §§ 15–12–1, 15–12–20 (1975); South Carolina: S. C. Code § 17–3–10 (Supp. 1977). Some States require counsel in misdemeanor cases only by virtue of judicial decisions reacting to *Argersinger:* Kansas: *State* v. *Giddings,* 216 Kan. 14, 531 P. 2d 445 (1975); Michigan: *People* v. *Studaker,* 387 Mich. 698, 199 N. W. 2d 177 (1972); *People* v. *Harris,* 45 Mich. App. 217, 206 N. W. 2d 478 (1973); Nebraska: *Kovarik* v. *County of Banner,* 192 Neb. 816, 224 N. W. 2d 761 (1975).

[23] See, *e. g.,* Krantz et al., *supra* n. 14, at 445–606.

event, the Court's "actual imprisonment" standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.

IV

The Court's opinion turns the reasoning of *Argersinger* on its head. It restricts the right to counsel, perhaps the most fundamental Sixth Amendment right,[24] more narrowly than the admittedly less fundamental right to jury trial.[25] The abstract pretext that "constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another," *ante,* at 372, cannot camouflage the anomalous result the Court reaches. Today's decision reminds one of Mr. Justice Black's description of *Betts* v. *Brady:* "an anachronism when handed down" that "ma[kes] an abrupt break with its own well-considered precedents." *Gideon* v. *Wainwright,* 372 U. S., at 345, 344.

MR. JUSTICE BLACKMUN, dissenting.

For substantially the reasons stated by MR. JUSTICE BRENNAN in Parts I and II of his dissenting opinion, I would hold that the right to counsel secured by the Sixth and Fourteenth Amendments extends at least as far as the right to jury trial secured by those Amendments. Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prose-

[24] "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." *Lakeside* v. *Oregon,* 435 U. S. 333, 341 (1978).

[25] "[T]he interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel." *Argersinger* v. *Hamlin,* 407 U. S., at 46 (POWELL, J., concurring in result) (footnotes omitted).

cuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Baldwin* v. *New York,* 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

This resolution, I feel, would provide the "bright line" that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan, Baldwin,* and *Argersinger.*

On this approach, of course, the judgment of the Supreme Court of Illinois upholding petitioner Scott's conviction should be reversed, since he was convicted of an offense for which he was constitutionally entitled to a jury trial. I, therefore, dissent.

Syllabus

LAKE COUNTRY ESTATES, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL.

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

No. 77–1327. Argued December 4, 1978—Decided March 5, 1979

California and Nevada entered into a Compact, later consented to by Congress, to create respondent Tahoe Regional Planning Agency (TRPA) to coordinate and regulate development in the Lake Tahoe Basin resort area and to conserve its natural resources. The Compact authorized TRPA to adopt and enforce a regional plan for land use, transportation, conservation, recreation, and public services. Petitioners, Basin property owners, brought suit in Federal District Court alleging that TRPA and its individual members and executive officer (also respondents) had adopted a land-use ordinance that destroyed the value of petitioners' property in violation of the Fifth and Fourteenth Amendments, and seeking monetary and equitable relief. To support their federal claim, petitioners asserted, *inter alia*, that respondents had acted under color of state law and that therefore their cause of action was authorized by 42 U. S. C. § 1983, and jurisdiction was provided by 28 U. S. C. § 1343. The District Court dismissed the complaint, holding that although a cause of action for "inverse condemnation" was sufficiently alleged, the action could not be maintained against TRPA because it had no authority to condemn property and that the individual respondents were immune from liability. The Court of Appeals, while reinstating the complaint against the individual respondents on other grounds, rejected petitioners' claims based on §§ 1983 and 1343, holding that congressional approval had transformed the Compact into federal law with the result that respondents had acted pursuant to federal authority rather than under color of state law. The court further held that TRPA was immune from suit under the Eleventh Amendment and that with respect to the individual respondents they should be absolutely immune for conduct of a legislative character and qualifiedly immune for executive action. *Held:*

1. Petitioners stated a cause of action under § 1983 and hence properly invoked federal jurisdiction under § 1343. The requirement of federal approval of the Compact did not foreclose a finding that respondents' conduct was "under color of state law" within the meaning of § 1983. The facts with respect to TRPA's operation—such as that its implementation depended upon the appointment of members by

both States and their subdivisions and upon financing by counties; that the appointees, in discharging their duties as TRPA officials, also serve the interests of the appointing units; that federal involvement is limited to the appointment of one nonvoting member; and that each State has an absolute right to withdraw from the Compact—adequately characterize respondents' alleged actions as "under color of state law." Pp. 398–400.

2. TRPA is not immune from liability under the Eleventh Amendment. The States' intention in creating TRPA, the terms of the Compact, and TRPA's actual operation make clear that nothing short of an absolute rule would allow TRPA to claim sovereign immunity, and because the Eleventh Amendment prescribes no such rule, TRPA is subject to "the judicial power of the United States" within the meaning of that Amendment. Pp. 400–402.

3. To the extent that the evidence discloses that the individual respondents were acting in a legislative capacity, they are entitled to absolute immunity from federal damages liability. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good," *Tenney* v. *Brandhove*, 341 U. S. 367, 377, and this reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, petitioners' federal claims do not encompass the recovery of damages from TRPA members acting in a legislative capacity. Pp. 402–406.

566 F. 2d 1353, reversed in part and affirmed in part.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined, and in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined in part. BRENNAN, J., *post*, p. 406, and MARSHALL, J., *post*, p. 406, filed opinions dissenting in part. BLACKMUN, J., filed an opinion dissenting in part, in Part I of which BRENNAN, J., joined, *post*, p. 408.

John J. Bartko argued the cause for petitioners. With him on the briefs were *Gary H. Moore, James B. Lewis, John S. Burd,* and *Joseph M. Lynn.*

Kenneth C. Rollston argued the cause and filed a brief for respondents Tahoe Regional Planning Agency et al. *E. Clement Shute, Jr.,* Assistant Attorney General, argued the cause for respondent State of California. With him on the brief were *Evelle J. Younger,* Attorney General, and *Leonard M.*

Sperry, Jr., Deputy Attorney General. *Robert Frank List,* Attorney General, and *James H. Thompson,* Chief Deputy Attorney General, filed a brief for respondent State of Nevada. *Reginald Littrell* filed a brief for respondents Henry et al.

MR. JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves.[1] 436 U. S. 943. The case also presents the question whether the individual members of the Agency's governing body are entitled to absolute immunity from federal damages claims when acting in a legislative capacity.

Lake Tahoe, a unique mountain lake, is located partly in California and partly in Nevada. The Lake Tahoe Basin, an area comprising 500 square miles, is a popular resort area that has grown rapidly in recent years.[2]

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[1] See *Edelman* v. *Jordan,* 415 U. S. 651. The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] The Senate Report on the Compact describes the lake and its background as follows:

"Lake Tahoe, a High Sierra Mountain lake, is famed for its scenic beauty and pristine clarity. Of recent geologic origin, the 190-square-mile lake bore little evidence of even natural aging processes when it was discovered by John Fremont in 1844. Because of its size, its 1,645-foot depth and its physical features, Lake Tahoe was able to resist pollution even when human activity began accelerating as a result of settlement and early logging operations. Even by 1962 its waters were still so transparent that a metal disc 20 centimeters in diameter reportedly could be seen at a depth of 136 feet and a light transmittance to a depth of nearly 500 feet as detected with hydrophotometer.

"Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake

In 1968, the States of California and Nevada agreed to create a single agency to coordinate and regulate development in the Basin and to conserve its natural resources. As required by the Constitution,[3] in 1969 Congress gave its consent to the Compact, and the Tahoe Regional Planning Agency (TRPA) was organized.[4] The Compact authorized TRPA to adopt and to enforce a regional plan for land use, transportation, conservation, recreation, and public services.[5]

Petitioners own property in the Lake Tahoe Basin. In 1973, they filed a complaint in the United States District Court for the Eastern District of California alleging that TRPA, the individual members of its governing body, and its executive officer had adopted a land-use ordinance and general plan, and engaged in other conduct, that destroyed the economic value of petitioners' property.[6] Petitioners alleged that respondents had thereby taken their property without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. They sought monetary and equitable relief.

Petitioners advanced alternative theories to support their

National Park, and Lake Baikal in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development." S. Rep. No. 91–510, pp. 3–4 (1969).

[3] Article I, § 10, cl. 3, of the Constitution provides:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[4] See Tahoe Regional Planning Compact, 83 Stat. 360, Cal. Gov't Code Ann. §§ 66800–66801 (West Supp. 1977), Nev. Rev. Stat. §§ 277.190–277.230 (1973) (hereinafter cited as Compact).

[5] Compact, Arts. V and VI.

[6] The States of California and Nevada and the county of El Dorado were originally named as defendants but either were not properly served or have been dismissed as parties.

federal claim. First, they asserted that the alleged violations of the Fifth and Fourteenth Amendments gave rise to an implied cause of action, comparable to the claim based on an alleged violation of the Fourth Amendment recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, and that jurisdiction could be predicated on 28 U. S. C. § 1331.[7] Second, they claimed that respondents had acted under color of state law and therefore their cause of action was authorized by 42 U. S. C. § 1983 [8] and jurisdiction was provided by 28 U. S. C. § 1343.[9]

The District Court dismissed the complaint. Although it concluded that the complaint sufficiently alleged a cause of

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[7] The amount in controversy exceeds $10,000. Title 28 U. S. C. § 1331, the general federal-question jurisdiction statute, provides in part:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity."

[8] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[9] Title 28 U. S. C. § 1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

action for "inverse condemnation," [10] it held that such an action could not be brought against TRPA because that agency did not have the authority to condemn property. The court also held that the individual defendants were immune from liability for the exercise of the discretionary functions alleged in the complaint.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the dismissal of TRPA, but reinstated the complaint against the individual respondents. 566 F. 2d 1353. Addressing first the questions of cause of action and jurisdiction, the Court of Appeals rejected petitioners' claims based on §§ 1983 and 1343. The court held that congressional approval had transformed the Compact between the States into federal law. As a result, the respondents were acting pursuant to federal authority, rather than under color of state law, and §§ 1983 and 1343 could not be invoked to provide a cause of action and federal jurisdiction. But the court accepted petitioners' alternative argument: It held that they had alleged a deprivation of due process in violation of the Fifth and Fourteenth Amendments, that an implied remedy comparable to that upheld in *Bivens, supra,* was available, and that federal jurisdiction was provided by § 1331.

Having found a cause of action and a basis for federal jurisdiction, the court turned to the immunity questions. Although the point had not been argued, the Court of Appeals decided that the Eleventh Amendment immunized TRPA from suit in a federal court. With respect to the individual respondents, the Court of Appeals held that absolute immunity should be afforded for conduct of a legislative character and qualified immunity for executive action. Since the record did not adequately disclose whether the challenged conduct was legislative or executive, the court remanded for a hearing.

Petitioners ask this Court to hold that TRPA is not entitled to Eleventh Amendment immunity and that the individual

[10] See 2 P. Nichols, Eminent Domain § 6.21 (rev. 3d ed. 1976).

respondents are not entitled to absolute immunity when acting in a legislative capacity. Because none of the respondents filed a cross-petition for certiorari, we have no occasion to review the Court of Appeals' additional holding that a violation of the Due Process Clause was adequately alleged.[11] For purposes of our decision, we assume the sufficiency of those allegations.

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[11] The issue we do not address is clearly stated in the following footnote to the Court of Appeals opinion:

"Under the strict standard of pleading called for by *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176 . . . (1935), none of the complaints in any of the cases on appeal would withstand a motion to dismiss. They lack specific factual allegations which, if proved, would rebut the presumption of constitutionality that the *Pacific States* Court accorded acts of administrative and legislative bodies.

"Although *Pacific States* has never been explicitly overruled, we do not believe that it represents the present state of the law because it was decided two years before the promulgation of the Federal Rules of Civil Procedure. We find no precedent in the Ninth Circuit applying *Pacific States* to an analogous case since the Rules took effect.

"In *Conley* v. *Gibson,* 355 U. S. 41 . . . (1957), the Supreme Court explained the modern philosophy of pleading:

" '[A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

"*Id.*, at 47–48, . . . (citations omitted).

"Thus a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A J. Moore, Federal Practice ¶ 12.08 (1975).

"The allegations of 'taking,' even though phrased in terms of inverse condemnation, are sufficient to show that appellants complained that the TRPA exercised its police powers improperly, and that they relied on the due process clauses of the Fifth and Fourteenth Amendments." 566 F. 2d, at 1359 n. 9.

I

Before addressing the immunity issues, we must consider whether petitioners properly invoked the jurisdiction of a federal court. While respondents did not cross petition for certiorari, they now argue that the *Bivens* rationale does not apply to a claim based on the deprivation of property rather than liberty, and therefore the Court of Appeals' jurisdictional analysis was defective.

We do not normally address any issues other than those fairly comprised within the questions presented by the petition for certiorari and any cross-petitions. An exception to this rule is the question of jurisdiction: even if not raised by the parties, we cannot ignore the absence of federal jurisdiction. In this case, however, respondents' attack on the Court of Appeals' *Bivens* holding fails to support dismissal for want of jurisdiction for two reasons.

First, respondents' "jurisdictional" arguments are not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of their federal rights. Faced with a similar claim in *Mt. Healthy Board of Ed.* v. *Doyle,* 429 U. S. 274, we found that the cause-of-action argument was "not of the jurisdictional sort which the Court raises on its own motion." *Id.,* at 279. Since the petitioners in *Mt. Healthy* had "failed to preserve the issue whether the complaint stated a claim upon which relief could be granted," *id.,* at 281, the Court simply assumed, without deciding, that the suit could properly be brought.

Second, even if the lack of a cause of action were considered a jurisdictional defect in a suit brought under § 1331,[12] we may not dismiss for that reason if the record discloses that federal jurisdiction does in fact exist. In this case, we need not even reach the *Bivens* question to conclude that there is both a cause of action and federal jurisdiction.

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[12] See *University of California Regents* v. *Bakke,* 438 U. S. 265, 380 (WHITE, J.); *United States* v. *Griffin,* 303 U. S. 226, 229.

Section 1983 provides a remedy for individuals alleging deprivations of their constitutional rights by action taken "under color of state law." The Court of Appeals incorrectly assumed that the requirement of federal approval of the interstate Compact foreclosed the possibility that the conduct of TRPA and its officers could be found to be "under color of state law" within the meaning of § 1983.[13]

The Compact had its genesis in the actions of the compacting States, and it remains part of the statutory law of both States.[14] The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the counties.[15] In discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them. The federal involvement, by contrast, is limited to the appointment of one nonvoting member to the governing board.[16] While congressional consent to the original Compact was required, the States may confer additional powers and duties on TRPA without further congressional action. And each State retains an absolute right to withdraw from the Compact.

Even if it were not well settled that § 1983 must be given

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[13] The fact that the Compact at issue here required congressional consent to be effective clearly does not itself mean that action taken pursuant to it does not qualify as being "under color of state law." This Court has, in the past, accepted that state regulations are properly considered "state law" even though they required federal approval prior to their implementation. See *Rosado* v. *Wyman,* 397 U. S. 397; *King* v. *Smith,* 392 U. S. 309.

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

[15] Compact, Arts. III (a), VII (a).

[16] § 3, 83 Stat. 369. Section 6, 83 Stat. 369, also reserves to Congress the right to require TRPA to furnish information and data that it considers appropriate.

a liberal construction,[17] these facts adequately characterize the alleged actions of the respondents as "under color of state law" within the meaning of that statute. Federal jurisdiction therefore rests on § 1343, and there is no need to address the question whether there is an implied remedy for violation of the Fifth or the Fourteenth Amendment.

II

The Court of Appeals held that California and Nevada had delegated authority ordinarily residing in each of those States to TRPA. Because "the bi-state Authority serves as an agency of the participant states, exercising a specially aggregated slice of state power," the court concluded "that the TRPA is protected by sovereign immunity, preserved for the states by the Eleventh Amendment." 566 F. 2d, at 1359–1360.

The reasoning of the Court of Appeals would extend Eleventh Amendment immunity to every bistate agency unless that immunity were expressly waived. TRPA argues that the propriety of this result is evidenced by the special constitutional requirement of congressional approval of any interstate compact. Any agency that is so important that it could not even be created by the States without a special Act of Congress should receive the same immunity that is accorded to the States themselves.

We cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising

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[17] Section 1983 originated as § 1 of the Civil Rights Act of 1871. In introducing that Act in Congress, Representative Shellabarger pointed out: "This act is remedial and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.[18] But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power." [19]

If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

California and Nevada have both filed briefs in this Court disclaiming any intent to confer immunity on TRPA. They point to provisions of their Compact that indicate that TRPA is to be regarded as a political subdivision rather than an arm of the State. Thus TRPA is described in Art. III (a) as a "separate legal entity" and in Art. VI (a) as a "political subdivision." Under the terms of the Compact, 6 of the 10 governing members of TRPA are appointed by counties and cities, and only 4 by the 2 States.[20] Funding under the

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[18] See *Edelman* v. *Jordan*, 415 U. S. 651; *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459.

[19] See *Mt. Healthy Board of Ed.* v. *Doyle*, 429 U. S. 274; *Moor* v. *County of Alameda*, 411 U. S. 693, 717–721; *Lincoln County* v. *Luning*, 133 U. S. 529, 530; Compact, Art. VIII (b).

[20] Compact, Art. III (a). In addition, 10 of the 17 members of the Advisory Planning Commission established by the Compact are to be associated with local agencies, 4 others are to be residents of the region, and only 1 is from state government. Compact, Art. III (h).

Compact must be provided by the counties, not the States.[21] Finally, instead of the state treasury being directly responsible for judgments against TRPA, Art. VII (f) expressly provides that obligations of TRPA shall *not* be binding on either State.

The regulation of land use is traditionally a function performed by local governments. Concern with the proper performance of that function in the bistate area was a primary motivation for the creation of TRPA itself, and gave rise to the specific controversy at issue in this litigation. Moreover, while TRPA, like cities, towns, and counties, was originally created by the States, its authority to make rules within its jurisdiction is not subject to veto at the state level. Indeed, that TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA.[22]

The intentions of Nevada and California, the terms of the Compact, and the actual operation of TRPA make clear that nothing short of an absolute rule, such as that implicit in the holding of the Court of Appeals, would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California. Because the Eleventh Amendment prescribes no such rule, we hold that TRPA is subject to "the judicial power of the United States" within the meaning of that Amendment.[23]

III

We turn, finally, to petitioners' challenge to the Court of Appeals' holding that the individual respondents are abso-

[21] Compact, Art. VII (a).

[22] See *California* v. *TRPA*, 516 F. 2d 215 (CA9 1975).

[23] Because of our disposition of this question, we need not address petitioners' argument that, even assuming that TRPA might be entitled to Eleventh Amendment immunity, such protection was affirmatively waived by the compacting States. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275.

lutely immune from federal damages liability for actions taken in their legislative capacities.

The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders.[24] In *Tenney* v. *Brandhove,* 341 U. S. 367, this Court reasoned that Congress, in enacting § 1983 as part of the Civil Rights Act of 1871, could not have intended "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." 341 U. S., at 376. It therefore held that state legislators are absolutely immune from suit under § 1983 for actions "in the sphere of legitimate legislative activity." 341 U. S., at 376.

Petitioners do not challenge the validity of the holding in *Tenney,* or of the decisions recognizing the absolute immunity of federal legislators.[25] Rather, their claim is that absolute immunity should be limited to the federal and state levels, and should not extend to individuals acting in a legislative capacity at a regional level. In support of this proposed distinction, petitioners argue that the source of immunity for state legislators is found in constitutional provisions, such as the Speech or Debate Clause, which have no application to a body such as TRPA. In addition, they point out that because state legislatures have effective means of disciplining their members that TRPA does not have, the threat of possi-

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[24] See *Tenney* v. *Brandhove,* 341 U. S. 367, 372–375; *Scheuer* v. *Rhodes,* 416 U. S. 232, 239 n. 4; Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1200 (1977) (legislative immunity "enjoys a unique historical position").

[25] See *Doe* v. *McMillan,* 412 U. S. 306; *Kilbourn* v. *Thompson,* 103 U. S. 168.

ble personal liability is necessary to deter lawless conduct by the governing members of TRPA.[26]

We find these arguments unpersuasive. The Speech or Debate Clause of the United States Constitution [27] is no more applicable to the members of state legislatures than to the members of TRPA. The States are, of course, free to adopt similar clauses in their own constitutions, and many have in fact done so.[28] These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for

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[26] In support of these arguments, petitioners invoke decisions of the Courts of Appeals denying absolute immunity to subordinate officials such as county supervisors and members of a park district board. *Williams* v. *Anderson,* 562 F. 2d 1081, 1101 (CA8 1977) (school board members); *Jones* v. *Diamond,* 519 F. 2d 1090, 1101 (CA5 1975) (county supervisors); *Curry* v. *Gillette,* 461 F. 2d 1003, 1005 (CA6 1972), cert. denied *sub nom. Marsh* v. *Curry,* 409 U. S. 1042 (alderman); *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222, 231 (CA7 1961) (members of park district board and village board of trustees); *Nelson* v. *Knox,* 256 F. 2d 312, 314–315 (CA6 1958) (city commissioners); *Cobb* v. *Malden,* 202 F. 2d 701, 706–707 (CA1 1953) (McGruder, C. J., concurring) (city councilmen). Respondents, on the other hand, contend that in most, if not all, of the cases in which absolute immunity has been denied, the individuals were not in fact acting in a legislative capacity. We need not resolve this dispute. Whether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damages claims is a question not presented in this case.

[27] Article I, § 6, of the United States Constitution provides in part that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

[28] See *Tenney* v. *Brandhove, supra,* at 375.

immunity to protect the "public good." As Mr. Justice Frankfurter pointed out:

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U. S., at 377.

This reasoning is equally applicable to federal, state, and regional legislators.[29] Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity.[30]

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[29] There is no allegation in this complaint that any members of TRPA's governing board profited personally from the performance of any legislative act. App. 8–12. If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658.

[30] This holding is supported by the analysis in *Butz* v. *Economou,* 438 U. S. 478, which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. In that case, we rejected the argument that absolute immunity should be denied because the individuals were employed in the Executive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Id.,* at 511. This reasoning also applies to legislators.

Like the Court of Appeals, we are unable to determine from the record the extent to which petitioners seek to impose liability upon the individual respondents for the performance of their legislative duties. We agree, however, that to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability.

The judgment of the Court of Appeals is reversed in part and affirmed in part.

It is so ordered.

MR. JUSTICE BRENNAN, dissenting in part.

I join Part I of MR. JUSTICE BLACKMUN's opinion dissenting in part. In addition I would not reach the question, which the Court discusses in dicta, *ante,* at 401, whether compacting States can create an agency protected by Eleventh Amendment immunity. In all other respects I join the Court's opinion.

MR. JUSTICE MARSHALL, dissenting in part.

The Court today extends absolute immunity to nonelected regional officials for their legislative acts. Because extension of such extraordinary protection is without support in either precedent or policy, I cannot join Part III of the Court's opinion.

In *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), this Court declined to construe 42 U. S. C. § 1983 as abrogating state legislators' unqualified immunity from suits that arise out of their legislative activity. Underlying the decision in *Tenney* was a recognition of the unique status of the legislative privilege, maintained for several centuries at common law and enshrined in the Federal Constitution, Art. I, § 6, as well as in all but seven of the States' constitutions. 341 U. S., at 372–375. Absent evidence of explicit congressional intent,

the Court was unwilling to strip state legislators of a protection so long enjoyed when there remained power in the voters to "discourag[e] or correc[t]" abuses by their elected representatives. *Id.*, at 378.

Neither of the premises on which *Tenney* rested can sustain today's holding. Immunity for appointed regional officials is without common-law antecedents or state constitutional status. Even the Compact does not purport to confer immunity on TRPA officials, and neither California nor Nevada has claimed any such intent in the briefs filed in the instant case. More significantly, none of TRPA's 10-member governing board is elected. Six are appointed by county and city governments in the area, two are appointed by the Governors of California and Nevada respectively, and two are members by virtue of their offices in state natural resource agencies. Compact, Art. III (a). Thus, no member of the board is directly accountable to the public for his legislative acts. To cloak these officials with absolute protection where control by the electorate is so attenuated subverts the very system of checks and balances that the doctrine of legislative privilege was designed to secure. Insulating appointed officials from liability, no matter how egregious their "legislative" misconduct, is unlikely to enhance the integrity of the decisional process. Nor will public support for the outcome of such processes be fostered by a scheme placing these decision-makers beyond constitutional constraints.

Equally troubling is the majority's refusal to confront the logical implications of its analysis. To be sure, the Court expressly reserves the question whether individuals performing legislative functions at the local level should be afforded absolute immunity from federal damages claims. *Ante*, at 404 n. 26. But the majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions

of a trial" will impede officials in the " 'uninhibited discharge of their legislative duty,' " *ante,* at 405, quoting *Tenney* v. *Brandhove, supra,* at 377, applies with equal force whether the officials occupy local or regional positions. Moreover, the Court implies that the test for conferring unqualified immunity is purely functional. *Ante,* at 405 n. 30. If the sole inquiry under that test is the nature of the officials' responsibilities, see *ibid.,* not the common-law and constitutional underpinnings of the privilege itself or the wisdom of extending it to nonelected officials, then presumably any appointed member of a municipal government can claim absolute protection for his legislative acts.

A doctrine that denies redress for constitutional wrongs should, in my judgment, be narrowly confined to those contexts where history and public policy compel its acceptance. Today's decision both expands the scope of immunity beyond such limits and lays the groundwork for further extension.

I respectfully dissent.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins as to Part I, dissenting in part.

I

I cannot conclude so easily, as the Court does, *ante,* at 405–406, that the members of TRPA are absolutely immune from liability from federal claims for what ultimately may be determined to be legislative acts. Nor do I know what the Court means by a "regional legislator"—other than its conclusion that members of TRPA are such—or where the line is now to be drawn between a "regional legislator" and a member of a public body somewhat farther down the scale of entities in our varied political structures.

It is difficult for me to associate the members of TRPA with federal or state legislators. Their duties are not solely legislative; they possess some executive powers. They are not in equipoise with other branches of government, and the concept

of separation of powers has no relevance to them. They are not subject to the responsibility and the brake of the electoral process. And there is no provision for discipline within the body, as the Houses of Congress and the state legislatures possess.

I therefore am not now prepared to agree that the members of TRPA enjoy absolute immunity, against federal claims, for their "legislative" acts. I think they are entitled to qualified immunity within the limitations outlined in *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), and *Butz* v. *Economou,* 438 U. S. 478 (1978). Those cases, it seems to me, set forth the guidelines appropriate for this one, and I would follow them in the present context.

II

I also do not join the Court in its flat ruling, *ante,* at 404, that the Speech or Debate Clause of our Federal Constitution, Art. I, § 6, has no application to state legislatures. That may well be, but some federal courts have ruled otherwise, *Eslinger* v. *Thomas,* 476 F. 2d 225, 228 (CA4 1973) (holding the Clause to be applicable); *In re Grand Jury Proceedings,* 563 F. 2d 577, 582–583 (CA3 1977), and *United States* v. *Gillock,* 587 F. 2d 284, 286 (CA6 1978) (both recognizing a federal common-law speech or debate privilege for state legislators based in part on the federal Speech or Debate Clause), and the controversy on this point remains a live one. See *United States* v. *Craig,* 528 F. 2d 773, 776 (CA7), opinion on rehearing en banc, 537 F. 2d 957, cert. denied *sub nom. Markert* v. *United States,* 429 U. S. 999 (1976). Because the issue of application of the Clause to state legislatures (as distinguished from TRPA) is not presented here, I would not decide it with a passing fiat.

NEVADA ET AL. *v.* HALL ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 77–1337. Argued November 7, 1978—Decided March 5, 1979

Respondents, California residents, brought this suit in a California court for damages against petitioner State of Nevada and others for injuries respondents sustained when a Nevada-owned vehicle on official business collided on a California highway with a vehicle occupied by respondents. After the California Supreme Court, reversing the trial court, held Nevada amenable to suit in the California courts, Nevada, on the basis of the Full Faith and Credit Clause of the Federal Constitution, unsuccessfully invoked a Nevada statute limiting to $25,000 any tort award against the State pursuant to its statutory waiver of sovereign immunity. Following trial, damages were awarded respondents for $1,150,000, and the judgment in their favor was affirmed on appeal. *Held:* A State is not constitutionally immune from suit in the courts of another State. Pp. 414–427.

(a) The doctrine that no sovereign may be sued in its own courts without its consent does not support a claim of immunity in another sovereign's courts. Pp. 414–418.

(b) The need for constitutional protection against one State's being sued in the courts of another State was not discussed by the Framers, and nothing in Art. III authorizing the judicial power of the United States or in the Eleventh Amendment limitation on that power provides any basis, explicit or implicit, for this Court to limit the judicial powers that California has exercised in this case. Pp. 418–421.

(c) The Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy. *Pacific Ins. Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493. Here California, which has provided by statute for jurisdiction in its courts over residents and nonresidents alike to allow those negligently injured on its highways to secure full compensation for their injuries in California courts, is not required to surrender jurisdiction to Nevada or to limit respondents' recovery to the $25,000 Nevada statutory maximum. Pp. 421–424.

(d) The specific limitations that certain constitutional provisions such as Art. I, § 8, and Art. IV, § 2, place upon the sovereignty of the States do not imply that any one State's immunity from suit in the courts of

another State is anything more than a matter of comity, and nothing in the Constitution authorizes or obligates this Court to frustrate California's policy of fully compensating those negligently injured on its highways. Pp. 424–427.

74 Cal. App. 3d 280, 141 Cal. Rptr. 439, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 427. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 432.

Michael W. Dyer, Deputy Attorney General of Nevada, argued the cause for petitioners. With him on the briefs were *Robert Frank List,* Attorney General, and *James H. Thompson,* Chief Deputy Attorney General.

Everett P. Rowe argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

In this tort action arising out of an automoble collision in California, a California court has entered a judgment against the State of Nevada that Nevada's own courts could not have entered. We granted certiorari to decide whether federal law prohibits the California courts from entering such a judgment or, indeed, from asserting any jurisdiction over another sovereign State.

The respondents are California residents. They suffered severe injuries in an automoble collision on a California highway on May 13, 1968. The driver of the other vehicle, an employee of the University of Nevada, was killed in the collision. It is conceded that he was driving a car owned by the State, that he was engaged in official business, and that the University is an instrumentality of the State itself.

Respondents filed this suit for damages in the Superior Court for the city of San Francisco, naming the administrator

of the driver's estate, the University, and the State of Nevada as defendants. Process was served on the State and the University pursuant to the provisions of the California Vehicle Code authorizing service of process on nonresident motorists.[1] The trial court granted a motion to quash service on the State, but its order was reversed on appeal. The California Supreme Court held, as a matter of California law, that the State of Nevada was amenable to suit in California courts and remanded the case for trial. *Hall* v. *University of Nevada,* 8 Cal. 3d 522, 503 P. 2d 1363. We denied certiorari. 414 U. S. 820.

On remand, Nevada filed a pretrial motion to limit the amount of damages that might be recovered. A Nevada statute places a limit of $25,000 on any award in a tort action against the State pursuant to its statutory waiver of sovereign immunity.[2] Nevada argued that the Full Faith and Credit

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[1] Section 17451 of the Code provides:

"The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any operation by himself or agent of a motor vehicle anywhere within this state, or in the event the nonresident is the owner of a motor vehicle then by the operation of the vehicle anywhere within this state by any person with his express or implied permission, is equivalent to an appointment by the nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against the nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle anywhere within this state by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator." Cal. Veh. Code Ann. § 17451 (West 1971).

An administrator of the decedent's estate was appointed in California and was served personally.

[2] Nev. Rev. Stat. § 41.035 (1) as it existed in 1968, found in official edition, 1965 Nev. Stats., p. 1414 (later amended by 1968 Nev. Stats., p. 44, 1973 Nev. Stats., p. 1532, and 1977 Nev. Stats. pp. 985, 1539):

"No award for damages in an action sounding in tort brought under section 2 may exceed the sum of $25,000 to or for the benefit of any

Clause of the United States Constitution [3] required the California courts to enforce that statute. Nevada's motion was denied, and the case went to trial.

The jury concluded that the Nevada driver was negligent and awarded damages of $1,150,000.[4] The Superior Court entered judgment on the verdict and the Court of Appeal affirmed. After the California Supreme Court denied review,

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claimant. No such award may include any amount as exemplary or punitive damages or as interest prior to judgment."

Nev. Rev. Stat. § 41.031 (1977):

"1. The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, and subsection 3 of this section, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive, or the limitations of the NRS 41.010. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the state, and their liability shall be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, and subsection 3 of this section, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive.

"2. An action may be brought under this section, in a court of competent jurisdiction of this state, against the State of Nevada, any agency of the state, or any political subdivision of the state. In an action against the state or any agency of the state, the State of Nevada shall be named as defendant, and the summons and a copy of the complaint shall be served upon the secretary of state."

[3] Article IV, § 1, provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

[4] The evidence indicated that respondent John Hall, a minor at the time of the accident, sustained severe head injuries resulting in permanent brain damage which left him severely retarded and unable to care for himself, and that respondent Patricia Hall, his mother, suffered severe physical and emotional injuries.

the State of Nevada and its University successfully sought a writ of certiorari. 436 U. S. 925.

Despite its importance, the question whether a State may claim immunity from suit in the courts of another State has never been addressed by this Court. The question is not expressly answered by any provision of the Constitution; Nevada argues that it is implicitly answered by reference to the common understanding that no sovereign is amenable to suit without its consent—an understanding prevalent when the Constitution was framed and repeatedly reflected in this Court's opinions. In order to determine whether that understanding is embodied in the Constitution, as Nevada claims,[5] it is necessary to consider (1) the source and scope of the traditional doctrine of sovereign immunity; (2) the impact of the doctrine on the framing of the Constitution; (3) the Full Faith and Credit Clause; and (4) other aspects of the Constitution that qualify the sovereignty of the several States.

I

The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign.

The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.

The doctrine, as it developed at common law, had its origins in the feudal system. Describing those origins, Pollock and Maitland noted that no lord could be sued by a vassal in his

[5] No one claims that any federal statute places any relevant restriction on California's jurisdiction or lends any support to Nevada's claim of immunity. If there is a federal rule that restricts California's exercise of jurisdiction in this case, that restriction must be a part of the United States Constitution.

own court, but each petty lord was subject to suit in the courts of a higher lord. Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued.[6] The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.[7]

We must, of course, reject the fiction. It was rejected by the colonists when they declared their independence from the Crown,[8] and the record in this case discloses an actual wrong committed by Nevada. But the notion that immunity from suit is an attribute of sovereignty is reflected in our cases.

Mr. Chief Justice Jay described sovereignty as the "right to govern"; [9] that kind of right would necessarily encompass the right to determine what suits may be brought in the sovereign's own courts. Thus, Mr. Justice Holmes explained sover-

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[6] See 1 F. Pollock & F. Maitland, History of English Law 518 (2d ed. 1899) ("He can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident"); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 2–5 (1972).

[7] See 1 W. Blackstone, Commentaries *246 ("The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing"). In fact, however, effective mechanisms developed early in England to redress injuries resulting from the wrongs of the King. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3–5 (1963).

[8] The Declaration of Independence proclaims:

"[T]hat whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government . . . and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states."

See generally B. Bailyn, The Ideological Origins of the American Revolution 198–229 (1967).

[9] See *Chisholm* v. *Georgia,* 2 Dall. 419, 472.

eign immunity as based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." [10]

This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

This point was plainly stated by Mr. Chief Justice Marshall in *The Schooner Exchange* v. *McFaddon,* 7 Cranch 116, which held that an American court could not assert jurisdiction over a vessel in which Napoleon, the reigning Emperor of France, claimed a sovereign right. In that case, the Chief Justice observed:

> "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.
>
> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Id.,* at 136.

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[10] See *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353.

After noting that the source of any immunity for the French vessel must be found in American law, the Chief Justice interpreted that law as recognizing the common usage among nations in which every sovereign was understood to have waived its exclusive territorial jurisdiction over visiting sovereigns, or their representatives, in certain classes of cases.[11]

The opinion in *The Schooner Exchange* makes clear that if California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California.[12] It is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts.[13] By rejecting the defense in

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[11] The opinion describes the exemption of the person of the sovereign from arrest or detention in a foreign territory, the immunity allowed to foreign ministers, and the passage of troops through a country with its permission. 7 Cranch, at 137–140.

[12] Were it an independent sovereign, Nevada might choose to withdraw its money from California banks, or to readjust its own rules as to California's amenability to suit in the Nevada courts. And it might refuse to allow this judgment to be enforced in its courts. But it could not, absent California's consent and absent whatever protection is conferred by the United States Constitution, invoke any higher authority to enforce rules of interstate comity and to stop California from asserting jurisdiction. For to do so would be wholly at odds with the sovereignty of California.

[13] Such a defense was sustained in 1929 by the Supreme Court of North Dakota in *Paulus* v. *South Dakota,* 58 N. D. 643, 647–649, 227 N. W. 52, 54–55. The States' practice of waiving sovereign immunity in their own courts is a relatively recent development; it was only last year, for example, that Pennsylvania concluded that the defense would no longer be recognized, at least in certain circumstances, in that State. See *Mayle* v. *Pennsylvania Dept. of Highways,* 479 Pa. 382, 388 A. 2d 709 (1978); 1978 Pa. Laws, Act. No. 1978–152, to be codified as 42 Pa. Cons. Stat. §§ 5101, 5110. But as States have begun to waive their rights to immunity in their

this very case, however, the California courts have told us that whatever California law may have been in the past, it no longer extends immunity to Nevada as a matter of comity.

Nevada quite rightly does not ask us to review the California courts' interpretation of California law. Rather, it argues that California is not free, as a sovereign, to apply its own law, but is bound instead by a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted. Unless such a federal rule exists, we of course have no power to disturb the judgment of the California courts.

II

Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence.[14] Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign.

But the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted

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own courts, it was only to be expected that the privilege of immunity afforded to other States as a matter of comity would be subject to question.

Similarly, as concern for redress of individual injuries has enhanced, so too have moves toward the reappraisal of the practices of sovereign nations according absolute immunity to foreign sovereigns. The governing rule today, in many nations, is one of restrictive rather than absolute immunity. See 26 Dept. State Bull. 984 (1952); Note, The Jurisdictional Immunity of Foreign Sovereigns, 63 Yale L. J. 1148 (1954); Martiniak, Hall v. Nevada: State Court Jurisdiction Over Sister States v. American State Sovereign Immunity, 63 Calif. L. Rev. 1144, 1155–1157 (1975).

[14] See generally C. Jacobs, The Eleventh Amendment and Sovereign Immunity 1–40 (1972).

and ratified. Regardless of whether the Framers were correct in assuming, as presumably they did, that prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another, the need for constitutional protection against that contingency was not discussed.

The debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III.[15] In The Federalist, Hamilton took the position that this authorization did not extend to suits brought by an individual against a nonconsenting State.[16] The contrary position was also advocated [17] and actually prevailed in this Court's decision in *Chisholm* v. *Georgia,* 2 Dall. 419.

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[15] Article III provides, in relevant part:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[16] The Federalist No. 81, p. 508 (H. Lodge ed. 1908) (A. Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*"); see 3 J. Elliot, Debates on the Federal Constitution 555 (1876) (John Marshall) ("I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words"). *Id.,* at 533 (James Madison).

[17] See 2 *id.,* at 491 (James Wilson) ("When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing"); Jacobs, *supra* n. 14, at 40 ("[T]he legislative history of the Constitution hardly warrants the conclusion drawn

The *Chisholm* decision led to the prompt adoption of the Eleventh Amendment.[18] That Amendment places explicit limits on the powers of federal courts to entertain suits against a State.[19]

The language used by the Court in cases construing these limits, like the language used during the debates on ratification of the Constitution, emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent.[20] But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits

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by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity").

[18] See *Hans* v. *Louisiana,* 134 U. S. 1, 11; *Monaco* v. *Mississippi,* 292 U. S. 313, 325.

[19] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Even as so limited, however, the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal-court actions. The States are subject to suit by both their sister States and the United States. See, *e. g., North Dakota* v. *Minnesota,* 263 U. S. 365, 372; *United States* v. *Mississippi,* 380 U. S. 128, 140–141. Further, prospective injunctive and declaratory relief is available against States in suits in federal court in which state officials are the nominal defendants. See *Ex parte Young,* 209 U. S. 123; *Edelman* v. *Jordan,* 415 U. S. 651. See generally Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139 (1977).

[20] See, *e. g., Hans* v. *Louisiana, supra,* at 18 ("The state courts have no power to entertain suits by individuals against a state without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power?"); *Monaco* v. *Mississippi, supra,* at 322–323 ("There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention' ").

against themselves in those courts. These decisions do not answer the question whether the Constitution places any limit on the exercise of one's State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case. A mandate for federal-court enforcement of interstate comity must find its basis elsewhere in the Constitution.

III

Nevada claims that the Full Faith and Credit Clause of the Constitution requires California to respect the limitations on Nevada's statutory waiver of its immunity from suit. That waiver only gives Nevada's consent to suits in its own courts. Moreover, even if the waiver is treated as a consent to be sued in California, California must honor the condition attached to that consent and limit respondents' recovery to $25,000, the maximum allowable in an action in Nevada's courts.

The Full Faith and Credit Clause does require each State to give effect to official acts of other States. A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter. Moreover, in certain limited situations, the courts of one State must apply the statutory law of another State. Thus, in *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, the Court held that a federal court sitting in New Hampshire was required by the Constitution to apply Vermont law in an action between a Vermont employee and a Vermont employer arising out of a contract made in Vermont.[21] But this Court's

[21] Mr. Justice Stone concurred in the *Clapper* decision, expressing the view that the result was supported by the conflict-of-laws rule that a New Hampshire court could be expected to apply in this situation, and that

decision in *Pacific Insurance Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.[22]

The question in *Pacific Insurance* was whether the Full Faith and Credit Clause precluded California from applying its own workmen's compensation Act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment. Even though the employer and employee had agreed to be bound by Massachusetts law, this Court held that California was not precluded from applying its own law imposing greater responsibilities on the employer. In doing so, the Court reasoned:

> "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy. . . . And in the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of

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it was unnecessary to rely on the Constitution to support the Court's judgment. He also made it clear that the rule of the case did not encompass an action in which the source of the relationship was not a Vermont contract between a Vermont employer and a Vermont employee. 286 U. S., at 163–165.

[22] See also *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532; *Bonaparte* v. *Tax Court*, 104 U. S. 592 (holding that a law exempting certain bonds of the enacting State from taxation did not apply extraterritorially by virtue of the Full Faith and Credit Clause).

> the state of its enactment with respect to the same persons and events. . . . Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.*, at 502–503.

The *Clapper* case was distinguished on the ground that "there was nothing in the New Hampshire statute, the decisions of its courts, or in the circumstances of the case, to suggest that reliance on the provisions of the Vermont statute, as a defense to the New Hampshire suit, was obnoxious to the policy of New Hampshire." 306 U. S., at 504.[23] In *Pacific Insurance,* on the other hand, California had its own scheme governing compensation for injuries in the State, and the California courts had found that the policy of that scheme would be frustrated were it denied enforcement. "Full faith and credit," this Court concluded, "does not here enable one state to legislate for the other or to project its laws across

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[23] Mr. Justice Stone who had concurred separately in *Clapper,* see n. 21, *supra,* wrote for the Court in *Pacific Insurance.* After distinguishing *Clapper,* he limited its holding to its facts:

"The *Clapper* case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy." 306 U. S., at 504.

state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Id.*, at 504–505.

A similar conclusion is appropriate in this case. The interest of California afforded such respect in the *Pacific Insurance* case was in providing for "the bodily safety and economic protection of employees injured within it." *Id.*, at 503. In this case, California's interest is the closely related and equally substantial one of providing "full protection to those who are injured on its highways through the negligence of both residents and nonresidents." App. to Pet. for Cert. vii. To effectuate this interest, California has provided by statute for jurisdiction in its courts over residents and nonresidents alike to allow those injured on its highways through the neligence of others to secure full compensation for their injuries in the California courts.

In further implementation of that policy, California has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign. As the California courts have found, to require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery. The Full Faith and Credit Clause does not require this result.[24]

IV

Even apart from the Full Faith and Credit Clause, Nevada argues that the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly

[24] California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

sovereigns, but must respect the sovereignty of one another. While sovereign nations are free to levy discriminatory taxes on the goods of other nations or to bar their entry altogether, the States of the Union are not.[25] Nor are the States free to deny extradition of a fugitive when a proper demand is made by the executive of another State.[26] And the citizens in each State are entitled to all privileges and immunities of citizens in the several States.[27]

Each of these provisions places a specific limitation on the sovereignty of the several States. Collectively they demonstrate that ours is not a union of 50 wholly independent sovereigns. But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity. Indeed, in view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people,[28] the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

In the past, this Court has presumed that the States intended to adopt policies of broad comity toward one another. But this presumption reflected an understanding of state policy, rather than a constitutional command. As this Court stated in *Bank of Augusta* v. *Earle,* 13 Pet. 519, 590:

> "The intimate union of these states, as members of the same great political family; the deep and vital interests

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[25] See U. S. Const., Art. I, § 8.

[26] Art. IV, § 2.

[27] *Ibid.*

[28] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

> which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end."

In this case, California has "declared its will"; it has adopted as its policy full compensation in its courts for injuries on its highways resulting from the negligence of others, whether those others be residents or nonresidents, agents of the State, or private citizens. Nothing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada.[29]

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intru-

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[29] Cf. *Georgia* v. *Chattanooga,* 264 U. S. 472, 480 ("Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of eminent domain of the State wherein the land is situated").

sion on the sovereignty of the States—and the power of the people—in our Union.

The judgment of the California Court of Appeal is

Affirmed.

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

The Court, in a plausible opinion, holds that the State of Nevada is subject to an unconsented suit in a California state court for damages in tort. This result at first glance does not seem too unreasonable. One might well ask why Nevada, even though it is a State, and even though it has not given its consent, should not be responsible for the wrong its servant perpetrated on a California highway. And one might also inquire how it is that, if no provision of our national Constitution specifically prevents the nonimmunity result, these tort action plaintiffs could be denied their judgment.

But the Court paints with a very broad brush, and I am troubled by the implications of its holding. Despite a fragile footnote disclaimer, *ante,* at 424 n. 24, the Court's basic and undeniable ruling is that what we have always thought of as a "sovereign State" is now to be treated in the courts of a sister State, once jurisdiction is obtained, just as any other litigant. I fear the ultimate consequences of that holding, and I suspect that the Court has opened the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system. Accordingly, I dissent.

It is important to note that at the time of the Constitutional Convention, as the Court concedes, there was "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent." *Ante,* at 420. The Court also acknowledges that "the notion that immunity from suit is an attribute of sovereignty is reflected in our cases." *Ante,* at 415. Despite these concessions, the Court holds that the sovereign-immunity doctrine is a mere matter of "comity"

which a State is free to reject whenever its "policy" so dictates. *Ante,* at 426.

There is no limit to the breadth of the Court's rationale, which goes beyond the approach taken by the California Court of Appeal in this case. That court theorized that Nevada was not "sovereign" for purposes of this case because sovereignty ended at the California-Nevada line: " 'When the sister state enters into activities in this state, it is not exercising sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless this state has conferred immunity by law or as a matter of comity.' " *Hall* v. *University of Nevada,* 74 Cal. App. 3d 280, 284, 141 Cal. Rptr. 439, 441 (1977), quoting *Hall* v. *University of Nevada,* 8 Cal. 3d 522, 524, 503 P. 2d 1363, 1364 (1972), cert. denied, 414 U. S. 820 (1973). The California court, in other words, recognized that sovereign States are immune from unconsented suit; it held only that this rule failed in its application on the facts because Nevada was not a "sovereign" when its agent entered California and committed a tort there. Indeed, the court said flatly that " 'state sovereignty ends at the state boundary,' " 74 Cal. App. 3d, at 284, 141 Cal. Rptr., at 441, again quoting *Hall,* 8 Cal. 3d, at 525, 503 P. 2d, at 1365.

That reasoning finds no place in this Court's opinion. Rather, the Court assumes that Nevada is "sovereign," but then concludes that the sovereign-immunity doctrine has no *constitutional* source. Thus, it says, California can abolish the doctrine at will. By this reasoning, Nevada's amenability to suit in California is not conditioned on its agent's having committed a tortious act in California. Since the Court finds no constitutional source for the sovereign-immunity doctrine, California, so far as the Federal Constitution is concerned, is able and free to treat Nevada, and any other State, just as it would treat any other litigant. The Court's theory means that State A constitutionally can be sued by an individual in

the courts of State B on any cause of action, provided only that the plaintiff in State B obtains jurisdiction over State A consistently with the Due Process Clause.

The Court, by its footnote 24, *ante,* at 424, purports to confine its holding to traffic-accident torts committed outside the defendant State, and perhaps even to traffic "policies." Such facts, however, play absolutely no part in the reasoning by which the Court reaches its conclusion. The Court says merely that "California has 'declared its will'; it has adopted as its policy full compensation in its courts for injuries on its highways . . . . Nothing in the Federal Constitution authorizes or obligates this Court to frustrate that policy." *Ante,* at 426. There is no suggestion in this language that, if California had adopted some other policy in some other area of the law, the result would be any different. If, indeed, there is "[n]othing in the Federal Constitution" that allows frustration of California's policy, it is hard to see just how the Court could use a different analysis or reach a different result in a different case.

The Court's expansive logic and broad holding—that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued—will place severe strains on our system of cooperative federalism. States in all likelihood will retaliate against one another for respectively abolishing the "sovereign immunity" doctrine. States' legal officers will be required to defend suits in all other States. States probably will decide to modify their tax-collection and revenue systems in order to avoid the collection of judgments. In this very case, for example, Nevada evidently maintains cash balances in California banks to facilitate the collection of sales taxes from California corporations doing business in Nevada. Pet. for Cert. 5. Under the Court's decision, Nevada will have strong incentive to withdraw those balances and place them in Nevada banks so as to insulate itself from California judgments. If respond-

ents were forced to seek satisfaction of their judgment in Nevada, that State, of course, might endeavor to refuse to enforce that judgment, or enforce it only on Nevada's terms. The Court's decision, thus, may force radical changes in the way States do business with one another, and it imposes, as well, financial and administrative burdens on the States themselves.

I must agree with the Court that if the judgment of the California Court of Appeal is to be reversed, a constitutional source for Nevada's sovereign immunity must be found. I would find that source not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism. The Court has had no difficulty in implying the guarantee of freedom of association in the First Amendment, *NAACP* v. *Button,* 371 U. S. 415, 430–431 (1963); *Kusper* v. *Pontikes,* 414 U. S. 51, 56–57 (1973), and it has had no difficulty in implying a right of interstate travel, *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *United States* v. *Guest,* 383 U. S. 745 (1966). In the latter case, the Court observed, *id.,* at 757: "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." And although the right of interstate travel "finds no explicit mention in the Constitution," the reason, "it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.,* at 758. Accordingly, the Court acknowledged the existence of this constitutional right without finding it necessary "to ascribe the source of this right . . . to a particular constitutional provision." *Shapiro* v. *Thompson,* 394 U. S., at 630.

I have no difficulty in accepting the same argument for the existence of a constitutional doctrine of interstate sovereign immunity. The Court's acknowledgment, referred to above, that the Framers must have assumed that States were immune

from suit in the courts of their sister States lends substantial support. The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention. The prompt passage of the Eleventh Amendment nullifying the decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), is surely significant. If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a " 'higher' sovereign," *ante,* at 418—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State. The concept of sovereign immunity prevailed at the time of the Constitutional Convention. It is, for me, sufficiently fundamental to our federal structure to have implicit constitutional dimension. Indeed, if the Court means what it implies in its footnote 24—that *some* state policies might require a different result—it must be suggesting that there are some federalism constraints on a State's amenability to suit in the courts of another State. If that is so, the only question is whether the facts of this case are sufficient to call the implicit constitutional right of sovereign immunity into play here. I would answer that question in the affirmative.

Finally, it strikes me as somewhat curious that the Court relegates to a passing footnote reference what apparently is the only other appellate litigation in which the precise question presented here was considered and, indeed, in which the Court's result was rejected. *Paulus* v. *South Dakota,* 52 N. D. 84, 201 N. W. 867 (1924); *Paulus* v. *South Dakota,* 58 N. D. 643, 227 N. W. 52 (1929). The plaintiff there was injured in a coal mine operated in North Dakota by the State of South Dakota. He sued South Dakota in a North Dakota state court. The Supreme Court of North Dakota rejected the plaintiff's contention that South Dakota "discards its sovereignty when it crosses the boundary line." 52 N. D., at 92, 201 N. W., at 870. It held that South Dakota was immune from suit in the North Dakota courts;

"Therefore, in the absence of allegations as to the law of the sister state showing a consent to be sued, the courts of this state must necessarily regard a sovereign sister state as immune to the same extent that this state would be immune in the absence of a consenting statute." 58 N. D., at 647, 227 N. W., at 54. The court noted that under the Eleventh Amendment no State could be sued in federal court by a citizen of another State. "Much less," the court reasoned, "would it be consistent with any sound conception of sovereignty that a state might be haled into the courts of a sister sovereign state at the will or behest of citizens or residents of the latter." *Id.*, at 649, 227 N. W., at 55. The Supreme Court of California purported to distinguish *Paulus* (citing only the first opinion in that litigation) on the ground that "the plaintiff was a citizen of South Dakota." *Hall* v. *University of Nevada,* 8 Cal. 3d, at 525, 503 P. 2d, at 1365. That court, however, made no reference to the Supreme Court of North Dakota's second opinion and thus passed over the fact that the plaintiff had amended his complaint to allege that he was a resident of North Dakota. The North Dakota Supreme Court then held that that fact "in nowise alter[ed]" its view of the immunity issue. 58 N. D., at 648, 227 N. W., at 54. Thus, the only authority that has been cited to us or that we have found is directly opposed to the Court's conclusion.

I would reverse the judgment of the California Court of Appeal, and remit the plaintiffs-respondents to those remedies prescribed by the statutes of Nevada.

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

Like my Brother BLACKMUN, I cannot agree with the majority that there is no constitutional source for the sovereign immunity asserted in this case by the State of Nevada. I think the Court's decision today works a fundamental readjustment of interstate relationships which is impossible to

reconcile not only with an "assumption" this and other courts have entertained for almost 200 years, but also with express holdings of this Court and the logic of the constitutional plan itself.

Any document—particularly a constitution—is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.[1] Thus, in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), Mr. Chief Justice Marshall, writing for the Court, invalidated a state tax on a federal instrumentality even though no express provision for intergovernmental tax immunity can be found in

[1] Mr. Chief Justice Marshall captured this idea in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407 (1819):

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

This was the preface to the famous line: "In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *Ibid.* (Emphasis in original.)

the Constitution. He relied on the notion that the power to tax is the power to destroy, and that to concede the States such a power would place at their mercy the Constitution's affirmative grants of authority to the Federal Government—a result the Framers could not have intended. More recently this Court invalidated a federal minimum wage for state employees on the ground that it threatened the States' " 'ability to function effectively in a federal system.' " *National League of Cities* v. *Usery,* 426 U. S. 833, 852 (1976), quoting *Fry* v. *United States,* 421 U. S. 542, 547 n. 7 (1975). The Court's literalism, therefore, cannot be dispositive here, and we must examine further the understanding of the Framers and the consequent doctrinal evolution of concepts of state sovereignty.

Article III, like virtually every other Article of the Constitution, was inspired by the experience under the Articles of Confederation. To speak of the "judicial Power" of the United States under the Articles of Confederation is to invite charges of pretense, for there was very little latitude for federal resolution of disputes. The Confederation Congress could create prize courts and courts for the adjudication of "high seas" crimes. It could set up ad hoc and essentially powerless tribunals to consider controversies between States and between individuals who claimed lands under the grants of different States.[2] But with respect to all other disputes of interstate or international significance, the litigants were left to the state courts and to the provincialism that proved the bane of this country's earliest attempt at political organization.

One obvious attribute of Art. III in light of the Confederation experience was the potential for a system of neutral forums for the settlement of disputes between States and citizens of different States. The theme recurs throughout the

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[2] 1 J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, pp. 143–195 (O. W. Holmes Devise History 1971); C. Jacobs, The Eleventh Amendment and Sovereign Immunity 9 (1972).

ratification debates. For example, during the debates in North Carolina, William Davie, a member of the Constitutional Convention, observed:

> "It has been equally ceded, by the strongest opposers to this government, that the federal courts should have cognizance of controversies between two or more states, between a state and the citizens of another state, and between the citizens of the same state claiming lands under the grant of different states. Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge.
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> "The security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states." 4 J. Elliot, Debates on the Federal Constitution 159 (1876) (hereinafter Elliot's Debates).

As the Court observes, the matter of sovereign immunity was indeed a subject of great importance in the early days of the Republic. In fact, it received considerable attention in the years immediately preceding the Constitutional Convention. In 1781 a citizen of Pennsylvania brought suit in the Pennsylvania courts in an effort to attach property belonging to Virginia that was located in Philadelphia Harbor. The case raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order. The Pennsylvania Court of Common Pleas ultimately held that by virtue of its sovereign immunity, Virginia was immune from the processes of Pennsylvania. *Nathan* v. *Virginia,* 1 Dall. 77 (1781).

That experience undoubtedly left an impression—particularly on Virginians—and throughout the debates on the Constitution fears were expressed that extending the judicial power of the United States to controversies "between a state

and citizens of another state" would abrogate the States' sovereign immunity. James Madison and John Marshall repeatedly assured opponents of the Constitution, such as Patrick Henry, that the sovereign immunity of the States was secure.[3] Alexander Hamilton as Publius wrote:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal." The Federalist No. 81, p. 508 (H. Lodge ed. 1908) (emphasis in original).

In *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), this Court

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[3] 3 Elliot's Debates 533 (James Madison):

"[Federal-court] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court."

Id., at 555–556 (John Marshall):

"It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided."

Although there were those other than opponents of the Constitution who suggested that Art. III was an abrogation of state sovereign immunity—Edmund Randolph and James Wilson being the most eminent—this Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers. See *Edelman* v. *Jordan,* 415 U. S. 651, 660–662, n. 9 (1974); *Monaco* v. *Mississippi,* 292 U. S. 313, 323–330 (1934); *Hans* v. *Louisiana,* 134 U. S. 1, 12–15 (1890).

disagreed with the Madison-Marshall-Hamilton triumvirate, and its judgment was in turn overruled by the Eleventh Amendment.[4] By its terms that Amendment only deprives federal courts of jurisdiction where a State is haled into court by citizens of another State or of a foreign country. Yet it is equally clear that the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions, for, as MR. JUSTICE BLACKMUN notes, they would have otherwise perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States. The Eleventh Amendment is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States.

This I think explains why this Court on a number of occasions has indicated that unconsenting States are not subject to the jurisdiction of the courts of other States. In *Beers* v. *Arkansas*, 20 How. 527, 529 (1858), Mr. Chief Justice Taney observed in an opinion for the Court that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." Some 25 years later Mr. Justice Miller, again for the Court, was even more explicit:

> "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.
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> "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispen-

[4] The adverse reaction to *Chisholm* was immediate, widespread, and vociferous. 1 Goebel, *supra* n. 2, at 734–741.

> sible party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446, 451 (1883).

The most recent statement by this Court on the topic appears to be that authored by Mr. Justice Black in *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U. S. 71 (1961), which held that Western Union's due process rights would be violated if Pennsylvania escheated Western Union's unclaimed money orders. The Court found that conclusion compelled by Pennsylvania's inability to provide Western Union with a forum where all claims, including those of other States, could be resolved. The Court noted that "[i]t is plain that Pennsylvania courts, with no power to bring other States before them, cannot give such hearings." *Id.,* at 80.

When the State's constitutional right to sovereign immunity has been described, it has been in expansive terms. In *Great Northern Insurance Co.* v. *Read,* 322 U. S. 47, 51 (1944), the Court stated:

> "Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. . . . A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment." (Emphasis added.)

Although Mr. Justice Frankfurter disagreed with the *Great Northern Insurance Co.* majority on the issue of consent, he was in complete agreement on the broad nature of the right.

> "The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent." *Id.,* at 59 (dissenting opinion).

Presumably the Court today dismisses all of this as dicta. Yet these statements—far better than the Court's literalism—comport with the general approach to sovereign-immunity questions evinced in this Court's prior cases. Those cases have consistently recognized that Art. III and the Eleventh Amendment are built on important concepts of sovereignty that do not find expression in the literal terms of those provisions, but which are of constitutional dimension because their derogation would undermine the logic of the constitutional scheme. In *Hans* v. *Louisiana,* 134 U. S. 1 (1890), the Eleventh Amendment was found to bar federal-court suits against a State brought by its own citizens, despite the lack of any reference to such suits in the Amendment itself. The Court found this limit on the judicial power in the "established order of things"—an order that eschewed the "anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts." *Id.,* at 10, 14. The anomaly lay in the availability of the neutral forum in cases where there was some political check on parochialism—suits against a State by its own citizens—and its unavailability in situations where concerns of a biased tribunal were most acute—suits against a State by citizens of another State. The *Hans* Court, speaking through Mr. Justice Bradley, concluded:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to

hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." *Id.*, at 21.

Similarly, in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), this Court relied on precepts underlying but not explicit in Art. III and the Eleventh Amendment to conclude that this Court was without jurisdiction to entertain a suit brought by the Principality of Monaco against the State of Mississippi for payment on bonds issued by the State. On its face, Art. III would suggest that such a suit could be entertained, and such actions are not addressed by the terms of the Eleventh Amendment. But Mr. Chief Justice Hughes in *Monaco* did not so limit his analysis, and held that the Court could not entertain the suit without Mississippi's consent.

"Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. *Behind the words of the constitutional provisions are postulates which limit and control.* There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist No. 81. The question is whether the plan of the Constitution involves the surrender of immunity

when the suit is brought against a State, without her consent, by a foreign State." *Id.*, at 322–323 (emphasis added).[5]

Likewise, I think here the Court should have been sensitive to the constitutional plan and avoided a result that destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity. MR. JUSTICE BLACKMUN's references to the "right to travel" cases is most telling. In the first such case, *Crandall* v. *Nevada,* 6 Wall. 35 (1868), the Court invalidated a Nevada head tax on exit from the State, relying in large part on *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). The essential logic of the opinion is that to admit such power would be to concede to the States the ability to frustrate the exercise of authority delegated to the Federal Government—for example, the power to transport armies and to maintain postal services. There is also the theme that the power to obstruct totally the movements of people is incompatible with the concept of one Nation. The Court admitted that "no express provision of the Constitution" addressed the problem, 6 Wall., at 48; but it concluded that the constitutional framework demanded that the tax be proscribed lest it sap the logic and vitality of the express provisions.[6]

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[5] These cases do not exhaust the contexts in which this Court has invoked the constitutional plan to find a State was not amenable to an unconsented suit despite the absence of express protection in the Constitution. See, *e. g., Ex parte New York,* 256 U. S. 490 (1921) (admiralty cases); *Smith* v. *Reeves,* 178 U. S. 436 (1900) (suits by federal corporations).

[6] The Court appealed to the logic and structure of the constitutional scheme because the case was decided before ratification of the Fourteenth Amendment, and therefore the Court could not avail itself of the flexible analytical "tools" provided by the Equal Protection Clause and the Due Process Clause.

The incompatibility of the majority's position in this case with the constitutional plan is even more apparent than that in *Crandall*. I would venture to say that it is much more apparent than the incompatibility of the one-year residency requirement imposed on Thompson as a precondition to receipt of AFDC benefits.[7] Despite the historical justification of federal courts as neutral forums, now suits against unconsenting States by citizens of different States can *only* be brought in the courts of other States. That result is achieved because in the effort to "protect" the sovereignty of individual States, state legislators had the lack of foresight to ratify the Eleventh Amendment. The State cannot even remove the action to federal court, because it is not a citizen for purposes of diversity jurisdiction. *Moor* v. *County of Alameda*, 411 U. S. 693, 717 (1973); *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487 (1894). Ironically, and I think wrongly, the Court transforms what it described as a constitutional right in *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974), and *Great Northern Insurance Co.* v. *Read*, 322 U. S. 47 (1944), into an albatross.

I join my Brother BLACKMUN's doubts about footnote 24 of the majority opinion. Where will the Court find its principles of "cooperative federalism"? Despite the historical justification of federal courts as neutral forums, despite an understanding shared by the Framers and, for close to 200 years, expounded by some of the most respected Members of this Court, and despite the fact that it is the operative postulate that makes sense of the Eleventh Amendment, the Court concludes that the rule that an unconsenting State is not subject to the jurisdiction of the courts of a different State finds no support "explicit or implicit" in the Constitution. *Ante*, at 421. If this clear guidance is not enough, I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of "cooperative federalism" can be taken

[7] *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

seriously. Yet given the ingenuity of our profession, pressure for such limits will inevitably increase. Having shunned the obvious, the Court is truly adrift on uncharted waters; the ultimate balance struck in the name of "cooperative federalism" can be only a series of unsatisfactory bailing operations in fact.

I am also concerned about the practical implications of this decision. The federal system as expressed in the Constitution—with the exception of representation in the House—is built on notions of state parity. No system is truly federal otherwise. This decision cannot help but induce some "Balkanization" in state relationships as States try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions. That will work to the detriment of smaller States—like Nevada—who are more dependent on the facilities of a dominant neighbor—in this case, California.

The problem of enforcement of a judgment against a State creates a host of additional difficulties. Assuming Nevada has no seizable assets in California, can the plaintiff obtain enforcement of California's judgment in Nevada courts? Can Nevada refuse to give the California judgment "full faith and credit" because it is against state policy? Can Nevada challenge the seizure of its assets by California in this Court? If not, are the States relegated to the choice between the gamesmanship and tests of strength that characterize international disputes, on the one hand, and the midnight seizure of assets associated with private debt collection on the other?

I think the Framers and our predecessors on this Court expressed the appropriate limits on the doctrine of state sovereign immunity. Since the California judgment under review transgresses those limits, I respectfully dissent.

RAMSEY *v.* NEW YORK

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

No. 77–6540. Argued February 22, 1979—Decided March 5, 1979

A writ of certiorari granted to decide a certain question as to the validity of a guilty plea in a state prosecution is dismissed as having been improvidently granted, where after briefing and argument it is uncertain that the question is actually presented.

Certiorari dismissed. Reported below: 61 App. Div. 2d 891, 401 N. Y. S. 2d 671.

Steven W. Fisher argued the cause for petitioner. With him on the briefs was *Barry Gene Rhodes.*

Richard Elliot Mischel argued the cause for respondent. With him on the brief was *Eugene Gold.*

PER CURIAM.

The petition for certiorari in this case stated the question presented as follows:

> "Whether a guilty plea is obtained in violation of due process of law when it is induced by a judge's threat that, should the defendant be convicted after trial, he will receive a sentence almost four times greater than one once seriously discussed, and more than twice as great as the one then held out as part of a plea offer."

We granted certiorari to decide this question. 439 U. S. 892. After briefing and oral argument, it has become evident that on the record in this case it cannot be said with any degree of certainty that this question is actually presented. The writ, therefore, is dismissed as having been improvidently granted.

So ordered.

Per Curiam

ANDERS, SOLICITOR OF RICHLAND COUNTY *v.* FLOYD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 77–1255. Decided March 5, 1979

Where it appears that the District Court's judgment enjoining a South Carolina prosecution in connection with the abortion of a 25-week-old fetus may have been based on an erroneous concept of "viability," the judgment is vacated and the case is remanded for further consideration in light of *Colautti* v. *Franklin,* 439 U. S. 379, and also for further consideration of abstention in view of the possible alternative constructions of the South Carolina criminal statutes.

440 F. Supp. 535, vacated and remanded.

PER CURIAM.

The motion of Legal Defense Fund for Unborn Children for leave to file a brief, as *amicus curiae,* is denied.

The motion of David Gaetano for leave to file a brief, as *amicus curiae,* is granted.

Appellee was indicted by a grand jury of Richland County, S. C., for criminal abortion and murder in connection with the abortion of a 25-week-old fetus. The District Court enjoined the prosecution, concluding that under *Roe* v. *Wade,* 410 U. S. 113 (1973), there was no possibility of obtaining a constitutionally binding conviction of appellee. 440 F. Supp. 535 (1977). Because the District Court may have reached this conclusion on the basis of an erroneous concept of "viability," which refers to potential, rather than actual, survival of the fetus outside the womb, *Colautti* v. *Franklin,* 439 U. S. 379, 388–389 (1979), the judgment is vacated and the case is remanded to the United States District Court for the District of South Carolina for further consideration in light of *Colautti.*

In addition, it is suggested, in view of the alternative constructions of the South Carolina criminal statutes that are

available, that the District Court give further consideration to the possibility of abstention, at least in part, in deference to the pendency of the state-court proceeding.

Vacated and remanded.

MR. JUSTICE STEWART dissents.

CHASE MANHATTAN BANK, N. A., ET AL. *v.* FINANCE ADMINISTRATION OF CITY OF NEW YORK ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 77–1659. Decided March 5, 1979

Petitioners, national banks that lease offices and maintain their principal places of business in New York City, brought the present action after the city had assessed them for its commercial rent and occupancy tax for the period June 1, 1970, through May 31, 1972. The New York Court of Appeals held that the tax could be imposed pursuant to Pub. L. 91–156, as amended, which provided that as of January 1, 1973, national banks were to be treated as state banks for the purposes of state tax laws, and which contained temporary provisions that enabled States to tax national banks on a more limited basis from its date of enactment, December 24, 1969, until January 1, 1973. A saving clause, however, prevented the imposition prior to January 1, 1973, of any tax in effect prior to the enactment of Pub. L. 91–156, unless such imposition was authorized by subsequent "affirmative action" of the state legislature.

Held:

1. The disputed tax could not be imposed on petitioners prior to January 1, 1973, because the affirmative-action requirement of the saving clause was not satisfied by a mere rate increase in the city's commercial rent tax passed subsequent to Pub. L. 91–156. The affirmative-action provision was designed to require the States, when imposing new taxes on national banks prior to January 1, 1973, to consider the impact of such taxes on the existing balance of taxation between national and state banks, and nothing in the legislative history of the rate increase suggests that Pub. L. 91–156 was given the slightest attention.

2. The city's commercial rent and occupancy tax is not a tax on "tangible personal property" within the meaning of the provisions of Pub. L. 91–156 that render the saving-clause prohibition inapplicable to such a tax. The question is one of federal law; and for the purposes of Pub. L. 91–156, Congress did not consider real estate occupancy taxes to be taxes on tangible personal property.

Certiorari granted; 43 N. Y. 2d 425, 372 N. E. 2d 789, reversed.

PER CURIAM.

Petitioners are national banks that lease office space in New York City, where they maintain their principal places of business. After the city assessed them for its commercial rent and occupancy tax for the period June 1, 1970, through May 31, 1972, they brought the present action, arguing that their status as national banks rendered them immune from the tax. Petitioners relied on our cases that have held that national banks may not be taxed except as permitted by Congress. *First Agricultural Bank* v. *State Tax Comm'n*, 392 U. S. 339 (1968); *McCulloch* v. *Maryland*, 4 Wheat. 316, 436–437 (1819). The New York state courts upheld the assessments, finding the necessary congressional authorization in Pub. L. 91–156, 83 Stat. 434, as amended, 12 U. S. C. § 548 (1970 ed.).

Pub. L. 91–156, as amended by Pub. L. 92–213, § 4 (a), 85 Stat. 775, provided that as of January 1, 1973, national banks were to be treated as state banks for the purposes of state tax laws. The Act also contained temporary provisions that enabled States to tax national banks on a more limited basis from its date of enactment, December 24, 1969, until January 1, 1973. Banks like petitioners, with their principal offices in the taxing State, could be subjected to any nondiscriminatory tax generally applicable to state banks. A saving clause, however, prevented the imposition prior to January 1, 1973, of any tax in effect prior to the enactment of Pub. L. 91–156, unless such imposition was authorized by subsequent "affirmative action" of the state legislature. The saving-clause prohibition did not apply to "any tax on tangible personal property."

The New York Court of Appeals held that the disputed tax could be imposed on petitioners prior to January 1, 1973, because the affirmative-action requirement of the saving clause had been satisfied by an amendment of the commercial rent tax passed subsequent to Pub. L. 91–156 which increased the rate of the tax. 43 N. Y. 2d 425, 372 N. E. 2d 789. We dis-

agree. Based on our study of the legislative history of Pub. L. 91–156, we are quite sure that the affirmative-action provision was designed to require the States, when imposing new taxes on national banks prior to January 1, 1973, to consider the impact of such taxes on the existing balance of taxation between national and state banks. On its face, a mere increase in the tax rate under an existing tax law does not indicate that such attention has been given; and nothing in the available legislative history of the rate amendment suggests that Pub. L. 91–156 was given the slightest attention.

The New York Court of Appeals also concluded that, under New York law, the commercial rent and occupancy tax was a tax on tangible personal property and hence not subject to the prohibitions of the saving clause. Whether the tax at issue is a tax on tangible personal property within the meaning of Pub. L. 91–156 is a question of federal law; and for the purposes of that statute, it appears to us that Congress did not consider real estate occupancy taxes to be taxes on tangible personal property. This is sufficiently clear from the provisions of the Act dealing with the interim taxation of banks having their principal offices outside the taxing State. Those provisions, in numbered paragraphs, list five kinds of taxes that were permissible. Paragraph (2) specified "[t]axes on real property *or on the occupancy of real property* located within such jurisdiction" (emphasis added), while paragraph (4) referred to "[t]axes on tangible personal property." It follows that the saving clause forbade collecting from banks like petitioners pre-existing real estate and occupancy taxes without affirmative legislative action, although it did not bar taxes on tangible personal property.

We accordingly conclude that the New York Court of Appeals was in error. The petition for certiorari is granted, and the judgments of the New York Court of Appeals are reversed.

It is so ordered.

NEW JERSEY *v.* PORTASH

CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

No. 77–1489. Argued December 5, 1978—Decided March 20, 1979

Respondent municipal official testified before a state grand jury under immunity granted pursuant to a New Jersey statute preventing a public employee's grand jury testimony or evidence derived therefrom from being used against him in a subsequent criminal proceeding. Thereafter, respondent was charged with misconduct in office and extortion, and at his trial the judge ruled that respondent's grand jury testimony could be used to impeach his credibility if he testified. As a result of this ruling, respondent did not testify, and he was ultimately convicted. The New Jersey appellate court held that the use of the immunized grand jury testimony to impeach respondent would have violated the Constitution, and, because respondent's decision not to testify was based on the trial court's erroneous ruling to the contrary, reversed the conviction and remanded for a new trial. *Held:* Under the Fifth Amendment privilege against compulsory self-incrimination made binding on the States by the Fourteenth Amendment, respondent's testimony before the grand jury under a grant of immunity could not constitutionally be used against him in the later criminal trial. Pp. 453–460.

(a) That respondent did not take the witness stand does not render the constitutional question abstract and hypothetical. It appears from the record that the trial judge did rule on the merits of such question, and the appellate court necessarily concluded that such question had been properly presented, because it ruled in respondent's favor on the merits. Moreover, there is nothing in federal law to prohibit New Jersey from following such a procedure, nor, so long as Art. III's "case or controversy" requirement is met, to foreclose this Court's consideration of the constitutional issue now that the New Jersey courts have decided it. Pp. 454–456.

(b) Testimony given in response to a grant of legislative immunity is the essence of coerced testimony and involves the constitutional privilege against compulsory self-incrimination in its most pristine form. Thus, any balancing of interests so as to take into account the interest in preventing perjury is not only unnecessary but impermissible. *Harris* v. *New York,* 401 U. S. 222, and *Oregon* v. *Hass,* 420 U. S. 714, distinguished. Pp. 456–460.

151 N. J. Super. 200, 376 A. 2d 950, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post,* p. 460. POWELL, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post,* p. 462. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 463.

Edwin H. Stier argued the cause for petitioner. With him on the brief were *John J. Degnan,* Attorney General of New Jersey, and *Richard W. Berg,* Deputy Attorney General.

Michael E. Wilbert argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the scope of the privilege against compulsory self-incrimination, grounded in the Fifth Amendment and made binding against the States by the Fourteenth. The precise question is whether, despite this constitutional privilege, a prosecutor may use a person's legislatively immunized grand jury testimony to impeach his credibility as a testifying defendant in a criminal trial.

I

In the early 1970's, Joseph Portash was Mayor of Manchester Township, Executive Director of the Pinelands Environmental Council, and a member of both the Ocean County Board of Freeholders and the Manchester Municipal Utilities Authority in New Jersey. In November 1974, after a lengthy investigation, a state grand jury subpoenaed Portash. He expressed an intention to claim his privilege against compulsory self-incrimination. The prosecutors and Portash's lawyers then agreed that, if Portash testified before the grand jury, neither his statements nor any evidence derived from them could, under New Jersey law, be used in subsequent criminal proceedings (except in prosecutions for perjury or

false swearing).[1] After Portash's testimony, the parties tried to come to an agreement to avoid a criminal prosecution against Portash, but no bargain was reached. In April 1975, Portash was indicted for misconduct in office and extortion by a public official.[2]

Before trial, defense counsel sought to obtain a ruling from the trial judge that no use of the immunized grand jury testimony would be permitted. The judge refused to rule that the prosecution could not use this testimony for purposes of impeachment. After the completion of the State's case, defense counsel renewed his request for a ruling by the trial judge as to the use of the grand jury testimony. There followed an extended colloquy, and the judge finally ruled that if Portash testified and gave an answer on direct or cross-examination which was materially inconsistent with his grand jury testimony, the prosecutor could use that testimony in his cross-examination of Portash. Defense counsel then stated that, because of this ruling, he would advise his client not to take the stand. Portash did not testify, and the jury ultimately found him guilty on one of the two counts.

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[1] At that time a New Jersey statute provided as follows:

"If any public employee testifies before any court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying." New Jersey Public Employees Immunity Statute, N. J. Stat. Ann. § 2A:81–17.2a2 (West 1976).

[2] Portash has not contended that the indictment was based on information disclosed by or "derived" from his immunized testimony. Before trial he did move for dismissal of the indictment on two grounds. First, he argued that the course of dealings between himself and the prosecution established an agreement that he would not be prosecuted so long as he cooperated with the State. Second, he contended that he had impermissibly been forced to incriminate himself by providing certain employment records to the grand jury. The trial court rejected both arguments; neither is urged here.

The New Jersey Appellate Division reversed the conviction. 151 N. J. Super. 200, 376 A. 2d 950 (1977). That court held that the Constitution requires that the immunity granted by the New Jersey statute must be at least coextensive with the privilege afforded by the Fifth and Fourteenth Amendments. To confer such protection, the court reasoned, the grant of immunity must "leave defendant and the State in the position each would have occupied had defendant's claim of privilege [before the grand jury] been honored." *Id.*, at 205, 376 A. 2d, at 953. Use of the immunized grand jury testimony to impeach a defendant at his trial, it held, did not meet this test. Because Portash's decision not to testify was based upon the trial court's erroneous ruling to the contrary, the Appellate Division reversed the conviction and remanded the case for a new trial.[3] The New Jersey Supreme Court denied the State's petition for certification of an appeal. 75 N. J. 597, 384 A. 2d 827 (1978). We granted certiorari. 436 U. S. 955.

II

New Jersey presents two questions. First, it argues that Portash cannot properly invoke the privilege against compulsory incrimination because he did not take the witness stand and, as a result, his immunized grand jury testimony was never used against him. Second, it urges that the Fifth and

[3] We read the state-court opinion as resting its judgment unambiguously and exclusively on the Federal Constitution. The court said:

"The immunity device, however, will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self-incrimination which it replaces. *United States* v. *Calandra*, 414 U. S. 338, 346 . . . (1974); *Kastigar* v. *United States*, 406 U. S. 441, 459 . . . (1972)." 151 N. J. Super., at 205, 376 A. 2d, at 953.

Both *Calandra* and *Kastigar* were, of course, federal constitutional decisions. The court discussed several other federal cases in the course of its opinion, and nowhere indicated any reliance on principles of state constitutional or common law.

Fourteenth Amendments do not prohibit the use of immunized grand jury testimony to impeach materially inconsistent statements made at trial.

A

The State contends that the issue presented by Portash is abstract and hypothetical because he did not, in fact, become a witness. Portash could have taken the stand, testified, objected to the prosecution's use of the immunized testimony to impeach him, and appealed any subsequent conviction. Absent that, the State would have us hold that the constitutional question was not and is not presented. This argument must be rejected. First, it is clear that although the trial judge was concerned about making a ruling before specific questions were asked, he did rule on the merits of the constitutional question:

"THE COURT: Well, this is what the Court was concerned with and still is and I thought the Court had straightened it out previously, the witness taking the stand and testifying as to something and then have counsel saying didn't you say before the grand jury such and such.

"MR. WILBERT [defense counsel]: That's the problem that we have. We don't know whether he's going to be able to use that or not, your Honor, especially if he didn't touch that area in his examination—

"THE COURT: Mr. Wilbert, suppose your client takes the stand and he testifies that I worked for Donald Safran and suppose he testified before the grand jury I never worked for Donald Safran?

"MR. WILBERT: Inconsistency and under your Honor's ruling that can be used in this case.

"THE COURT: *No doubt about it.*

"MR. WILBERT: Your Honor, I would submit it could be used over my objection, of course.

"THE COURT: You have a standing objection with respect to the use at all of the grand jury testimony." (Emphasis added.) App. 223a.

Second, the New Jersey appellate court necessarily concluded that the federal constitutional question had been properly presented, because it ruled in Portash's favor on the merits.[4] See *Raley* v. *Ohio,* 360 U. S. 423, 435–437; cf. *Jenkins* v. *Georgia,* 418 U. S. 153, 157; *Coleman* v. *Alabama,* 377 U. S. 129, 133; *Whitney* v. *California,* 274 U. S. 357, 360–361; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134.

Moreover, there is nothing in federal law to prohibit New Jersey from following such a procedure, or, so long as the "case or controversy" requirement of Art. III is met, to foreclose our consideration of the substantive constitutional issue now that the New Jersey courts have decided it. This is made clear by a case decided by this Court in 1972, *Brooks* v. *Tennessee,* 406 U. S. 605. There the Court held unconstitutional a Tennessee statutory requirement that a defendant in a criminal case had to be his own first witness if he was to take the stand at all. The Court held that such a requirement unconstitutionally penalized a defendant's right to remain silent, since a defendant could remain silent immediately after the close of the State's case only at the cost of never testifying in his own defense. Although Brooks had not testified, the Tennessee court considered the constitutional validity of the state statute, and so did this Court. Because the rule imposed

[4] *Lefkowitz* v. *Newsome,* 420 U. S. 283, was another case where provisions of state law allowed federal review that may not otherwise have been available. There, New York law allowed a defendant to appeal defeat of a motion to suppress even though he later pleaded guilty. The Court held that because the State recognized such a procedure, a state prisoner who had pleaded guilty could assert his Fourth and Fourteenth Amendment claim in a federal habeas corpus proceeding, even though federal habeas corpus relief would not generally have been available to one who had pleaded guilty.

a penalty on the right to remain silent, the Court found that his constitutional rights had been infringed even though he had never taken the stand. *Id.,* at 611 n. 6.

In *Brooks* the Court held that the defendant's Fifth and Fourteenth Amendment rights had been violated because, in order to assert his Fifth Amendment right to remain silent after the prosecution's case in chief had been presented, the defendant would have had to pay a penalty. He could never testify. Here, as in *Brooks,* federal law does not insist that New Jersey was wrong in not requiring Portash to take the witness stand in order to raise his constitutional claim.[5]

B

In both Great Britain and in what later became the United States, immunity statutes, like the privilege against compulsory self-incrimination, predate the adoption of the Constitution. *Kastigar* v. *United States,* 406 U. S. 441, 445 n. 13, 446 n. 14. This Court first considered a constitutional challenge to an immunity statute in *Counselman* v. *Hitchcock,* 142 U. S. 547. The witness in that case had refused to testify before a federal grand jury in spite of a grant of immunity under the relevant federal statute. The Court overturned his contempt conviction. It construed the statute to permit the use of evidence *derived* from his immunized testimony. The witness was held to have validly asserted his privilege because "legislation cannot abridge a constitutional privilege, and . . . it cannot replace or supply one, at least unless it is so broad

[5] A similar situation existed in *Wardius* v. *Oregon,* 412 U. S. 470. The Court held in that case that state notice-of-alibi requirements could be enforced only if the State provided reciprocal discovery rights for the defendant. The defendant in that case had not given a notice of alibi. The State argued that he could not assert his constitutional claim, because he should have given his notice of alibi and then argued that the State had to grant him reciprocal discovery. The Court rejected that argument, and held that he need not give notice to raise his constitutional claim.

as to have the same extent in scope and effect." *Id.*, at 585. See also *Brown* v. *United States,* 359 U. S. 41; *Ullmann* v. *United States,* 350 U. S. 422; *Brown* v. *Walker,* 161 U. S. 591. After the holding in *Malloy* v. *Hogan,* 378 U. S. 1, that the Fifth Amendment privilege against compulsory self-incrimination is also contained in the Fourteenth Amendment, this rule is necessarily applicable to state immunity statutes as well. Cf. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52.[6]

Language in *Counselman* and its progeny was read by some to require that the witness must be immune from prosecution for the transaction his testimony concerned. Indeed, the federal statutes subsequently upheld by the Court granted such transactional immunity. *Brown* v. *United States, supra; Ullman* v. *United States, supra; Heike* v. *United States,* 227 U. S. 131; *Brown* v. *Walker, supra.*[7] The adoption of Pub. L. 91–452 in 1970 marked a change in federal immunity legislation from the provision of transactional immunity to the provision of what is known as "use" immunity. 18 U. S. C §§ 6001, 6002. This immunity, similar to that provided by the New Jersey statute in this case, protects the witness from the use of his compelled testimony and any information derived from it. In *Kastigar* v. *United States, supra,* the Court upheld that statute against a challenge that mere use immunity is not coextensive with the Fifth Amendment's privilege.

> "The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its

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[6] The *Murphy* case dealt with the problem of dual sovereignty. The issue was whether a State could grant constitutionally sufficient immunity if another jurisdiction could use the immunized testimony in a prosecution. The Court proceeded on the premise that a State is required to provide at least use immunity, and held that such immunity would have to be honored by the Federal Government. See *Kastigar* v. *United States,* 406 U. S. 441, 455–459.

[7] See *Shapiro* v. *United States,* 335 U. S. 1, 6 n. 4, for a list of the federal statutes that provided transactional immunity.

> sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts." ' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U. S., at 453. (Emphasis in original; footnote omitted.)

Against this broad statement of the necessary constitutional scope of testimonial immunity, the State asks us to weigh *Harris* v. *New York,* 401 U. S. 222, and *Oregon* v. *Hass,* 420 U. S. 714.[8] Those cases involved the use of statements, concededly taken in violation of *Miranda* v. *Arizona,* 384 U. S. 436, to impeach a defendant's testimony at trial. In both cases the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed. The State asks that we apply the same reasoning to this case. It points out that the interest in preventing perjury is just as strongly involved, and that the statements made to the grand jury are at least as reliable as those made by the defendants in *Harris* and *Hass.*

But the State has overlooked a crucial distinction between those cases and this one. In *Harris* and *Hass* the Court expressly noted that the defendant made "no claim that the statements made to the police were coerced or involuntary," *Harris* v. *New York, supra,* at 224; *Oregon* v. *Hass, supra,* at

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[8] The Court in both the *Harris* and *Hass* cases relied on *Walder* v. *United States,* 347 U. S. 62, a case in which the Court held that the Fourth Amendment's exclusionary rule does not prevent the use of unconstitutionally seized evidence to impeach a defendant's credibility.

722–723. That recognition was central to the decisions in those cases.

The Fifth and the Fourteenth Amendments provide that no person "shall be *compelled* in any criminal case to be a witness against himself." As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of *Miranda,* may not be put to any testimonial use whatever against him in a criminal trial. "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law." (Emphasis in original.) *Mincey* v. *Arizona,* 437 U. S. 385, 398.[9]

Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

The Superior Court of New Jersey, Appellate Division, correctly ruled that a person's testimony before a grand jury

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[9] We express no view as to whether possibly truthful immunized testimony may be used in a subsequent false-declarations prosecution premised on an inconsistency between that testimony and later, nonimmunized, testimony. That question will be presented in *Dunn* v. *United States,* No. 77–6949, cert. granted, 439 U. S. 1045.

under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial.[10] Accordingly, the judgment is affirmed.

It is so ordered.

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

I join the Court's opinion affirming the judgment in this case, despite my reservations that the decision of the Superior Court of New Jersey, Appellate Division, 151 N. J. Super. 200, 376 A. 2d 950 (1977), certification denied, 75 N. J. 597, 384 A. 2d 827 (1978), may well rest on independent and adequate state grounds.

The privilege against self-incrimination is not set out in the New Jersey Constitution. Its origins are instead to be found in the common law, see *State* v. *Fary*, 19 N. J. 431, 434–435, 117 A. 2d 499, 501–502 (1955), and in statutes. See N. J. Stat. Ann. § 2A:84A–19 (West 1976). Although New Jersey courts have looked to constructions of the Fifth Amendment of the Federal Constitution as a source of illumination for the interpretation of the state privilege, see *In re Pillo*, 11 N. J. 8, 15–17, 93 A. 2d 176, 179–180 (1952), they have also held that the interpretation of that privilege is "a matter of state law and policy, as to which [New Jersey] may impose standards more strict than required by the federal Constitution, which standards will control regardless of the final outcome of the question in the federal sphere." *State* v. *Deatore*, 70 N. J. 100, 112, 358 A. 2d 163, 170 (1976). Cf. *State* v. *Johnson*, 68 N. J. 349, 353, 346 A. 2d 66, 67–68 (1975).

In this context the Appellate Division's decision appears

[10] There is discussion in the briefs of the parties regarding the admissibility of statements made by Portash during pre-indictment negotiations with the state prosecutors. We do not understand the opinion of the state appellate court to have dealt with this issue, and nothing said in this opinion bears on it.

to rest on the independent and adequate state ground of N. J. Stat. Ann. § 2A:81–17.2a2 (West 1976). The Division's opinion begins by reciting the statute *in toto,* labeling it as "[t]he statutory authority for the State's grant of immunity to defendant." 151 N. J. Super., at 204, 376 A. 2d, at 952. The opinion states that "[t]he question is whether the State should be required to honor its promise, *expressed in its statute* . . . , not to use the testimony compelled in any subsequent criminal proceeding against the defendant . . . ." (Emphasis supplied.) *Id.,* at 207, 376 A. 2d, at 954. Under these circumstances the Appellate Division's references to decisions interpreting federal constitutional law seem to be mere analogies, illuminating the Division's ultimate construction of N. J. Stat. Ann. § 2A:81–17.2a2.[1] Logically, interpretations of the Fifth Amendment can at most serve as guidance to New Jersey's interpretation of its own statute.[2] It is also of no little significance that, although the State rests its case heavily on *Harris* v. *New York,* 401 U. S. 222 (1971), see Brief for Petitioner 38–39, the Supreme Court of New Jersey has recently held that the state privilege against self-incrimination may well be "stricter" than that required by *Harris.* See *State* v. *Deatore, supra,* at 116, 358 A. 2d, at 172.

But the Court reads the New Jersey court's opinion as resting on the Federal Constitution. That reading would not have been possible had the New Jersey court's opinion in this case been as explicit as in *Deatore.*[3] However, since I fully agree

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[1] The immunity statute at issue in this case, N. J. Stat. Ann. § 2A:81–17.2a2 (West 1976), is "self-executing," *State* v. *Vinegra,* 134 N. J. Super. 432, 440, 341 A. 2d 673, 677 (1975), and therefore, as one New Jersey court put it, a "defendant's Fifth Amendment protection is derived from the statute." *Id.,* at 439, 341 A. 2d, at 677.

[2] There is no suggestion, of course, that New Jersey's interpretation of its statute violates the guarantees of the Fifth Amendment of the Federal Constitution.

[3] "We reach that conclusion as a matter of state law and policy . . .

with the Court's disposition of the federal constitutional question, I shall not further press the point but join the Court's opinion.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the Court's opinion, and add these comments.

As stated by the Court, New Jersey makes two arguments in support of its request for reversal. First, it insists that, because Portash did not take the witness stand, his immunized testimony was not used against him and he therefore cannot complain of a violation of his Fifth Amendment privilege. The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.[1]

This is a state case, however, in which the New Jersey Appellate Division apparently accepted the procedure followed by the trial court and treated the constitutional question as having been properly presented. I agree with the Court that this procedural question was within the authority of the state court to decide.[2]

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regardless of the final outcome of the question in the federal sphere." 70 N. J., at 112, 358 A. 2d, at 170.

[1] Criminal defendants, as an aid to determining trial strategy, no doubt would prefer to be told in advance of trial whether prior testimony may be used to impeach if they take the stand. But there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented.

[2] Accordingly, the Court need not, and, as I read its opinion, does not

The State also argues, quite apart from the procedural context in which the question arises, that immunized grand jury testimony may be used to impeach a criminal defendant's testimony at trial. The Court correctly rejects this argument, ruling that the coercing of Portash to testify before the grand jury constituted a classic case of "compelling" a defendant to be a witness against himself. See *Kastigar* v. *United States,* 406 U. S. 441, 453 (1972).

The Court has referred to two quite different interests in determining whether the Fifth Amendment permits a defendant's statements to be used against him at trial. In *Harris* v. *New York,* 401 U. S. 222 (1971), the Court emphasized the trustworthiness of a suspect's statements made to police, noting that there was no indication that the statements were "coerced or involuntary." Similarly, here there is no reason to question the veracity of the respondent's grand jury testimony. The Court today recognizes, however, that the privilege against self-incrimination protects against more than just the use of false or inaccurate statements against a criminal defendant. In addition, the Fifth Amendment, by virtue of its incorporation through the Fourteenth Amendment, prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction.

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

The Court in this case reaches out to decide an important constitutional question even though that question is presented in the context of an abstract dispute over a hypothetical ruling of the trial court. For me, the facts present too remote and speculative an injury to federally protected rights to support the exercise of jurisdiction by this Court. Indeed,

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decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court.

examination of the record reveals for me that the Court decides today a question different from the one the trial court considered. This demonstrates how far afield we range when we cut loose from the requirement that only concrete disputes may be decided by this Court. Because I believe the Court is without authority to engage in this type of abstract adjudication of constitutional rights in a factual vacuum, I dissent.

Prior to trial, and again at the close of the State's evidence, respondent Portash attempted to obtain an advance evidentiary ruling from the trial court. Though the precise nature of the ruling respondent sought is a matter of dispute, it related generally to whether and to what extent the State would be permitted to use, during cross-examination of respondent and in the rebuttal phase of its own case, information supplied by respondent under the statutory grant of immunity. When respondent failed to obtain a ruling he considered satisfactory, he refrained from testifying in his own behalf. Accordingly, he did not take the stand at the trial. He was not cross-examined. He gave no answer determined by the trial court to be materially inconsistent with any prior immunized statement on a relevant issue. The State did not seek to impeach him through use of immunized testimony. And the trial court did not rule that the State could do so in response to an inconsistent answer, or that the State could otherwise make use of immunized testimony at trial. In short, because of his failure to take the stand, respondent was never incriminated through the use of the testimony he previously had supplied under the immunity grant.

Even so, the Court takes jurisdiction over this dispute and decides the merits of respondent's claim that it would have constituted a violation of his right under the Fifth and Fourteenth Amendments to be free from compelled self-incrimination had the State used immunized testimony to impeach him, assuming, of course, that he would have taken the stand,

that he would have given materially inconsistent answers to relevant questions, and that the State would have chosen to impeach him with prior immunized testimony. The Court justifies this assertion of jurisdiction, over the State's objection that the dispute is only hypothetical, by announcing that the New Jersey courts decided the issue and held it to be properly presented on appeal. Citing cases such as *Raley* v. *Ohio,* 360 U. S. 423 (1959), and *Jenkins* v. *Georgia,* 418 U. S. 153 (1974), *ante,* at 455, the Court holds that New Jersey's determination that the federal issue properly has been presented is sufficient to allow this Court to decide the issue, notwithstanding respondent's failure to take the stand. "[T]here is nothing in federal law to prohibit New Jersey from following such a procedure," the Court holds, "or, so long as the 'case or controversy' requirement of Art. III is met, to foreclose our consideration of the substantive constitutional issue now that the New Jersey courts have decided it." *Ibid.*

But the State's objection, as I understand it, goes not to whether the federal issue properly was presented in the state courts, but to whether, in light of respondent's failure to testify, the alleged claim is too remote and speculative to support jurisdiction here. As such, resolution of the State's objection turns not on the determination that the New Jersey courts recognized the federal issue as properly presented, but on the determination that there is indeed a federal issue in the case. And this latter determination depends upon whether, as a matter of federal law, there is a sufficiently concrete controversy over the scope of a federal right to support the exercise of jurisdiction by this Court.

The Court tacitly recognizes this, I take it, by conceding, *ante,* at 455–456, that the "case or controversy" requirement of Art. III must be met and by its citation of *Brooks* v. *Tennessee,* 406 U. S. 605 (1972). For in *Brooks,* the dissenters argued that since the defendant had not taken the stand, his right

to be free from compelled self-incrimination had not been infringed, and therefore the defendant had not presented the Court with any federal issue "bearing on the privilege against self-incrimination." *Id.*, at 617. The Court answered that argument by saying that the Tennessee statute in issue imposed a burden on the right to remain silent by penalizing a defendant who asserted that right at the start of his case, and "that penalty constitute[d] the infringement of the right." *Id.*, at 611 n. 6. Thus, in *Brooks,* the Court found that there was a federal issue presented even though the defendant had not taken the stand, since it was the exercise of the right not to testify that the State burdened.

As in *Brooks,* the Court here must believe that there was some infringement of a federal right sufficient to establish a concrete controversy capable of supporting its jurisdiction. But, unlike in *Brooks,* the Court takes care to omit any mention of what federal right was infringed by the hypothetical "ruling" of the trial court. It simply says that New Jersey recognized the issue as having been presented, intimates that the case is within Art. III's case-or-controversy requirement, and proceeds to the merits.

What federal right it is that the "ruling" of the trial court infringed is not easy to ascertain. It would not appear that the right to remain silent, at issue in *Brooks,* was burdened, since respondent asserted that right without suffering any penalty for doing so. Nor did the hypothetical ruling compel respondent to incriminate himself, since it did not force him to take the stand and subject himself to impeachment by use of the immunized testimony. Respondent argues that it was his right to testify in his own behalf that the trial court infringed by threatening him with the possibility that, if he were to testify and if he were to give materially inconsistent answers to relevant questions, the court would permit the State to impeach respondent with his immunized testimony, if the State could do so. This threat, respondent now argues, deterred him from taking the stand in his own behalf, and

thereby constituted an unconstitutional infringement of his right to testify. Brief for Respondent 13.

This appears to be the theory that the Appellate Division proceeded upon, see 151 N. J. Super. 200, 204, 209, 376 A. 2d 950, 952, 955, and it appears to be the most plausible reasoning upon which one could conclude that this case involves an actual, and not hypothetical, invasion of federal rights. As such, the Court today *sub silentio* decides as a matter of federal law that the hypothetical ruling by a state court that it would permit impeachment with immunized testimony in certain circumstances not yet come to pass creates a sufficient infringement on the right to testify as to create a controversy capable of being adjudicated here.

But this claimed burden on the right to testify is too speculative to support the exercise of jurisdiction by this Court over the ultimate dispute concerning the use of immunized testimony. On this record, we cannot tell whether respondent would have taken the stand even had he obtained the ruling he sought from the trial court. The decision by a criminal defendant to testify is often the most important decision he faces in the trial, and it seldom turns on the resolution of one factor among many. Even had respondent taken the stand, there is no assurance he would have given inconsistent answers to questions. Indeed, respondent vigorously has argued, in this Court and in the state courts, that he would not have testified in any manner inconsistently with his immunized testimony. Moreover, even had inconsistent answers been given, the trial court would have had to determine whether the answers were offered in response to relevant and material questions before it would have permitted impeachment. And even then, there is no certainty that the State actually would have sought to use immunized materials to impeach respondent.

In these circumstances, I would hold the dispute as to the use of the immunized testimony to be too remote and speculative to enable this Court to adjudicate it. Cf. *Laird*

v. *Tatum,* 408 U. S. 1 (1972). By finding sufficient controversy to exist in this case to reach the federal issue, the Court exercises jurisdiction over an abstract dispute of no concrete significance, and as a result renders an advisory opinion, informing respondent what the State would have been permitted to do or not do had respondent ever taken the stand.

I find this adjudication of an abstract dispute not only to be beyond the jurisdiction of the Court but to be unwise as well. At a minimum, as our Brother POWELL notes, *ante,* at 462, a requirement that such a claim be adjudicated on appeal only when presented by a defendant who has taken the stand prevents a defendant from manufacturing constitutional challenges when he has no intention of taking the stand and testifying in his own behalf. More fundamentally, such disembodied decisionmaking removes disputes from the factual and often legal context that sharpens issues, highlights problem areas of special concern, and, above all, gives a reviewing court some notion of the practical reach of its pronouncements.

Indeed, my examination of the record in this case makes me suspect that in adjudicating an abstract and academic legal question the Court has affirmed the reversal of respondent's conviction on the basis of an issue not even argued by respondent at the trial level in his attempt to obtain an advance ruling from the trial court. It is clear to me that the possible use of immunized testimony to impeach respondent was not at all respondent's concern before the trial court. At the pretrial hearing respondent's counsel conceded that if respondent gave materially inconsistent answers, he could be impeached with the grand jury testimony or prosecuted for perjury. App. 144a. Rather, respondent was attempting to obtain an advance ruling from the trial court that the State could not rely on information gathered from respondent's immunized testimony in formulating questions for respondent on cross-examination. His argument to the trial court was that unless the State could show that it discovered the infor-

mation that formed the basis of its questions from a source independent of his immunized testimony, the Fifth Amendment prohibited the State from asking those questions. And it was in reliance on the trial court's ruling that it would not decide in advance on this request—but would wait until each question was asked to consider this objection—that respondent refused to take the stand.

The record at almost every point supports this interpretation of what it was that respondent sought from the trial court. For example, in the course of conceding that respondent properly would be subject to impeachment with the grand jury testimony if he gave answers at trial materially inconsistent with that testimony, respondent's counsel stated that he "merely want[ed] a ruling from the Court that, *unless the door is opened,* that they are not permitted to use any of [the immunized testimony] by way of cross examination, by way of rebuttal, or by way of cross examination of any of our witnesses, with the one limitation, that I think is inherent, is that except in the event of perjury" (emphasis added). App. 146a. See *id.,* at 143a–148a.

Similarly, when counsel renewed this argument at the close of the State's evidence, the record reveals that his concern was not with impeachment, but with the use of the immunized testimony as a basis for asking questions. Thus, counsel argued that what the immunity statute proscribed was "use [of] the fruits of his testimony to cross examine him in his testimony." *Id.,* at 203a.[1]

[1] "Mr. Wilbert [defense counsel]: Your Honor, what they are going to do is attempt to enlarge the cross examination to question him about aspects of that grand jury testimony when he is not inconsistent at all on direct examination with it. They're going to make him inconsistent or make him incriminate himself by the use of the grand jury testimony. . . . If we stay out of the area totally and then *on cross examination they ask him to give an answer that's consistent with his grand jury testimony but which incriminates him, how can that possibly be permitted, your Honor?* . . . [W]hat they're doing there is utilizing that grand jury

Concededly, in the passage the Court quotes, *ante,* at 454–455, the trial court stated that if respondent gave materially inconsistent answers, it would permit impeachment with the immunized testimony. But an examination of the entire discussion from which that quotation is lifted makes it clear that respondent was not seeking a ruling as to impeachment for inconsistent statements, but a limitation on the scope of cross-examination. Thus, just before the quoted exchange, respondent's counsel assured the trial court that "the direct examination will in no way be inconsistent with his grand jury [immunized] testimony," App. 220a, but that the problem concerned the use of "consistent grand jury testimony which is incriminating to convict the man on the stand." *Ibid.* And immediately after the passage upon which the Court relies, respondent waved off the impeachment issue and stated that the problem that concerned him was the use by the State of information obtained from the immunized testimony to force respondent to give answers on the stand that would incriminate him.[2]

The trial court refused to rule in advance on this attempt to limit cross-examination, and it was this refusal that respondent claimed prompted his refusal to testify. *Id.,* at 243a. Before the Appellate Division, however, the dispute was transmuted into one over the ability of the State to impeach respondent with the immunized testimony. It was on that issue that the conviction was reversed. And it is on

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testimony not to show an inconsistency but to create consistent incrimination . . . ." App. 203a–204a (emphasis added).

See *id.,* at 168a, 173a, 192a–193a, 202a–203a.

[2] "Mr. Wilbert: . . . . If they're allowed to open the grand jury testimony of Mr. Portash by asking him the questions that they only gained knowledge of in his grand jury testimony and when he didn't testify about it on direct, I submit it is an absolute erroneous use under the law, erroneous use of that grand jury testimony and that's what I'm—that's why I'm here seeking clarification, that's what it's all about." *Id.,* at 228a. See *id.,* at 225a, 228a, 230a–231a.

that issue that this Court affirms that reversal. Thus, because the Court reaches out to decide a theoretical legal question presented in an abstract setting, it permits respondent to obtain a favorable ruling from this Court on an issue of federal law that he did not assert in the trial court, and that did not form the basis for his refusing to testify in that court. And I assume respondent will be free at a new trial to renew his original argument, that the State is forbidden to use what it learned from the immunized testimony in formulating questions on cross-examination. This illustrates, I think, the problems the Court will encounter in every case in which it abandons the requirement that such an issue be presented for resolution only in the context of a concrete dispute about its actual operation at trial.

If this case presented simply the question whether state law had viewed the federal issue as properly presented, I could understand better the Court's desire to reach the federal issue. But though a State may decide whether a federal issue actually present in the case properly was brought to the attention of its own courts for adjudication, *e. g., Raley* v. *Ohio,* 360 U. S. 423 (1959), it never should transform an abstract dispute about a federal constitutional right into a case or controversy capable of being adjudicated in this Court simply by deciding that federal issue. *Doremus* v. *Board of Education,* 342 U. S. 429, 434–435 (1952). Otherwise, a State, by ruling on a purely hypothetical legal question in the context of reviewing a criminal conviction, could confer Art. III jurisdiction on this Court where the facts do not support the existence of a case or controversy.

I would require that respondent take the stand and actually assert the rights he seeks to vindicate in the context of an actual attempt by the State to use the immunized testimony. Because the Court does not require this, I dissent.

NATIONAL MUFFLER DEALERS ASSN., INC. *v.* UNITED STATES

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

No. 77–1172. Argued November 27, 1978—Decided March 20, 1979

Petitioner is a trade organization for muffler dealers but it has confined its membership to dealers franchised by Midas International Corporation and its activities to Midas' muffler business. In a suit seeking a federal income tax refund, petitioner claimed the "business league" exemption provided by § 501 (c)(6) of the Internal Revenue Code of 1954. Treas. Reg. § 1.501 (c)(6)–1 states that a business league is "an organization of the same general class as a chamber of commerce or board of trade," and that a tax exempt business league's activities "should be directed to the improvement of business conditions of one or more lines of business." The District Court held that Midas muffler franchisees do not constitute a "line of business" and that petitioner was not a "business league" within the meaning of § 501 (c)(6) and thus was not entitled to the claimed refund. The Court of Appeals affirmed, applying the maxim *noscitur a sociis* and holding that petitioner's purpose was too narrow to satisfy the "line of business" test of the Regulation. *Held:* Petitioner is not entitled to the tax exemption as a "business league" within the meaning of § 501 (c)(6). Pp. 476–489.

565 F. 2d 845, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined, *post,* p. 489.

Myron P. Gordon argued the cause for petitioner. With him on the briefs was *Monte Engler.*

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Leonard J. Henzke, Jr.,* and *Robert T. Duffy.**

**Robert J. Sisk* and *David R. Tillinghast* filed a brief for the Pepsi-Cola Bottlers Assn., Inc., as *amicus curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner, National Muffler Dealers Association, Inc. (Association), as its name indicates, is a trade organization for muffler dealers. The issue in this case is whether the Association, which has confined its membership to dealers franchised by Midas International Corporation (Midas), and its activities to the Midas muffler business, and thus is not "industrywide," is a "business league" entitled to the exemption from federal income tax provided by § 501 (c)(6) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(6).[1]

I

In 1971, during a contest for control of Midas, Midas muffler franchisees organized the Association under the New York Not-for-Profit Corporation Law. The Association's purpose was to establish a group to negotiate unitedly with Midas management. Its principal activity has been to serve as a bargaining agent for its members in dealing with Midas. It has enrolled most Midas franchisees as members.[2] The Association was successful in negotiating a new form of franchise agreement which prevents termination during its 20-year life except for cause. It also persuaded Midas to eliminate its requirement that a customer pay a service charge when a guaranteed Midas muffler is replaced. And the Association

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[1] The statute exempts:

"Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players) not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

[2] The trial court, in focusing on the Association's fiscal years ended November 30 in 1971, 1972, and 1973, found that 290 franchised Midas dealers were members of the Association. App. 18a. This was about 50% of the dealers. By the time of the trial in 1975, the Association included almost 80% of all Midas dealers. *Id.*, at 49a.

sponsors group insurance programs, holds an annual convention, and publishes a newsletter for members.

The Association sought the exemption from federal income tax which § 501 (c)(6) provides for a "business league." Treasury Regulation § 1.501 (c)(6)–1, 26 CFR § 1.501 (c)(6)–1 (1978), states that the activities of a tax exempt business league "should be directed to the improvement of business conditions of one or more lines of business." [3] In view of that requirement, the Internal Revenue Service initially rejected the Association's exemption application, stating that § 501 (c)(6) "would not apply to an organization that is not industry wide." [4]

The Association then (in October 1972) amended its bylaws and eliminated the requirement that its members be Midas franchisees. Despite that amendment, and despite the Association's announced purpose to promote the interests of individuals "engaged in business as muffler dealers," [5] it neither recruited nor acquired a member who was not a Midas franchisee.[6]

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[3] The regulation reads:

"A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. . . . A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of section 501 (c)(6) and is not exempt from tax. . . ."

[4] Letter dated March 28, 1972, from District Director (New York), Internal Revenue Service, to the Association. Complaint Exhibit C, Record Document No. 1.

[5] Certificate of Incorporation of National Muffler Dealers Association, Inc., ¶ 3. App. 41a.

[6] According to an Association survey, Midas has 21% of the replacement muffler business in 18 major metropolitan markets. See 565 F. 2d 845,

In 1974, after the Internal Revenue Service had issued a final rejection of the Association's exemption application, the Association filed income tax returns for its fiscal years 1971, 1972, and 1973, and, thereafter, claims for refund of the taxes paid with those returns. The 1972 claim was formally denied. Subsequent to that denial, and after more than six months had passed since the filing of the 1971 and 1973 claims, see § 6532 (a)(1) of the 1954 Code, 26 U. S. C. § 6532 (a)(1), the Association brought this suit in the United States District Court for the Southern District of New York asserting its entitlement to a refund for the income taxes paid for the three fiscal years. The District Court found: "There is no evidence that [the Association] confers a benefit on the muffler industry as a whole or upon muffler franchisees as a group." App. to Pet. for Cert. 11a. It then concluded that "Midas Muffler franchisees do not constitute a 'line of business,'" and held that the Association was not a "business league" within the meaning of § 501 (c)(6), and thus was not entitled to the claimed refund. App. to Pet. for Cert. 13a–14a.

The United States Court of Appeals for the Second Circuit affirmed. 565 F. 2d 845 (1977). It confronted what it called the "lexicographer's task of deciding what is meant by a 'business league.'" *Id.*, at 846. Finding no direct guidance in the statute, the court applied the maxim *noscitur a sociis* ("[i]t is known from its associates," Black's Law Dictionary 1209 (Rev. 4th ed. 1968)), and looked "at the general characteristics of the organizations" with which business leagues were grouped in the statute, that is, chambers of commerce and boards of trade. The court agreed with the Service's deter-

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847 n. 2 (CA2 1977). A letter dated November 27, 1975, sent out by the Association's president and seeking new members, contained the greeting, "Dear Fellow Midas Dealer." In that letter, the Association's president announced a joint endeavor with Midas "to improve the Midas program," and stated, "I have been as loyal to the Midas business as I have to our country." App. 49a.

mination, in § 1.501 (c)(6)–1 of the regulations, that a business league is an "organization of the same general class as a chamber of commerce or board of trade." Reasoning that it was the "manifest intention" of Congress by the statute "to provide an exemption for organizations which promote some aspect of the general economic welfare rather than support particular private interests," the court concluded that the "line of business" requirement set forth in the regulations is "well suited to assuring that an organization's efforts do indeed benefit a sufficiently broad segment of the business community." 565 F. 2d, at 846–847. The court noted that any success the Association might have in improving business conditions for Midas franchisees, and any advantage it might gain through tax exemption, would come at the expense of the rest of the muffler industry, and concluded that the Association's purpose was too narrow to satisfy the line-of-business test.

The court, *id.*, at 847 n. 1, explicitly refused to follow the decision in *Pepsi-Cola Bottlers' Assn.* v. *United States,* 369 F. 2d 250 (CA7 1966). There, the Seventh Circuit, by a divided vote, had upheld the exempt status of an association composed solely of bottlers of a single brand of soft drink. It did so on the ground that the line-of-business requirement unreasonably narrowed the statute.

We granted certiorari to resolve this conflict. 436 U. S. 903 (1978).

II

The statute's term "business league" has no well-defined meaning or common usage outside the perimeters of § 501 (c)(6). It is a term "so general . . . as to render an interpretive regulation appropriate." *Helvering* v. *Reynolds Co.,* 306 U. S. 110, 114 (1939). In such a situation, this Court customarily defers to the regulation, which, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld." *United States* v. *Cartwright,* 411 U. S.

546, 550 (1973), quoting *United States* v. *Correll,* 389 U. S. 299, 307 (1967).

We do this because "Congress has delegated to the [Secretary of the Treasury and his delegate, the] Commissioner [of Internal Revenue], not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U. S. C. § 7805 (a)." *United States* v. *Correll,* 389 U. S., at 307. That delegation helps ensure that in "this area of limitless factual variations," *ibid.,* like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," *United States* v. *Moore,* 95 U. S. 760, 763 (1878), who will be responsible for putting the rules into effect.

In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute. See *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948); *Helvering* v. *Winmill,* 305 U. S. 79, 83 (1938).

III

A

The history of Treas. Reg. § 1.501 (c)(6)–1 and its "line of business" requirement provides much that supports the Government's view that the Association, which is not tied to a particular community and is not industrywide, should not be exempt. The exemption for "business leagues" from federal

income tax had its genesis at the inception of the modern income tax system with the enactment of the Tariff Act of October 3, 1913, 38 Stat. 114, 172. In response to a House bill which would have exempted, among others, "labor, agricultural, or horticultural organizations," the Senate Finance Committee was urged to add an exemption that would cover nonprofit business groups. Both the Chamber of Commerce of the United States and the American Warehousemen's Association, a trade association for warehouse operators,[7] submitted statements to the Committee. The Chamber's spokesman said:

> "The commercial organization of the present day is not organized for selfish purposes, and performs broad patriotic and civic functions. Indeed, it is one of the most potent forces in each community for the improvement of physical and social conditions. While its original reason for being is commercial advancement, it is *not in the narrow sense of advantage to the individual, but in the broad sense of building up the trade and commerce of the community as a whole . . . .*" (Emphasis added.) Briefs and Statements on H. R. 3321 filed with the Senate Committee on Finance, 63d Cong., 1st Sess., 2002 (1913) (hereinafter Briefs and Statements).

The Chamber's written submission added:

> "These organizations receive their income from dues . . . which business men pay that they *may receive in common with all other members of their communities or of their industries* the benefits of cooperative study of local development, of civic affairs, of industrial resources, and of local, national, and international trade." (Emphasis added.) *Id.*, at 2003.[8]

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[7] See Proceedings of the Twenty-Third Annual Meeting of the American Warehousemen's Association (1913).

[8] The Chamber's statement and submission, and those of the American Warehousemen's Association, Briefs and Statements 2040, assume an

The Committee was receptive to the idea, but rejected the Chamber's proposed broad language which would have exempted all "commercial organizations not organized for profit." Instead, the Committee, and ultimately the Congress, provided that the tax would not apply to

> "business leagues, nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual." Tariff Act of Oct. 3, 1913, § IIG (a), 38 Stat. 172.

Congress has preserved this language, with few modifications, in each succeeding Revenue Act.[9]

The Commissioner of Internal Revenue had little difficulty determining which organizations were "chambers of commerce" or "boards of trade" within the meaning of the statute. Those terms had commonly understood meanings before the

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importance here beyond that usually afforded such documents in the interpretation of statutes. They do so for two reasons. First, the submissions are the only available evidence of the amendment's purpose. The amendment was not discussed on the floor of either the House or the Senate, see J. Seidman, Legislative History of Federal Income Tax Laws 1002, 1003 (1938). and the Committee Reports do no more than state its text, see S. Rep. No. 80, 63d Cong., 1st Sess., 25–26 (1913); H. R. Conf. Rep. No. 86, 63d Cong., 1st Sess., 26 (1913). Second, the subsequent administrative interpretation of the statute directly parallels the language of the private submissions.

[9] Revenue Act of 1916, § 11 (a), Seventh, 39 Stat. 766 (punctuation added); Revenue Act of 1918, § 231 (7), 40 Stat. 1076; Revenue Act of 1921, § 231 (7), 42 Stat. 253; Revenue Act of 1924, § 231 (7), 43 Stat. 282; Revenue Act of 1926, § 231 (7), 44 Stat. 40; Revenue Act of 1928, § 103 (7), 45 Stat. 813 (real estate boards added); Revenue Act of 1932, § 103 (7), 47 Stat. 193; Revenue Act of 1934, § 101 (7), 48 Stat. 700; Revenue Act of 1936, § 101 (7), 49 Stat. 1674; Revenue Act of 1938, § 101 (7), 52 Stat. 481; Internal Revenue Code of 1939, § 101 (7), 53 Stat. 33; Internal Revenue Code of 1954, § 501 (c)(6), 68A Stat. 164. See also Act of Nov. 8, 1966, Pub. L. No. 89–800, § 6 (a), 80 Stat. 1515 (reference to professional football leagues added).

statute was enacted.[10] "Business league," however, had no common usage, and in 1919 the Commissioner undertook to define its meaning by regulation. The initial definition was the following:

> "A business league is an association of persons having some common business interest, which limits its activities to work for such common interest and does not engage in a regular business of a kind ordinarily carried on for profit. Its work need not be similar to that of a chamber of commerce or board of trade." Treas. Regs. 45, Art. 518 (1919).

This language, however, proved too expansive to identify with precision the class of organizations Congress intended to ex-

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[10] Webster's New International Dictionary 245, 366 (1913), defined the terms as follows:

board of trade: "In the United States, a body of men appointed for the advancement and protection of business interests. Cf. chamber of commerce."

chamber of commerce: "[A] board or association to protect the interests of commerce, chosen from among the merchants and traders of a city. The term *chamber of commerce* is by some distinctively used of the bodies that are intrusted with the protection of general commercial interests, esp. in connection with foreign trade and *board of trade* for those dealing primarily with local commerce."

In *Retailers Credit Assn.* v. *Commissioner*, 90 F. 2d 47, 51 (CA9 1937), an additional explanation of the difference between the two terms was offered:

"Although the terms 'chamber of commerce' and 'board of trade' are nearly synonymous, there is a slight distinction between their meanings. The former relates to all businesses in a particular geographic location, while the latter may relate to only one or more lines of business in a particular geographic location, but need not relate to all."

In L. O. 1121, III–1 Cum. Bull. 275, 280 (1924), the Solicitor of Internal Revenue rejected an approach to the term "board of trade" that would have encompassed "organizations which provide conveniences or facilities to certain persons in connection with buying, selling, and exchanging goods."

empt. The Service began to cut back on the last sentence of the material just quoted when, in 1924, the Solicitor of Internal Revenue invoked *noscitur a sociis* to deny an exemption requested by a stock exchange. He reasoned that, while a stock exchange conceivably could come within the definitions of a "business league" or "board of trade," it lacked the characteristics that a "business league," "chamber of commerce," and "board of trade" share in common and that form the basis for the exemption. Congress must have used those terms, he said, "to indicate organizations of the same general class, having for their primary purpose the promotion of business welfare." The primary purpose of the stock exchange, by contrast, was "to afford facilities to a limited class of people for the transaction of their private business." L. O. 1121, III–1 Cum. Bull. 275, 280–281 (1924). The regulation was then amended so as specifically to exclude stock exchanges. T. D. 3746, IV–2 Cum. Bull. 77 (1925).[11]

In 1927, the Board of Tax Appeals, in a reviewed decision with some dissents, applied the principle of *noscitur a sociis* and denied a claimed "business league" exemption to a corporation organized by associations of insurance companies to provide printing services for member companies. *Uniform Printing & Supply Co.* v. *Commissioner*, 9 B. T. A. 251, aff'd, 33 F. 2d 445 (CA7), cert. denied, 280 U. S. 591 (1929). In 1928, Congress revised the statute so as specifically to exempt real estate boards that local revenue agents had tried to

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[11] See Treas. Regs. 69, Art. 518 (1926). Because the regulation now incorporates the denial of exempt status to stock exchanges, L. O. 1121 eventually was declared obsolete. Rev. Rul. 68–207, 1968–1 Cum. Bull. 577, 578.

In *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 393–394, and n. 12 (1956), the Court approved a similar use of *noscitur a sociis* by the Solicitor in defining the term "certificate of indebtedness." See L. O. 909, Sales Tax Rulings, No. 85 (1920).

tax.[12] The exclusion of stock exchanges, however, was allowed to remain.

In 1929, the Commissioner incorporated the principle of *noscitur a sociis* into the regulation itself. The sentence, "Its work need not be similar to that of a chamber of commerce or board of trade," was dropped and was replaced with the following qualification:

> "It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions or to the promotion of the general objects of one or more lines of business as distinguished from the performance of particular services for individual persons." Treas. Regs. 74, Art. 528 (1929).

This language has stood almost without change for half a century [13] through several re-enactments and one amendment of the statute.

During that period, the Commissioner and the courts have been called upon to define "line of business" as that phrase is employed in the regulation. True to the representation made by the Chamber of Commerce, in its statement to the Senate in 1913, that benefits would be received "in common with all other members of their communities or of their industries," *supra,* at 478, the term "line of business" has been interpreted

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[12] Revenue Act of 1928, § 103 (7), 45 Stat. 813. See Hearings on Revenue Revision 1927–1928, before the House Committee on Ways and Means, Interim 69th–70th Cong. 235–239, 268 (1927); H. R. Rep. No. 2, 70th Cong., 1st Sess., 17 (1927).

[13] See Treas. Regs. 77, Art. 528 (under 1932 Act); Treas. Regs. 86, Art. 101 (7)–1 (under 1934 Act) ("or to the promotion of the general objects" dropped); Treas. Regs. 94, Art. 101 (7)–1 (under 1936 Act); Treas. Regs. 101, Art. 101 (7)–1 (under 1938 Act); Treas. Regs. 103, § 19.101 (7)–1 (under 1939 Code); Treas. Regs. 111, § 29.101 (7)–1 (same); Treas. Regs. 118, § 39.101 (7)–1 (same); T. D. 6301, 1958–2 Cum. Bull. 197, 203–204, and Treas. Reg. § 1.501 (c)(6)–1 (under 1954 Code).

to mean either an entire industry, see, *e. g., American Plywood Assn.* v. *United States,* 267 F. Supp. 830 (WD Wash. 1967); *National Leather & Shoe Finders Assn.* v. *Commissioner,* 9 T. C. 121 (1947), or all components of an industry within a geographic area, see, *e. g., Commissioner* v. *Chicago Graphic Arts Federation, Inc.,* 128 F. 2d 424 (CA7 1942); *Crooks* v. *Kansas City Hay Dealers' Assn.,* 37 F. 2d 83 (CA8 1929); *Washington State Apples, Inc.* v. *Commissioner,* 46 B. T. A. 64 (1942).[14]

Most trade associations fall within one of these two categories.[15] The Commissioner consistently has denied exemption to business groups whose membership and purposes are narrower. Those who have failed to meet the "line of business" test, in the view of the Commissioner, include groups composed of businesses that market a single brand of automobile,[16] or have licenses to a single patented product,[17] or bottle one type of soft drink.[18] The Commissioner has reasoned that these groups are not designed to better conditions in an entire industrial "line," but, instead, are devoted to the promotion

[14] Cf. *Produce Exchange Stock Clearing Assn.* v. *Helvering,* 71 F. 2d 142, 144 (CA2 1934) (organization not entitled to exemption because "[n]othing is done to advance the interests of the community or to improve the standards or conditions of a particular trade, as in the case of chambers of commerce, real estate boards, and boards of trade"); Note, 35 Ford. L. Rev. 738, 741 (1967).

[15] The Department of Commerce has defined a trade association as "a nonprofit, cooperative, voluntarily-joined, organization of business competitors designed to assist its members *and its industry* in dealing with mutual business problems." J. Judkins, National Associations of the United States viii (1949) (emphasis added).

[16] Rev. Rul. 67–77, 1967–1 Cum. Bull. 138, superseding I. T. 4053, 1951–2 Cum. Bull. 53 (to the same effect under prior law). Cf. Rev. Rul. 55–444, 1955–2 Cum. Bull. 258 (industrywide advertising program exempt).

[17] Rev. Rul. 58–294, 1958–1 Cum. Bull. 244.

[18] Rev. Rul. 68–182, 1968–1 Cum. Bull. 263 (announcing nonacquiescence in *Pepsi-Cola Bottlers' Assn.* v. *United States,* 369 F. 2d 250 (CA7 1966)).

of a particular product at the expense of others in the industry.[19]

In short, while the Commissioner's reading of § 501 (c)(6) perhaps is not the only possible one, it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated. It evolved as the Commissioner administered the statute and attempted to give to a new phrase a content that would reflect congressional design. The regulation has stood for 50 years, and the Commissioner infrequently but consistently has interpreted it to exclude an organization like the Association that is not industrywide. The Commissioner's view therefore merits serious deference.

B

The Association contends, however, that the regulation is unreasonable because it unduly narrows the statute. This argument has three aspects: First, the Association argues that this Court need not defer to the regulation because, instead of being a contemporaneous construction of the statute, it is actually contrary to the regulation first in force from 1919 to 1929. Second, it argues that the addition in 1966 of pro-

[19] See Rev. Rul. 76–400, 1976–2 Cum. Bull. 153, 154. Cf. Rev. Rul. 61–177, 1961–2 Cum. Bull. 117 (organization to improve members' competitive standing in various lines of business through lobbying exempt).

The Association contends that the "line of business" language in the regulation does not represent a separate requirement for exemption but, instead, is merely illustrative of the type of organization normally granted an exemption. Both the Commissioner and the courts, however, have repeatedly characterized the line-of-business test as one that must be met before a business-league exemption will be allowed. See Rev. Rul. 67–77, 1967–1 Cum. Bull. 138; *United States* v. *Oklahoma City Retailers Assn.*, 331 F. 2d 328, 331 (CA10 1964); *Associated Industries of Cleveland* v. *Commissioner*, 7 T. C. 1449, 1466 (1946). While the plausibility and consistency of the Commissioner's interpretation are relevant to the reasonableness of the regulation as applied here, the Commissioner is otherwise free to determine how the regulation he has written should be construed.

fessional football leagues to the statutory list of exempt organizations makes a new view of *noscitur a sociis* appropriate. Third, it contends that, if the maxim applies here, the Court should reach out beyond § 501 (c)(6) and take into account the fact that the Association's bargaining function is much like that of a labor organization which would be exempt under § 501 (c)(5). We consider these arguments in turn.

1. As noted above, the Commissioner's first definition of "business league" provided that its work "*need not* be similar to that of a chamber of commerce or board of trade." Treas. Regs. 45, Art. 518 (1919) (emphasis added). The Association contends that, because this language differs from the language that replaced it in 1929, the latter is not a "contemporaneous construction" to which this Court should defer, *Bingler* v. *Johnson,* 394 U. S. 741, 749–750 (1969), but is instead an arbitrary narrowing of the statute. It is said that the earlier language rejects the rule of *noscitur a sociis,* and that it is the earlier language that should be treated by the Court as truly authoritative.

Contemporaneity, however, is only one of many considerations that counsel courts to defer to the administrative interpretation of a statute. It need not control here. Nothing in the regulations or case law, see *Produce Exchange Stock Clearing Assn.* v. *Helvering,* 71 F. 2d 142 (CA2 1934), directly explains the regulatory shift. We do know, however, that the change in 1929 incorporated an interpretation thought necessary to match the statute's construction to the original congressional intent.[20] We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience. In *Helvering* v. *Wilshire Oil*

[20] The Court has said: "The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.,* 367 U. S. 303, 307 (1961).

Co., 308 U. S. 90, 101 (1939), the Court acknowledged the need for flexibility and applied a 1929 regulation to a taxpayer even though the taxpayer had acted in reliance on an opposite interpretation incorporated in an earlier regulation. Here, where there is no claim that the Association ever relied on the Commissioner's prior view, the case for accepting the later regulation as authoritative is even stronger.

2. In 1966, Congress amended § 501 (c)(6) by adding to the list of exempt organizations "professional football leagues (whether or not administering a pension fund for football players)." Act of Nov. 8, 1966, Pub. L. 89–800, § 6 (a), 80 Stat. 1515. The Association contends that a professional football league is not of the same general character as a chamber of commerce or board of trade, and that a new view of *noscitur a sociis* is appropriate, one that would include the Association within the exemption. This, of course, is the complement to the first argument.

Nothing in the legislative history of the amendment, however, indicates that Congress objected to or endeavored to change the Commissioner's position as to the class of organizations included in § 501 (c)(6).[21] The purpose of the amendment was to forestall any claim that a football league's pension plan would be considered inurement of benefits to a private individual. Congressman Mills stated flatly that "no inference is intended by this change as to the application of section 501 (c)(6) to other types of organizations." 112 Cong. Rec. 28228 (1966).

Nor does the Association share characteristics in common with a professional football league that would necessarily

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[21] See H. R. Conf. Rep. No. 2308, 89th Cong., 2nd Sess., 9–10 (1966); Summary of the Act Temporarily Suspending the Investment Credit and Limiting the Use of Accelerated Depreciation, Joint Committee on Internal Revenue Taxation, 22 (1966); 112 Cong. Rec. 26882–26887, 28226, 28228 (1966).

entitle it to exemption even if a new view of *noscitur a sociis* were applied. The teams in a football league depend on mutual cooperation to promote a common business purpose. They need a league to provide uniform rules of play. A franchisee, however, does not need another franchisee in order to bargain with its franchisor, even though joint bargaining may make them more powerful. Also, it is not without significance that the 1966 amendment was part of a large statutory package which paved the way for a merger which created an "industrywide" professional football league. It can hardly be read to evince a congressional intent that other associations that are not industrywide should be afforded tax-exempt status.

3. The Association says that, if *noscitur a sociis* is to apply, then sound policy considerations support the reasonableness of searching for *socii* beyond the confines of § 501 (c)(6). The Association draws a comparison to other exempt organizations, particularly labor unions that are exempt under § 501 (c)(5). The Association says that, like a labor union, it exists to redress unequal bargaining power in the marketplace. Some States have special legislation protecting franchisee associations.[22] Employer bargaining associations that deal with unions in a particular industry are exempt "business leagues." Rev. Rul. 65–14, 1965–1 Cum. Bull. 236, 238. It is argued that the Association meets all the regulation's requirements except the line-of-business test.[23] Applying the

[22] See, *e. g.*, Franchise Practices Act, N. J. Stat. Ann. § 56:10–7 (West Supp. 1978–1979); Franchise Investment Protection Act, Wash. Rev. Code § 19.100.180 (1976).

[23] The Association is nonprofit, and the Government does not contend here that it engages in a regular business of a kind ordinarily carried on for profit, or that its income inures to individual members, or that it performs particular services for individual members in the fee-for-service sense. It does, however, provide services that benefit Midas franchisees exclusively.

thin logic of that requirement to tax a nonprofit organization like the Association, it is said, unreasonably will discourage joint action to improve shared business conditions and will yield only scant revenue to the Treasury. The Association concludes that it would be appropriate now to expand the "business league" exemption to embrace the modern phenomenon of franchisee associations that was unknown in 1913.

These arguments are not unlike those that persuaded the Senate to add the business-league exemption to the 1913 bill. See Briefs and Statements 2002–2003. Perhaps Congress would find them forceful today. The Association, however, needs more than a plausible policy argument to prevail here. Just last Term, in *Fulman* v. *United States*, 434 U. S. 528, 536 (1978), the Court upheld a regulation which had a "reasonable basis" in the statutory history, even though the taxpayer's challenge to its policy had "logical force." *Id.*, at 534, 536, and 540 (dissenting opinion). The choice among reasonable interpretations is for the Commissioner, not the courts. Certainly, *noscitur a sociis* does not compel the Commissioner to draw comparisons that go beyond the text of the Senate's amendment to the 1913 bill, particularly when the Senate Finance Committee, in drafting the amendment, rejected a broad proposal modeled on the same labor exemption the Association now wishes to incorporate.

In sum, the "line of business" limitation is well grounded in the origin of § 501 (c)(6) and in its enforcement over a long period of time. The distinction drawn here, that a tax exemption is not available to aid one group in competition with another within an industry, is but a particular manifestation of an established principle of tax administration. Because the Association has not shown that either the regulation or the Commissioner's interpretation of it fails to "implement the congressional mandate in some reasonable manner,"

United States v. *Correll,* 389 U. S., at 307, the Association's claim for a § 501 (c)(6) exemption must be denied.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST and MR. JUSTICE STEVENS join, dissenting.

I would reverse the judgment for substantially the reasons expressed by the Court of Appeals for the Seventh Circuit in *Pepsi-Cola Bottlers' Assn.* v. *United States,* 369 F. 2d 250 (1966). Additionally, I note that the initial administrative interpretation of the statute in the Treasury Regulations was exactly the opposite of the one now urged. *Ante,* at 480. That is strong evidence of the understanding of the meaning of the law at the time it was enacted.

NATIONAL LABOR RELATIONS BOARD *v.* CATHOLIC BISHOP OF CHICAGO ET AL.

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

No. 77–752. Argued October 30, 1978—Decided March 21, 1979

The National Labor Relations Board (NLRB) certified unions as bargaining agents for lay teachers in schools operated by respondents, which refused to recognize or bargain with the unions; the NLRB issued cease-and-desist orders against respondents, holding that it had properly assumed jurisdiction over the schools. Exercise of jurisdiction was asserted to be in line with its policy of declining jurisdiction only when schools are "completely religious" not just "religiously associated," as it found to be the case here, because the schools taught secular as well as religious subjects. On respondents' challenges to the NLRB orders, the Court of Appeals denied enforcement, holding that the NLRB standard failed to provide a workable guide for the exercise of its discretion and that the NLRB's assumption of jurisdiction was foreclosed by the Religion Clauses of the First Amendment. *Held:* Schools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the National Labor Relations Act, and the NLRB was therefore without authority to issue the orders against respondents. Pp. 499–507.

(a) There would be a significant risk of infringement of the Religion Clauses of the First Amendment if the Act conferred jurisdiction over church-operated schools. Cf. *Lemon* v. *Kurtzman,* 403 U. S. 602, 617. Pp. 501–504.

(b) Neither the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive First Amendment questions. Pp. 504–507.

559 F. 2d 1112, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a

dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 508.

Solicitor General McCree argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller, John S. Irving, Carl L. Taylor, Norton J. Come,* and *Carol A. De Deo.*

Don H. Reuben argued the cause for respondents. With him on the brief were *Lawrence Gunnels, James A. Serritella, James A. Klenk,* and *Jerome J. O'Dowd.**

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

This case arises out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. We granted certiorari to consider two questions: (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment? 434 U. S. 1061 (1978).

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Leo Pfeffer* and *Earl W. Trent, Jr.*, for the Baptist Joint Committee on Public Affairs; by *Thomas Stephen Neuberger* for the Center for Law and Religious Freedom of the Christian Legal Society; by *Warren L. Johns, Walter E. Carson, Lee Boothby,* and *Robert J. Hickey* for the General Conference of Seventh-Day Adventists; and by *David Goldberger* and *Barbara P. O'Toole* for the Roger Baldwin Foundation of the American Civil Liberties Union, Inc., Illinois Division.

Briefs of *amici curiae* were filed by *Lawrence A. Poltrock* and *Bruce E. Endy* for the American Federation of Teachers (AFL–CIO); by *Sharp Whitmore* for certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange; and by *George E. Reed* and *Patrick F. Geary* for the United States Catholic Conference.

I

One group of schools is operated by the Catholic Bishop of Chicago, a corporation sole; the other group is operated by the Diocese of Fort Wayne-South Bend, Inc. The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South.[1] Those schools are termed "minor seminaries" because of their role in educating high school students who may become priests. At one time, only students who manifested a positive and confirmed desire to be priests were admitted to the Quigley schools. In 1970, the requirement was changed so that students admitted to these schools need not show a definite inclination toward the priesthood. Now the students need only be recommended by their parish priest as having a potential for the priesthood or for Christian leadership. The schools continue to provide special religious instruction not offered in other Catholic secondary schools. The Quigley schools also offer essentially the same college-preparatory curriculum as public secondary schools. Their students participate in a variety of extracurricular activities which include secular as well as religious events. The schools are recognized by the State and accredited by a regional educational organization.[2]

The Diocese of Fort Wayne-South Bend, Inc., has five high schools.[3] Unlike the Quigley schools, the special recom-

[1] The Catholic Bishop operates other schools in the Chicago area, but they were not involved in the proceedings before the Board.

[2] As explained to the Board's Hearing Officer, in Illinois the term "approval" is distinct from "recognition." Before a school may operate, it must be approved by the State's Department of Education. Approval is given when a school meets the minimal requirements under state law, such as for compulsory attendance; approval does not require any evaluation of the school's program. Recognition, which is not required to operate, is given only after the school has passed the State's evaluation.

[3] The Diocese also has 47 elementary schools. They were not involved in the proceedings before the Board.

mendation of a priest is not a prerequisite for admission. Like the Quigley schools, however, these high schools seek to provide a traditional secular education but oriented to the tenets of the Roman Catholic faith; religious training is also mandatory. These schools are similarly certified by the State.[4]

In 1974 and 1975, separate representation petitions were filed with the Board by interested union organizations for both the Quigley and the Fort Wayne-South Bend schools; representation was sought only for lay teachers.[5] The schools challenged the assertion of jurisdiction on two grounds: (a) that they do not fall within the Board's discretionary jurisdictional criteria; and (b) that the Religion Clauses of the First Amendment preclude the Board's jurisdiction. The Board rejected the jurisdictional arguments on the basis of its decision in *Roman Catholic Archdiocese of Baltimore,* 216 N. L. R. B. 249 (1975). There the Board explained that its policy was to decline jurisdiction over religiously sponsored organizations "only when they are completely religious, not just religiously associated." *Id.,* at 250. Because neither group of schools was found to fall within the Board's "completely religious" category, the Board ordered elections. *Catholic Bishop of Chicago,* 220 N. L. R. B. 359 (1975).[6]

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[4] As explained to the Board's Hearing Officer, "certification" by the State of Indiana is roughly equivalent to "recognition" by the State of Illinois. Both are voluntary procedures which involve some evaluation by the state educational authorities.

[5] The certification and order cover only "all full-time and regular part-time lay teachers, including physical education teachers . . . ; and excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act . . . ." *Catholic Bishop of Chicago,* 220 N. L. R. B. 359, 360 (1975).

[6] The decision concerning the Diocese of Fort Wayne-South Bend, Inc., is not reported.

In the Board-supervised election at the Quigley schools, the Quigley Education Alliance, a union affiliated with the Illinois Education Association, prevailed and was certified as the exclusive bargaining representative for 46 lay teachers. In the Diocese of Fort Wayne-South Bend, the Community Alliance for Teachers of Catholic High Schools, a similar union organization, prevailed and was certified as the representative for the approximately 180 lay teachers. Notwithstanding the Board's order, the schools declined to recognize the unions or to bargain. The unions filed unfair labor practice complaints with the Board under §§ 8 (a)(1) and (5) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a) (1) and (5). The schools opposed the General Counsel's motion for summary judgment, again challenging the Board's exercise of jurisdiction over religious schools on both statutory and constitutional grounds.

The Board reviewed the record of previous proceedings and concluded that all of the arguments had been raised or could have been raised in those earlier proceedings. Since the arguments had been rejected previously, the Board granted summary judgment, holding that it had properly exercised its statutory discretion in asserting jurisdiction over these schools.[7] The Board concluded that the schools had violated the Act and ordered that they cease their unfair labor practices and that they bargain collectively with the unions. *Catholic*

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[7] The Board relied on its reasoning in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles,* 223 N. L. R. B. 1218 (1976): "We also do not agree that the schools are religious institutions intimately involved with the Catholic Church. It has heretofore been the Board's policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools,* 216 NLRB 249 (1975). The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis." 223 N. L. R. B., at 1218.

Bishop of Chicago, 224 N. L. R. B. 1221 (1976); *Diocese of Fort Wayne-South Bend, Inc.,* 224 N. L. R. B. 1226 (1976).

II

The schools challenged the Board's orders in petitions to the Court of Appeals for the Seventh Circuit. That court denied enforcement of the Board's orders. 559 F. 2d 1112 (1977).[8] The court considered the Board's actions in relation to its discretion in choosing to extend its jurisdiction only to religiously affiliated schools that were not "completely religious." It concluded that the Board had not properly exercised its discretion, because the Board's distinction between "completely religious" and "merely religiously associated" failed to provide a workable guide for the exercise of discretion:

> "We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous 'completely religious—merely religiously associated' standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e. g.,* [*Wisconsin* v.] *Yoder,* . . . 406 U. S. 205 [(1972)]." *Id.,* at 1118.

The Court of Appeals recognized that the rejection of the Board's policy as to church-operated schools meant that the Board would extend its jurisdiction to all church-operated

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[8] Cf. *Caulfield* v. *Hirsch,* 95 LRRM 3164 (ED Pa. 1977) (enjoining Board from asserting jurisdiction over elementary schools in Archdiocese of Philadelphia). This case is presently under review by the Court of Appeals for the Third Circuit. See App. to Pet. for Cert. in *Caulfield* v. *Hirsch,* O. T. 1977, No. 77–1411, p. A76, cert. denied, 436 U. S. 957 (1978).

schools. The court therefore turned to the question of whether the Board could exercise that jurisdiction, consistent with constitutional limitations. It concluded that both the Free Exercise Clause and the Establishment Clause of the First Amendment foreclosed the Board's jurisdiction. It reasoned that from the initial act of certifying a union as the bargaining agent for lay teachers the Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion. It analyzed the Board's action in this way:

> "At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an 'integral part of the religious mission of the Catholic Church,' *Lemon* [v. *Kurtzman,* 403 U. S. 602], 616 [(1971)], courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature." *Ibid.*

The court distinguished local regulations which required fire inspections or state laws mandating attendance, reasoning that they did not "have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned." *Id.*, at 1124. The court held that interference with management prerogatives, found acceptable in an ordinary commercial setting, was not acceptable in an area protected by the First Amendment. "The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools." *Ibid.*

III

The Board's assertion of jurisdiction over private schools is, as we noted earlier, a relatively recent development. Indeed, in 1951 the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions because to do so would not effectuate the purposes of the Act. *Trustees of Columbia University in the City of New York,* 97 N. L. R. B. 424. In 1970, however, the Board pointed to what it saw as an increased involvement in commerce by educational institutions and concluded that this required a different position on jurisdiction. In *Cornell University,* 183 N. L. R. B. 329, the Board overruled its *Columbia University* decision. *Cornell University* was followed by the assertion of jurisdiction over nonprofit, private secondary schools. *Shattuck School,* 189 N. L. R. B. 886 (1971). See also *Judson School,* 209 N. L. R. B. 677 (1974). The Board now asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious. 29 CFR § 103.1 (1978). See, *e. g., Academia San Jorge,* 234 N. L. R. B. 1181 (1978) (advisory opinion stating that Board would not assert jurisdiction over Catholic educational institution which did not meet jurisdictional standards); *Windsor School, Inc.,* 199 N. L. R. B. 457, 200 N. L. R. B. 991 (1972) (declining jurisdiction where private, proprietary school did not meet jurisdictional amounts).

That broad assertion of jurisdiction has not gone unchallenged. But the Board has rejected the contention that the Religion Clauses of the First Amendment bar the extension of its jurisdiction to church-operated schools. Where the Board has declined to exercise jurisdiction, it has done so only on the grounds of the employer's minimal impact on commerce. Thus, in *Association of Hebrew Teachers of Metropolitan Detroit,* 210 N. L. R. B. 1053 (1974), the Board did not assert jurisdiction over the Association which offered

courses in Jewish culture in after-school classes, a nursery school, and a college. The Board termed the Association an "isolated instance of [an] atypical employer." *Id.*, at 1058–1059. It explained: "Whether an employer falls within a given 'class' of enterprise depends upon those of its activities which are predominant and give the employing enterprise its character. . . . [T]he fact that an employer's activity . . . is dedicated to a sectarian religious purpose is not a sufficient reason for the Board to refrain from asserting jurisdiction." *Id.*, at 1058. Cf. *Board of Jewish Education of Greater Washington, D. C.*, 210 N. L. R. B. 1037 (1974). In the same year the Board asserted jurisdiction over an Association chartered by the State of New York to operate diocesan high schools. *Henry M. Hald High School Assn.*, 213 N. L. R. B. 415 (1974). It rejected the argument that its assertion of jurisdiction would produce excessive governmental entanglement with religion. In the Board's view, the Association had chosen to entangle itself with the secular world when it decided to hire lay teachers. *Id.*, at 418 n. 7.[9]

When it ordered an election for the lay professional employees at five parochial high schools in Baltimore in 1975, the Board reiterated its belief that exercise of its jurisdiction is not contrary to the First Amendment:

> "[T]he Board's policy in the past has been to decline jurisdiction over similar institutions only when they are completely religious, not just religiously associated, and the Archdiocese concedes that instruction is not limited to religious subjects. That the Archdiocese seeks to provide an education based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with

[9] The Board went on to explain that the rights guaranteed by § 7 of the Act, 29 U. S. C. § 157, were "a part of our national heritage established by Congress, [and] were a legitimate exercise of Congress' constitutional power." 213 N. L. R. B., at 418 n. 7.

their religious tenets." *Roman Catholic Archdiocese of Baltimore,* 216 N. L. R. B., at 250.

The Board also rejected the First Amendment claims in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles,* 223 N. L. R. B. 1218, 1218 (1976): "Regulation of labor relations does not violate the First Amendment when it involves a *minimal intrusion* on religious conduct and is necessary to obtain [the Act's] objective." (Emphasis added.)

The Board thus recognizes that its assertion of jurisdiction over teachers in religious schools constitutes some degree of intrusion into the administration of the affairs of church-operated schools. Implicit in the Board's distinction between schools that are "completely religious" and those "religiously associated" is also an acknowledgment of some degree of entanglement. Because that distinction was measured by a school's involvement with commerce, however, and not by its religious association, it is clear that the Board never envisioned any sort of religious litmus test for determining when to assert jurisdiction. Nevertheless, by expressing its traditional jurisdictional standards in First Amendment terms, the Board has plainly recognized that intrusion into this area could run afoul of the Religion Clauses and hence preclude jurisdiction on constitutional grounds.

IV

That there are constitutional limitations on the Board's actions has been repeatedly recognized by this Court even while acknowledging the broad scope of the grant of jurisdiction. The First Amendment, of course, is a limitation on the power of Congress. Thus, if we were to conclude that the Act granted the challenged jurisdiction over these teachers we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment.

Although the respondents press their claims under the Religion Clauses, the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray* v. *The Charming Betsy,* 2 Cranch 64, 118 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation of the Act now before us and related statutes.

In *Machinists* v. *Street,* 367 U. S. 740 (1961), for example, the Court considered claims that serious First Amendment questions would arise if the Railway Labor Act were construed to allow compulsory union dues to be used to support political candidates or causes not approved by some members. The Court looked to the language of the Act and the legislative history and concluded that they did not permit union dues to be used for such political purposes, thus avoiding "serious doubt of [the Act's] constitutionality." *Id.,* at 749.

Similarly in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963), a case involving the Board's assertion of jurisdiction over foreign seamen, the Court declined to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations. The international implications of the case led the Court to describe it as involving "public questions particularly high in the scale of our national interest." *Id.,* at 17. Because of those questions the Court held that before sanctioning the Board's exercise of jurisdiction " 'there must be present the affirmative intention of the Congress clearly expressed.' " *Id.,* at 21–22 (quoting *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138, 147 (1957)).

The values enshrined in the First Amendment plainly rank high "in the scale of our national values." In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

V

In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon* v. *Kurtzman,* 403 U. S. 602, 617 (1971), is true of the schools in this case: "Religious authority necessarily pervades the school system." The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools. For example, in *Lemon, supra,* at 617, we wrote:

> "In terms of potential for involving some aspect of faith or morals *in secular subjects,* a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation." (Emphasis added.)

Only recently we again noted the importance of the teacher's function in a church school: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek* v. *Pittenger,* 421 U. S. 349, 370 (1975). Cf.

Wolman v. *Walter,* 433 U. S. 229, 244 (1977). Good intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek,* and *Wolman.*

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.

Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F. 2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[10]

The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are "terms and conditions of

[10] This kind of inquiry and its sensitivity are illustrated in the examination of Monsignor O'Donnell, the Rector of Quigley North, by the Board's Hearing Officer, which is reproduced in the appendix to this opinion.

employment" and therefore mandatory subjects of bargaining. See 29 U. S. C. § 158 (d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment.'" *Springfield Education Assn.* v. *Springfield School Dist. No. 19,* 24 Ore. App. 751, 759, 547 P. 2d 647, 650 (1976).

The Pennsylvania Supreme Court aptly summarized the effect of mandatory bargaining when it observed that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." *Pennsylvania Labor Relations Board* v. *State College Area School Dist.,* 461 Pa. 494, 504, 337 A. 2d 262, 267 (1975). Cf. *Clark County School Dist.* v. *Local Government Employee-Management Relations Board,* 90 Nev. 442, 447, 530 P. 2d 114, 117–118 (1974). See M. Lieberman & M. Moskow, Collective Negotiations for Teachers 221–247 (1966). Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions. What we said in *Lemon, supra,* at 616, applies as well here:

> "[P]arochial schools involve substantial religious activity and purpose.
>
> "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." (Footnote omitted.)

Mr. Justice Douglas emphasized this in his concurring opinion in *Lemon,* noting "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith." 403 U. S., at 628.

The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would in turn require a decision on the constitutional claims raised by respondents.

VI

There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.

In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery. See, *e. g.*, 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner), 2 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, pp. 2341–2343 (1949).

Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of

employer-employee relations *not* covered by the Act. S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935), 2 Legislative History, *supra,* at 2307.

Congress' next major consideration of the jurisdiction of the Board came during the passage of the Labor Management Relations Act of 1947—the Taft-Hartley Act. In that Act Congress amended the definition of "employer" in § 2 of the original Act to exclude nonprofit hospitals. 61 Stat. 137, 29 U. S. C. § 152 (2) (1970 ed.). There was some discussion of the scope of the Board's jurisdiction but the consensus was that nonprofit institutions in general did not fall within the Board's jurisdiction because they did not affect commerce. See H. R. 3020, 80th Cong., 1st Sess. (1947), 1 National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947, p. 34 (1948) (hereinafter Leg. Hist.); H. R. Rep. No. 245, 80th Cong., 1st Sess., 12 (1947), 1 Leg. Hist. 303; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 3, 32 (1947), 1 Leg. Hist. 507, 536; 93 Cong. Rec. 4997 (1947), 2 Leg. Hist. 1464 (remarks of Sens. Tydings and Taft).[11]

The most recent significant amendment to the Act was passed in 1974, removing the exemption of nonprofit hospitals. Pub. L. 93–360, 88 Stat. 395. The Board relies upon that amendment as showing that Congress approved the Board's exercise of jurisdiction over church-operated schools. A close examination of that legislative history, however, reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction. Since the Board did not assert jurisdiction over teachers in a church-operated

[11] The National Labor Relations Act was amended again when Congress passed the Labor-Management Reporting and Disclosure Act in 1959. 73 Stat. 519. That Act made no changes in the definition of "employer" and the legislative history contains no reference to church-operated schools. See generally National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959).

school until after the 1974 amendment, nothing in the history of the amendment can be read as reflecting Congress' tacit approval of the Board's action.

During the debate there were expressions of concern about the effect of the bill on employees of religious hospitals whose religious beliefs would not permit them to join a union. 120 Cong. Rec. 12946, 16914 (1974), Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, 93d Cong., 2d Sess., 118, 331–332 (1974) (remarks of Sen. Ervin and Rep. Erlenborn). The result of those concerns was an amendment which reflects congressional sensitivity to First Amendment guarantees:

> "Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501 (c)(3) of title 26, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee." 29 U. S. C. § 169.

The absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.

The Board relies heavily upon *Associated Press* v. *NLRB*,

301 U. S. 103 (1937). There the Court held that the First Amendment was no bar to the application of the Act to the Associated Press, an organization engaged in collecting information and news throughout the world and distributing it to its members. Perceiving nothing to suggest that application of the Act would infringe First Amendment guarantees of press freedoms, the Court sustained Board jurisdiction. *Id.*, at 131–132. Here, on the contrary, the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses.

Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Affirmed.

APPENDIX TO OPINION OF THE COURT

Q. [by Hearing Officer] Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A. I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q. I believe you defined it before, is that correct, when you first testified?

A. I am not sure. Let me try briefly to do it again, okay?

Q. Yes.

A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman

Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q. I see.

A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

Q. Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?

A. Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so the students attend there, rather than their parish churches. Some schools feel that is not a good idea; they should always be in their parish church; so that varies a great deal from school to school.

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

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

I

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary

one. The governing canon, however, is *not* that expressed by the Court today. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. *Ante,* at 504. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments. This flouts Mr. Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation." *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 518 (1926). See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515 (1964); *Jay* v. *Boyd,* 351 U. S. 345, 357 n. 21 (1956); *Shapiro* v. *United States,* 335 U. S. 1, 31, and n. 40 (1948); *United States* v. *Sullivan,* 332 U. S. 689, 693 (1948); *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315, 335 (1935).[1]

[1] The Court's new canon derives from the statement, " 'there must be present the affirmative intention of the Congress clearly expressed,' " in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 21–22 (1963). Reliance upon that case here is clearly misplaced. The question in *McCulloch* was whether the National Labor Relations Act extended to foreign seamen working aboard foreign-flag vessels. No question as to the constitutional power of Congress to cover foreign crews was presented. Indeed, all parties agreed that Congress was constitutionally empowered to reach the foreign seamen involved while they were in American waters. *Id.,* at 17. The only question was whether Congress had intended to do so.

The *McCulloch* Court held that Congress had not meant to reach disputes between foreign shipowners and their foreign crews. *McCulloch,* however, did not turn simply upon an absence of affirmative evidence that Congress wanted to reach alien seamen, but rather upon the fact, as a prior case had already held, that the legislative history " 'inescapably describe[d] the boundaries of the Act as including only the workingmen of

The settled canon for construing statutes wherein constitutional questions may lurk was stated in *Machinists* v. *Street,* 367 U. S. 740 (1961), cited by the Court, *ante,* at 500:

> " 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.' *Crowell* v. *Benson,* 285 U. S. 22, 62." *Id.,* at 749–750 (emphasis added).[2]

Accord, *Pernell* v. *Southall Realty,* 416 U. S. 363, 365 (1974); *Johnson* v. *Robison,* 415 U. S. 361, 367 (1974); *Curtis* v. *Loether,* 415 U. S. 189, 192 n. 6 (1974); *Ashwander* v. *TVA,* 297 U. S. 288, 348 (1936) (Brandeis, J., concurring); *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933). This limitation to constructions that are "fairly possible," and "reasonable," see *Yu Cong Eng* v. *Trinidad, supra,* at 518, acts as a

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our own country and its possessions,' " *Id.,* at 18, quoting *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138, 144 (1957). The Court also noted that under well-established rules of international law, "the law of the flag state ordinarily governs the internal affairs of a ship. See *Wildenhus's Case,* [120 U. S. 1,] 12." 372 U. S., at 21. In light of that contrary legislative history and domestic and international precedent, it is not at all surprising that *McCulloch* balked at holding foreign seamen covered without a strong affirmative showing of congressional intent. As the Court today admits, there is no such contrary legislative history or precedent with respect to jurisdiction over church-operated schools. *Ante,* at 504. The *McCulloch* statement, therefore, has no role to play in this case.

[2] In *Street,* the Court construed the Railway Labor Act as not permitting the use of an employee's compulsorily checked-off union dues for political causes with which he disagreed. As in *McCulloch,* see n. 1, *supra,* it so held not because of an absence of affirmative evidence that Congress *did* mean to permit such uses, but rather because the language and history of the Act indicated affirmatively that Congress *did not* mean to permit such constitutionally questionable practices. See 367 U. S., at 765–770.

brake against wholesale judicial dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention. The Court's new "affirmative expression" rule releases that brake.

II

The interpretation of the National Labor Relations Act announced by the Court today is not "fairly possible." The Act's wording, its legislative history, and the Court's own precedents leave "the intention of the Congress . . . revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *Moore Ice Cream Co.* v. *Rose, supra,* at 379. Section 2 (2) of the Act, 29 U. S. C. § 152 (2), defines "employer" as

> ". . . any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (Emphasis added.)

Thus, the Act covers all employers not within the eight express exceptions. The Court today substitutes amendment for construction to insert one more exception—for church-operated schools. This is a particularly transparent violation of the judicial role: The legislative history reveals that Congress itself considered and rejected a very similar amendment.

The pertinent legislative history of the NLRA begins with the Wagner Act of 1935, 49 Stat. 449. Section 2 (2) of that Act, identical in all relevant respects to the current section, excluded from its coverage neither church-operated schools

nor any other private nonprofit organization.[3] Accordingly, in applying that Act, the National Labor Relations Board did not recognize an exception for nonprofit employers, even when religiously associated.[4] An argument for an implied nonprofit exemption was rejected because the design of the Act was as clear then as it is now: "[N]either charitable institutions nor their employees are exempted from operation of the Act by its terms, although certain other employers and employees are exempted." *Central Dispensary & Emergency Hospital,* 44 N. L. R. B. 533, 540 (1942) (footnotes omitted), enf'd, 79 U. S. App. D. C. 274, 145 F. 2d 852 (1944). Both the lower courts and this Court concurred in the Board's construction. See *Polish National Alliance* v. *NLRB,* 322 U. S. 643 (1944), aff'g 136 F. 2d 175 (CA7 1943); *Associated Press* v. *NLRB,* 301 U. S. 103 (1937), aff'g 85 F. 2d 56 (CA2 1936); *NLRB* v. *Central Dispensary & Emergency Hospital,* 79 U. S. App. D. C. 274, 145 F. 2d 852 (1944).

The Hartley bill, which passed the House of Representa-

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[3] Section 2 (2), 49 Stat. 450, stated:

"The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[4] See *Christian Board of Publication,* 13 N. L. R. B. 534, 537 (1939), enf'd, 113 F. 2d 678 (CA8 1940); *American Medical Assn.,* 39 N. L. R. B. 385, 386 (1942); *Central Dispensary & Emergency Hospital,* 44 N. L. R. B. 533, 539 (1942), enf'd, 79 U. S. App. D. C. 274, 145 F. 2d 852 (1944); *Henry Ford Trade School,* 58 N. L. R. B. 1535, 1536 (1944); *Polish National Alliance,* 42 N. L. R. B. 1375, 1380 (1942), enf'd, 136 F. 2d 175 (CA7 1943), aff'd, 322 U. S. 643 (1944); *Associated Press,* 1 N. L. R. B. 788, 790, enf'd, 85 F. 2d 56 (CA2 1936), aff'd, 301 U. S. 103 (1937). In unpublished decisions, the Board also exercised jurisdiction over the YWCA and the Welfare & Recreational Association. See *Central Dispensary & Emergency Hospital,* 44 N. L. R. B., at 538 n. 8.

tives in 1947, would have provided the exception the Court today writes into the statute:

> "The term 'employer' . . . shall not include . . . any corporation, community chest, fund, or foundation organized and operated exclusively for *religious,* charitable, scientific, literary, or *educational* purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ." (Emphasis added.) H. R. 3020, 80th Cong., 1st Sess., § 2 (2) (Apr. 18, 1947), reprinted in National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947, pp. 160–161 (hereinafter, 1947 Leg. Hist.).

But the proposed exception was not enacted.[5] The bill reported by the Senate Committee on Labor and Public Welfare did not contain the Hartley exception. See S. 1126, 80th Cong., 1st Sess., § 2 (2) (Apr. 17, 1947), 1947 Leg. Hist. 99, 102. Instead, the Senate proposed an exception limited to nonprofit hospitals, and passed the bill in that form. See H. R. 3020, 80th Cong., 1st Sess., § 2 (2) (Senate, May 13, 1947), 1947 Leg. Hist. 226, 229. The Senate version was accepted by the House in conference, thus limiting the exception

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[5] A number of reasons were offered for the rejection of the Hartley bill's exception. Some Congressmen strongly opposed the exception, see 93 Cong. Rec. 3446 (1947) (remarks of Rep. Klein); some were opposed to additional exceptions to the Board's jurisdiction, see *id.,* at 4997 (remarks of Sen. Taft); and some thought it unnecessary, see H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32 (1947), 1947 Leg. Hist. 536. See generally *NLRB* v. *Wentworth Institute,* 515 F. 2d 550, 555 (CA1 1975) ("[P]erhaps the most obvious, interpretation of the rejection of the House exclusion would be that Congress meant to include nonprofit organizations [within the scope of the Act]"); Sherman & Black, The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption, 83 Harv. L. Rev. 1323, 1331–1337 (1970). But whatever the reasons, it is clear that an amendment similar to that made by the Court today was proposed and rejected in 1947.

for nonprofit employers to nonprofit hospitals. Ch. 120, 61 Stat. 136.[6]

Even that limited exemption was ultimately repealed in 1974. Pub. L. 93–360, 88 Stat. 395. In doing so, Congress confirmed the view of the Act expressed here: that it was intended to cover all employers—including nonprofit employers—unless expressly excluded, and that the 1947 amendment excluded only nonprofit hospitals. See H. R. Rep. No. 93–

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[6] The Board's contemporaneous construction of the 1947 amendment was that only nonprofit hospitals were intended to be exempt. In 1950, for example, in asserting jurisdiction over a nonprofit religious organization, the Board stated:

"The Employer asserts that, as it is a nonprofit organization which is engaged in purely religious activities, it is not engaged in commerce within the meaning of the Act. We find no merit in this contention. . . . As this Board and the courts have held, it is immaterial that the Employer may be a nonprofit organization, or that its activities may be motivated by considerations other than those applicable to enterprises which are, in the generally accepted sense, commercial." *Sunday School Board of the Southern Baptist Convention,* 92 N. L. R. B. 801, 802.

It is true that in *Trustees of Columbia University,* 97 N. L. R. B. 424 (1951), the Board indicated that it would not exercise jurisdiction over nonprofit, educational institutions; but it expressly did so as a matter of discretion, affirming that the activities of the University did come within the Act and the Board's jurisdiction. *Id.,* at 425. That 1951 discretionary decision does not undermine the validity of the Board's determination in *Cornell University,* 183 N. L. R. B. 329 (1970), that changing conditions—particularly the increasing impact of such institutions on interstate commerce—now required a change in policy leading to the renewed exercise of Board jurisdiction. As we emphasized in *NLRB* v. *Weingarten, Inc.,* 420 U. S. 251, 265–266 (1975):

"To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. ' "Cumulative experience" begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.' *NLRB* v. *Seven-Up Co.,* 344 U. S. 344, 349 (1953)."

1051, p. 4 (1974), reprinted in Senate Committee on Labor and Public Welfare, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, p. 272 (Comm. Print 1974) (hereafter 1974 Leg. Hist.); 120 Cong. Rec. 12938 (1974), 1974 Leg. Hist. 95 (Sen. Williams); 120 Cong. Rec. 16900 (1974), 1974 Leg. Hist. 291 (Rep. Ashbrook).[7] Moreover, it is significant that in considering the 1974 amendments, the Senate expressly rejected an amendment proposed by Senator Ervin that was analogous to the one the Court today creates—an amendment to exempt nonprofit hospitals operated by religious groups. 120 Cong. Rec. 12950, 12968 (1974), 1974 Leg. Hist. 119, 141. Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exception, explained:

> "[S]uch an exception for religiously affiliated hospitals would seriously erode *the existing national policy which holds religiously affiliated institutions generally such as* proprietary nursing homes, residential communities, and *educational facilities to the same standards as their nonsectarian counterparts.*" 120 Cong. Rec. 12957 (1974), 1974 Leg. Hist. 137 (emphasis added).

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[7] The House Report stated: "Currently, the only broad area of charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2 (2) of the Act. . . . [T]he bill removes the existing Taft-Hartley exemption in section 2 (2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees." H. R. Rep. No. 93–1051, p. 4 (1974), 1974 Leg. Hist. 272. Similarly, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, criticized the nonprofit-hospital exemption as "not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but it is also inconsistent with the coverage of other nonprofit activities." 120 Cong. Rec. 12938 (1974), 1974 Leg. Hist. 95. See also 120 Cong. Rec. 16900 (1974), 1974 Leg. Hist. 291 (Rep. Ashbrook).

See also *ibid.* (Sen. Javits); 120 Cong. Rec. 12957 (1974), 1974 Leg. Hist. 138 (Sen. Williams).[8]

In construing the Board's jurisdiction to exclude church-operated schools, therefore, the Court today is faithful to neither the statute's language nor its history. Moreover, it is also untrue to its own precedents. "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. See, *e. g., Guss* v. *Utah Labor Board,* 353 U. S. 1, 3; *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 647–648; *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607." *NLRB* v. *Reliance Fuel Oil Corp.,* 371 U. S. 224, 226 (1963) (emphasis in original). As long as an employer is within the reach of Congress' power under the Commerce Clause—and no one doubts that respondents are—the Court has held him to be covered by the Act regardless of the nature of his activity. See, *e. g., Polish National Alliance* v. *NLRB,* 322 U. S. 643 (1944) (nonprofit fraternal organization). Indeed, *Associated Press* v. *NLRB,* 301 U. S. 103 (1937), construed the Act to

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[8] The Court relies upon the fact that the 1974 amendments provided that "[a]ny *employee* of a health care institution who is a member of . . . a bona fide religion . . . which has historically held conscientious objections to joining . . . labor organizations shall not be required to join . . . any labor organization as a condition of employment . . . ." 29 U. S. C. § 169 (emphasis added). This is, of course, irrelevant to the instant case, as no employee has alleged that he was required to join a union against his religious principles and not even the respondent employers contend that collective bargaining itself is contrary to their religious beliefs. Recognizing this, the Court has limited its inference from the amendment to the proposition that it reflects "congressional sensitivity to First Amendment guarantees." *Ante,* at 506. This is quite true, but its usefulness as support for the Court's opinion is completely negated by the rejection of the Ervin amendment, see text, *supra,* which makes clear the balance struck by Congress. While Congress agreed to exclude conscientiously objecting employees, it expressly refused to sanction an exclusion for all religiously affiliated employers.

cover editorial employees of a nonprofit news-gathering organization despite a claim—precisely parallel to that made here—that their inclusion rendered the Act in violation of the First Amendment.[9] Today's opinion is simply unable to explain the grounds that distinguish that case from this one.[10]

Thus, the available authority indicates that Congress intended to include—not exclude—lay teachers of church-operated schools. The Court does not counter this with evidence that Congress *did* intend an exception it never stated. Instead, despite the legislative history to the contrary, it construes the Act as excluding lay teachers only because Congress did not state explicitly that they were covered. In Mr. Justice Cardozo's words, this presses "avoidance of a

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[9] *Associated Press* stated the employer's argument as follows:

"The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press." 301 U. S., at 131.

[10] The Court would distinguish *Associated Press* on the ground that there the Court "[p]erceiv[ed] nothing to suggest that application of the Act would infringe First Amendment guarantees . . . [while h]ere, on the contrary, the record affords abundant evidence that the Board's exercise of jurisdiction . . . would implicate the guarantees of the Religion Clauses." *Ante*, at 507. But this is mere assertion. The Court does not explain *why* the press' First Amendment problem in *Associated Press* was any less substantial than the church-supported schools' First Amendment challenge here. In point of fact, the problems raised are of precisely the same difficulty. The Court therefore cannot square its judicial "reconstruction" of the Act in this case with the refusal to rewrite the same Act in *Associated Press*.

difficulty . . . to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose,* 289 U. S., at 379.[11]

III

Under my view that the NLRA includes within its coverage lay teachers employed by church-operated schools, the constitutional questions presented would have to be reached. I do not now do so only because the Court does not. See *Sierra Club* v. *Morton,* 405 U. S. 727, 755 (1972) (BRENNAN, J., dissenting). I repeat for emphasis, however, that while the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent. A statute is not "a nose of wax to be changed from that which the plain language imports . . . ." *Yu Cong Eng* v. *Trinidad,* 271 U. S., at 518.

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[11] Not even the Court's redrafting of the statute causes all First Amendment problems to disappear. The Court's opinion implies limitation of its exception to church-operated schools. That limitation is doubtless necessary since this Court has already rejected a more general exception for nonprofit organizations. See *Polish National Alliance* v. *NLRB,* 322 U. S. 643 (1944). But such an exemption, available only to church-operated schools, generates a possible Establishment Clause *question* of its own. *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970), does not put that question to rest, for in upholding the property tax exemption for churches there at issue, we emphasized that New York had "not singled out . . . churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . . ." *Id.,* at 673. Like the Court, "at this stage of [my] consideration [I am] not compelled to determine whether the [Establishment Clause problem] is [as significant] as [I] would were [I] considering the constitutional issue." *Ante,* at 502. It is enough to observe that no matter which way the Court turns in interpreting the Act, it cannot avoid constitutional questions.

Syllabus

NEW YORK TELEPHONE CO. ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL.

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

No. 77-961. Argued October 30, 1978—Decided March 21, 1979

A New York statute authorizes the payment of unemployment compensation after one week of unemployment, except that if a claimant's loss of employment is caused by a strike in the place of his employment the payment of benefits is suspended for an additional 7-week period. Pursuant to this statute, petitioners' striking employees began to collect unemployment compensation after the 8-week waiting period and were paid benefits for the remaining five months of the strike. Because New York's unemployment insurance system is financed primarily by employer contributions based on the benefits paid to former employees of each employer in past years, a substantial part of the cost of these benefits was ultimately imposed on petitioners. Petitioners brought suit in District Court seeking a declaration that the New York statute conflicts with federal law and is therefore invalid, and injunctive and monetary relief. The District Court granted the requested relief, holding that the availability of unemployment compensation is a substantial factor in the worker's decision to remain on strike and has a measurable impact on the progress of the strike and that the payment of such compensation conflicted "with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the [S]upremacy [C]lause." The Court of Appeals reversed, holding that although the New York statute conflicts with the federal labor policy, the legislative histories of the National Labor Relations Act (NLRA) and Social Security Act (SSA) indicate that such conflict was one which Congress has decided to tolerate. *Held:* The judgment is affirmed. Pp. 527–546; 546–547; 547–551.

566 F. 2d 388, affirmed.

MR. JUSTICE STEVENS, joined by MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST, concluded that Congress, in enacting the NLRA and SSA, did not intend to pre-empt a State's power to pay unemployment compensation to strikers. Pp. 527–546.

(a) This case does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field but rather involves a state program for the distribution of benefits to certain

members of the public. *Teamsters* v. *Morton,* 377 U. S. 252, and *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, distinguished. Although the class benefited is primarily made up of employees in the State and the class providing the benefits is primarily made up of employers in the State, and although some members of each class are occasionally engaged in labor disputes, the general purport of the program is not to regulate the bargaining relationship between the two classes but instead to provide an efficient means of insuring employment security in the State. Pp. 527–533.

(b) Rather than being a "state la[w] regulating the relations between employees, their union, and their employer," as to which the reasons underlying the pre-emption doctrine have their "greatest force," *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180, 193, the New York statute is a law of general applicability. Since it appears that Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria, *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471; *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Batterton* v. *Francis,* 432 U. S. 416, it is appropriate to treat New York's statute with the same deference that this Court has afforded analogous state laws of general applicability that protect interests "deeply rooted in local feeling and responsibility." With respect to such laws, "in the absence of compelling congressional direction," it will not be inferred that Congress "had deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244. Pp. 533–540.

(c) The omission of any direction concerning payment of unemployment compensation to strikers in either the NLRA or SSA implies that Congress intended that the States be free to authorize, or to prohibit, such payments, an intention confirmed by frequent discussions in Congress subsequent to 1935 (when both of those Acts were passed) wherein the question of payments to strikers was raised but no prohibition against payments was ever imposed. In any event, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress. New York has not sought either to regulate private conduct that is subject to the National Labor Relations Board's regulatory jurisdiction or to regulate any private conduct of the parties to a labor dispute, but instead has sought to administer its unemployment compensation program in a manner that it believes best effectuates the purposes of that scheme. In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that

the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power. Pp. 540–546.

MR. JUSTICE BRENNAN concluded that the legislative histories of the NLRA and SSA provide sufficient evidence of congressional intent not to pre-empt a State's power to pay unemployment compensation to strikers, and that therefore it was unnecessary to rely on any purported distinctions between this case and *Teamsters* v. *Morton,* 377 U. S. 252, and *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132. Pp. 546–547.

MR. JUSTICE BLACKMUN, joined by MR. JUSTICE MARSHALL, concluded that, under the pre-emption analysis of *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, the evidence justifies the holding that Congress has decided to permit New York's compensation law notwithstanding its impact on the balance of bargaining power. He would not apply the requirement that "compelling congressional direction" be established before pre-emption can be found, nor would he find New York's law to be a "law of general applicability" under *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236. Pp. 547–551.

STEVENS, J., announced the Court's judgment and delivered an opinion, in which WHITE and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, *post,* p. 546. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post,* p. 547. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post,* p. 551.

David D. Benetar argued the cause for petitioners. With him on the brief were *Stanley Schair, Mark H. Leeds, George E. Ashley, William P. Witman,* and *Laurel J. McKee.*

Maria L. Marcus, Special Assistant Attorney General of New York, argued the cause for respondents. With her on the brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Kathleen H. Casey,* Assistant Attorney General, *Donald Sticklor,* Deputy Assistant Attorney General, and *Nicholas G. Garaufis,* Special Assistant Attorney General.*

*Briefs of *amici curiae* urging reversal were filed by *Vincent J. Apruz-*

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

The question presented is whether the National Labor Relations Act, as amended, implicitly prohibits the State of New York from paying unemployment compensation to strikers.

Communication Workers of America, AFL–CIO (CWA), represents about 70% of the nonmanagement employees of companies affiliated with the Bell Telephone Co. In June 1971, when contract negotiations had reached an impasse, CWA recommended a nationwide strike. The strike commenced on July 14, 1971, and, for most workers, lasted only a week. In New York, however, the 38,000 CWA members employed by petitioners remained on strike for seven months.[1]

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zese, Lawrence B. Kraus, and *Stephen A. Bokat* for the Chamber of Commerce of the United States; by *Lawrence M. Cohen, Jeffrey S. Goldman, Jared H. Jossem, Brynn Aurelius,* and *Anthony G. Sousa* for Dow Chemical Co. et al.; by *Eugene D. Ulterino* for Rochester Telephone Corp. et al.; and by *Hugh L. Reilly* for Stephen R. Havas et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, John S. Irving, Carl L. Taylor, Norton J. Come,* and *Linda Sher* for the United States; by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Michael Krinsky, Thomas Kennedy,* and *Jerome Tauber* for the National Lawyers Guild; and by *Frederick L. Edwards* for the Center on National Labor Policy.

[1] Petitioners—New York Telephone Co., American Telephone & Telegraph Co. Long Lines Department, Western Electric Co., and Empire City Subway Co.—are the four Bell Telephone Co. affiliates with facilities and employees in the State of New York.

The goal of the New York strike was to disassociate the New York units of the CWA from the nationally settled-upon contract and to dislodge petitioners from the "pattern" bargaining format long used by Bell affiliates. Under that format, management and International CWA officials would select two Bell affiliates with early contract expiration dates and would attempt to reach a settlement at both, which would then be used as the basis for the contracts at all Bell units around the country. In order to "break the pattern," the New York CWA units refused to ratify the pattern contract

New York's unemployment insurance law normally authorizes the payment of benefits after approximately one week of unemployment.[2] If a claimant's loss of employment is caused by "a strike, lockout, or other industrial controversy in the establishment in which he was employed," § 592 (1) of the law suspends the payment of benefits for an additional 7-week period.[3] In 1971, the maximum weekly benefit of $75 was payable to an employee whose base salary was at least $149 per week.

After the 8-week waiting period, petitioners' striking employees began to collect unemployment compensation. During the ensuing five months more than $49 million in benfits were paid to about 33,000 striking employees at an average rate of somewhat less than $75 per week. Because New York's unemployment insurance system is financed primarily by employer contributions based on the benefits paid

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agreed upon by the International CWA and the pattern-setting affiliates during the week-long national strike in July 1971, and most members of the New York units remained on strike. Although the International originally opposed the continuation of the strike, it eventually lent its support. The strike was settled when petitioners agreed to a modest, but precedentially significant, increase in wage benefits over the national pattern. 434 F. Supp. 810, 812–814, and n. 3 (SDNY 1977).

[2] N. Y. Lab. Law § 590 (7) (McKinney Supp. 1978–1979). Eligibility for benefits turns on the recipient's total unemployment and his capability and readiness, but inability, to gain work in his "usual employment or in any other for which he is reasonably fitted by training and experience." §§ 591 (1), 591 (2).

[3] Section 592 (McKinney 1977) is entitled "Suspension of accumulation of benefit rights." Subsection (1) of that section, entitled "Industrial controversy," provides:

"The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

to former employees of each employer in past years, a substantial part of the cost of these benefits was ultimately imposed on petitioners.[4]

[4] In order to explain why the entire cost was not borne by the companies, it is necessary to describe in some detail the rather complicated method used by New York to compute employer contributions. The State maintains an "unemployment insurance fund" made up of all moneys available for distribution to unemployed persons. § 550 (McKinney 1977). A separate "unemployment administration fund" is maintained to finance the administration of the unemployment law. § 551.

The unemployment fund is divided into various "accounts." The "general account" is primarily made up of moneys derived from federal contributions under 42 U. S. C. § 1103 (a part of Title IX of the Social Security Act), the earnings on all moneys in the fund, and, occasionally, employer contributions. N. Y. Lab. Law §§ 577 (1)(a), 577 (2) (McKinney 1977 and Supp. 1978–1979). The money in the general account may be transferred to the administrative fund (the federally contributed money being specially set aside for this purpose, § 550 (3)) or used to finance refunds, the payment of benefits to certain employees who move into New York from out of state, and claims against "employer accounts" that show negative balances. §§ 577 (1)(b), 581 (1)(e) (McKinney 1977 and Supp. 1978–1979).

Employer accounts, which make up the rest of the unemployment fund, contain all of the contributions from individual employers. The rate of contributions—above a minimum level charged to all employers—is generally based on the employer's "experience rating," *i. e.*, the amount of unemployment benefits attributable to employees previously in his employ. §§ 570 (1), 581 (McKinney 1977 and Supp. 1978–1979).

Employees are generally eligible for 156 "effective days" of benefits, which usually amount to about eight calendar months. §§ 523, 590 (4), 601 (McKinney 1977 and Supp. 1978–1979). But not all of those benefits are attributed to the account, and thus reflected in the experience rating, of the employer who last employed the claimant. First, the account is only charged with four days of benefits for every five days during which the claimant was employed by that employer. If this computation exhausts the claimant's tenure with a given employer, the benefits are then charged to the account of the recipient's next most recent employer, or to the general account when the class of former employers of the recipient is exhausted. § 581 (1)(e) (McKinney Supp. 1978–1979). Second, special provisions limit the liability of employers for claimants who previously

Petitioners brought suit in the United States District Court for the Southern District of New York against the state officials responsible for the administration of the unemployment compensation fund. They sought a declaration that the New York statute authorizing the payment of benefits to strikers conflicts with federal law and is therefore invalid, an injunction against the enforcement of § 592 (1), and an award recouping the increased taxes paid in consequence of the disbursement of funds to their striking employees. After an 8-day trial, the District Court granted the requested relief. 434 F. Supp. 810 (1977).

The District Court concluded that the availability of unemployment compensation is a substantial factor in the worker's

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held down two jobs or were only employed part time. *Ibid.* Third, any benefits reimbursed by the Federal Government are not debited to employer accounts. *Ibid.* Finally, and most importantly, only one-half of the last 52 effective days of benefits available to a claimant are charged to the employer's account; the other half is debited to the general account, and that account is credited with amounts received from the Federal Government pursuant to the Federal-State Extended Unemployment Compensation Act, 26 U. S. C. § 3304. N. Y. Lab. Law § 601 (4) (McKinney Supp. 1978–1979). Hence, it is not by any means accurate to state that the struck employer is charged with all of the unemployment benefits paid to striking employees. The Federal Government, and the class of New York employers as a whole, may also pay significant amounts of the benefits, as well as of the costs of administering the program.

In this case, for example, the payments to strikers commenced at a time when the unemployment account of petitioner New York Telephone Co. (TELCO) had credits of about $40 million. During the strike, about $43 million in benefits were paid to TELCO employees. Yet, TELCO's account was not completely depleted during the period, apparently because other accounts were debited with approximately $3 million in benefits paid to its workers.

Based on its unemployment benefits "experience" during the strike, TELCO's contributions to its unemployment account during the next two years were increased by about $16 million over what they would have been had no strike occurred. (The like figure for petitioners as a whole was just under $18 million.) See 434 F. Supp., at 813–814, and n. 4.

decision to remain on strike, and that in this case, as in others, it had a measurable impact on the progress of the strike.[5] The court held that the payment of such compensation by the State conflicted "with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the supremacy clause of the United States Constitution." [6] *Id.*, at 819.

The Court of Appeals for the Second Circuit reversed. It did not, however, question the District Court's finding that the New York statute "alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process." 566 F. 2d 388, 390. The Court of Appeals noted that Congress has not expressly forbidden state unemployment compensation for strikers; the court inferred from the legislative history of the National

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[5] "Notwithstanding the State's adamant position to the contrary, I regard it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. This being a truism, one therefore would expect to find confirmation of it everywhere. One does." *Id.*, at 813–814.

In the District Court's opinion, as well as in petitioners' briefs in this Court, the primary emphasis is on the impact of the availability of unemployment benefits on the striking *employee*. The District Court's economic-impact analysis finds further support, however, in the separate impact that the New York scheme has on the struck *employer*, whose unemployment insurance contribution rate will increase in rough proportion to the length of the 8-weeks-plus strike. But, as the District Court apparently recognized, under an economic-impact test it makes little difference—assuming the same amount of money is involved—whether the result of the unemployment scheme is simply to provide payments to striking workers, or simply to exact payments from struck employers, or some of both.

[6] The District Court regarded the State's interest in making the payments as not of sufficient consequence to be a factor in its determination. *Id.*, at 819.

Labor Relations Act,[7] and Title IX of the Social Security Act,[8] as well as from later developments, that the omission was deliberate. Accordingly, without questioning the premise that federal law generally requires that "State statutes which touch or concern labor relations should be neutral," the Court of Appeals concluded that "th[is] conflict is one which Congress has decided to tolerate." *Id.*, at 395.

The importance of the question led us to grant certiorari. 435 U. S. 941. We now affirm. Our decision is ultimately governed by our understanding of the intent of the Congress that enacted the National Labor Relations Act on July 5, 1935, and the Social Security Act on August 14 of the same year. Before discussing the relevant history of these statutes, however, we briefly summarize (1) the lines of pre-emption analysis that have limited the exercise of state power to regulate private conduct in the labor-management area and (2) the implications of our prior cases, both inside and outside the labor area, involving the distribution of public benefits to persons unemployed by reason of a labor dispute.

I

The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on "the permissible scope of state regulation of activity touching upon labor-management relations." *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180, 187. Although this case involves the exploration of those limits in a somewhat novel setting, it soon becomes apparent that much of that doctrine is of limited relevance in the present context.

There is general agreement on the proposition that the "animating force" behind the doctrine is a recognition that the purposes of the federal statute would be defeated if state

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[7] 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*

[8] 49 Stat. 639, as amended and recodified as the Federal Unemployment Tax Act, 26 U. S. C. § 3301 *et seq.*, 42 U. S. C. § 501 *et seq.*, § 1101 *et seq.*

and federal courts were free, without limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board. *Id.*, at 218 (BRENNAN, J., dissenting).[9] The overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in § 8 of the Act,[10] *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U. S. 953, as well as state interference with the exercise of rights protected by § 7 of the Act.[11] *Automobile Workers* v. *Russell,* 356 U. S. 634, 644.[12] Con-

[9] "The animating force behind the doctrine of labor law pre-emption has been the recognition that nothing could more fully serve to defeat the purposes of the Act than to permit state and federal courts, without any limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board. See *Motor Coach Employees* v. *Lockridge,* [403 U. S. 274, 286]. Congress created the centralized expert agency to administer the Act because of its conviction—generated by the historic abuses of the labor injunction, . . . that the judicial attitudes, court procedures, and traditional judicial remedies, state and federal, were as likely to produce adjudications incompatible with national labor policy as were different rules of substantive law. See *Garner* v. *Teamsters,* 346 U. S. 485, 490–491 (1953)." *Sears,* 436 U. S., at 218 (BRENNAN, J., dissenting).

[10] 29 U. S. C. § 158.

[11] 29 U. S. C. § 157.

[12] "Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts.' *Automobile Workers* v. *Russell,* 356 U. S. 634, 644 (1958). '[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable.' *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369, 383 n. 19

sequently, almost all of the Court's labor law decisions in which state regulatory schemes have been found to be pre-empted have involved state efforts to regulate or to prohibit private conduct that was either protected by § 7, prohibited by § 8,[13] or at least arguably so protected or prohibited.[14]

In contrast to those decisions, there is no claim in this case that New York has sought to regulate or prohibit any conduct subject to the regulatory jurisdiction of the Labor Board under § 8.[15] Nor are the petitioning employers pursuing any claim of interference with employee rights protected by § 7. The State simply authorized striking employees to receive unemployment benefits, and assessed a tax against the struck employers to pay for some of those benefits, once the economic warfare between the two groups reached its ninth week. Accordingly, beyond identifying the interest in national uniformity underlying the doctrine, the cases compris-

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(1969)." *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, 138.

[13] *E. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468; *Garner* v. *Teamsters,* 346 U. S. 485; *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538.

[14] *E. g., Iron Workers* v. *Perko,* 373 U. S. 701; *Plumbers* v. *Borden,* 373 U. S. 690; *Marine Engineers* v. *Interlake S. S. Co.,* 370 U. S. 173.

[15] Cf. *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235, in which the Court held that the NLRA pre-empted a state policy of denying unemployment benefits to persons who filed unfair labor practice charges against their former employer. Relying upon § 8 (a) (4) of the Act, which makes it an unfair labor practice for an employer to restrain or discriminate against an employee who files charges, the Court concluded that the state statute trenched on the employees' federally protected rights contrary to the Supremacy Clause. 389 U. S., at 238–239.

For similar reasons, we reject petitioners' contention that the NLRA at the least forbids the States from awarding benefits to participants in *illegal* strikes. See *Communication Workers of America (New York Telephone Co.),* 208 N. L. R. B. 267 (1974) (declaring part of the strike involved in this case illegal). Because such a rule would inevitably involve the States in ruling on the legality of strikes under § 8, it would invite precisely the harms that the pre-emption doctrine is designed to avoid.

ing the main body of labor pre-emption law are of little relevance in deciding this case.

There is, however, a pair of decisions in which the Court has held that Congress intended to forbid state regulation of economic warfare between labor and management, even though it was clear that none of the regulated conduct on either side was covered by the federal statute.[16] In *Teamsters* v. *Morton*, 377 U. S. 252, the Court held that an Ohio court could not award damages against a union for peaceful secondary picketing even though the union's conduct was neither protected by § 7 nor prohibited by § 8. Because Congress had focused upon this type of conduct and elected not to proscribe it when § 303 of the Labor Management Relations Act[17] was enacted, the Court inferred a deliberate legislative intent to preserve this means of economic warfare for use during the bargaining process.[18]

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[16] Although a leading commentator in this area contends that "[t]here are numerous situations in which the conduct is not arguably protected or prohibited but state law is precluded," Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1364 (1972), the Court has been faced with such situations on only the two occasions discussed in text. Dicta in other cases, however, have occasionally been cited in this context. See *Hanna Mining Co.* v. *Marine Engineers*, 382 U. S. 181, 187; *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96 (negative implication of the holding); *Garner* v. *Teamsters*, *supra*, at 500.

[17] 29 U. S. C. § 187.

[18] "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761* v. *Labor Board*, 366 U. S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is

More recently, in *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, the Court held that the state Commission could not prohibit a union's concerted refusal to work overtime. Although this type of partial strike activity had not been the subject of special congressional consideration, as had the secondary picketing involved in *Morton,* the Court nevertheless concluded that it was a form of economic self-help that was " 'part and parcel of the process of collective bargaining,' " 427 U. S., at 149 (quoting *NLRB* v. *Insurance Agents,* 361 U. S. 477, 495), that Congress implicitly intended to be governed only by the free play of economic forces. The Court identified the crucial inquiry in its pre-emption analysis in *Machinists* as whether the exercise of state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the policies of the National Labor Relations Act.[19]

The economic weapons employed by labor and management in *Morton, Machinists,* and the present case are similar, and petitioners rely heavily on the statutory policy, emphasized in the former two cases, of allowing the free play of economic forces to operate during the bargaining process. Moreover, because of the twofold impact of § 592 (1), which not only provides financial support to striking employees but also adds to the burdens of the struck employers, see n. 5, *supra,* we must accept the District Court's finding that New York's law, like the state action involved in *Morton* and *Machinists,*

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quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner* v. *Teamsters Union,* 346 U. S. 485, 500." *Teamsters* v. *Morton,* 377 U. S., at 259–260.

[19] "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S., at 380." 427 U. S., at 147–148. See also *id.,* at 147 n. 8

has altered the economic balance between labor and management.[20]

But there is not a complete unity of state regulation in the three cases.[21] Unlike *Morton* and *Machinists,* as well as the main body of labor pre-emption cases, the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public. Although the class benefited is primarily made up of employees in the State and the

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[20] What was said in *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115, 123–124, about a state benefits plan for strikers that did not impose a contributory burden on struck employers applies with special force in the present case with its twofold impact:

"Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes." See also *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471, 492.

[21] "[T]he conduct being regulated, not the formal description of governing legal standards, . . . is the proper focus of concern" in pre-emption cases. *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 292. Nevertheless, in assessing whether there is "conflicting [state and federal] regulation" of the conduct, *ibid.,* the scope, purport, and impact of the state program may not be ignored.

class providing the benefits is primarily made up of employers in the State, and although some of the members of each class are occasionally engaged in labor disputes, the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State.[22] It is therefore clear that even though the statutory policy underlying *Morton* and *Machinists* lends support to petitioners' claim, the holdings in those cases are not controlling. The Court is being asked to extend the doctrine of labor law pre-emption into a new area.

II

The differences between state laws regulating private conduct and the unemployment-benefits program at issue here are important from a pre-emption perspective. For a variety of reasons, they suggest an affinity between this case and others in which the Court has shown a reluctance to infer a pre-emptive congressional intent.

Section 591 (1) is not a "state la[w] regulating the relations between employees, their union, and their employer," as to which the reasons underlying the pre-emption doctrine have their "greatest force." *Sears,* 436 U. S., at 193. Instead, as discussed below, the statute is a law of general applicability. Although that is not a sufficient reason to exempt it from pre-emption, *Farmer* v. *Carpenters,* 430 U. S. 290, 300, our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity. See *id.,* at 302; *Sears, supra,* at 194–195; Cox, *supra* n. 16, at 1356–1357.

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[22] For these same reasons, § 591 (1) may be distinguished from a hypothetical state law, unattached to any benefits scheme, that imposes a fine on struck employers who failed to come to terms with striking employees within an allotted time period.

Because New York's program, like those in other States, is financed in part by taxes assessed against employers, it is not strictly speaking a public welfare program.[23] It nevertheless remains true that the payments to the strikers implement a broad state policy that does not primarily concern labor-management relations, but is implicated whenever members of the labor force become unemployed. Unlike most States,[24] New York has concluded that the community interest in the security of persons directly affected by a strike outweighs the interest in avoiding any impact on a particular labor dispute.

As this Court has held in a related context, such unemployment benefits are not a form of direct compensation paid to strikers by their employer; they are disbursed from public funds to effectuate a public purpose. *NLRB* v. *Gullett Gin*

[23] When confronted with welfare programs, the Courts of Appeals have been unwilling to imply a pre-emptive congressional intent. *Super Tire Engineering Co.* v. *McCorkle,* 550 F. 2d 903 (CA3 1977), cert. denied, 434 U. S. 827; *Francis* v. *Chamber of Commerce,* 529 F. 2d 515 (CA4 1975) (mem.) (unreported opinion), rev'd on other grounds *sub nom. Batterton* v. *Francis,* 432 U. S. 416; see *ITT Lamp Division* v. *Minter,* 435 F. 2d 989, 994 (CA1 1970), cert. denied, 402 U. S. 933. It is interesting to note that under the economic-impact test applied by the District Court in this case, there is no meaningful way, for pre-emption purposes, to distinguish between unemployment and welfare programs. See n. 5, *supra.*

[24] This may be an overstatement. It is true that only Rhode Island has a statutory provision like New York's that allows strikers to receive benefits after a waiting period of several weeks. See *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 457–459 (CA1 1973). But most States provide benefits to striking employees who have been replaced by nonstriking employees, and many States, pursuant to the so-called "American rule," allow strikers to collect benefits so long as their activities have not substantially curtailed the productive operations of their employer. See *Hawaiian Telephone Co.* v. *Hawaii Dept. of Labor & Industrial Relations,* 405 F. Supp. 275, 287–288 (Haw. 1976), cert. denied, 435 U. S. 943. For example, in *Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U. S. 804, this Court dismissed for want of a substantial federal question an appeal from the Supreme Court of New Mexico which had held that a retroactive post-strike award of unemployment benefits to strikers under the "American rule" was not pre-empted by federal labor law.

Co., 340 U. S. 361, 364–365. This conclusion is no less true because New York has found it most efficient to base employer contributions to the insurance program on "experience ratings." *Id.*, at 365. Although this method makes the struck, rather than all, employers primarily responsible for financing striker benefits, the employer-provided moneys are nonetheless funneled through a public agency, mingled with other—and clearly public—funds, and imbued with a public purpose.[25] There are obvious reasons, in addition, why the pre-emption doctrine should not "hinge on the myriad provisions of state unemployment compensation laws." *Ibid.*[26]

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[25] Despite the experience-rating system, it is almost inevitable that some of the unemployment payments will be charged to the individual accounts of nonstruck employers as well as to a general account funded by the entire class of employers and by the Federal Government. See n. 4, *supra*.

[26] "But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. See Dart's La. Gen. Stat., 1939, § 4434.1; *In re Cassaretakis,* 289 N. Y. 119, 126, 44 N. E. 2d 391, 394–395, aff'd *sub nom. Standard Dredging Co.* v. *Murphy,* 319 U. S. 306; *Unemployment Compensation Commission* v. *Collins,* 182 Va. 426, 438, 29 S. E. 2d 388, 393. We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than 'whole' as that phrase has been understood and applied.

"Finally, respondent urges that the Board's order imposes upon it a penalty which is beyond the remedial powers of the Board because, to the extent that unemployment compensation benefits were paid to its discharged employees, operation of the experience-rating record formula under the Louisiana Act, Dart's La. Gen. Stat., 1939 (Cum. Supp. 1949) §§ 4434.1 *et seq.*, will prevent respondent from qualifying for a lower tax rate. We doubt that the validity of a back-pay order ought to hinge on

New York's program differs from state statutes expressly regulating labor-management relations for another reason. The program is structured to comply with a federal statute, and as a consequence is financed, in part, with federal funds. The federal subsidy mitigates the impact on the employer of any distribution of benefits. See n. 4, *supra*. More importantly, as the Court has pointed out in the past, the federal statute authorizing the subsidy provides additional evidence of Congress' reluctance to limit the States' authority in this area.

Title IX of the Social Security Act of 1935 established the participatory federal unemployment compensation scheme. The statute authorizes the provision of federal funds to States having programs approved by the Secretary of Labor.[27] In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, an employee who was involuntarily deprived of his job because of a strike claimed a federal right under Title IX to collect benefits from the Ohio Bureau. Specifically, he contended that Ohio's statutory disqualification of claims based on certain labor disputes was inconsistent with a federal re-

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the myriad provisions of state unemployment compensation laws. Cf. *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 122–124. However, even if the Louisiana law has the consequence stated by respondent, which we assume *arguendo*, this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself." *NLRB* v. *Gullett Gin Co.*, 340 U. S., at 364–365 (footnotes omitted). See also *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508.

[27] In broad outline, the federal scheme imposes a tax on employers which the States may mitigate (as all have done) by establishing their own unemployment programs. 26 U. S. C. § 3301. State programs qualified by the Secretary of Labor are then eligible for federal funds. 42 U. S. C. §§ 501–503.

quirement that all persons involuntarily unemployed must be eligible for benefits.

Our review of both the statute and its legislative history convinced us that Congress had not intended to prescribe the nationwide rule that Hodory urged us to adopt. The voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish.[28] We further noted that when Congress

[28] "Appellee cites only a single page of the voluminous legislative history of the Social Security Act in support of his assertion that the Act forbids disqualification of persons laid off due to a labor dispute at a related plant. That page contains the sentence: 'To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed.' Report of the Committee on Economic Security, as reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935).

"The cited Report was one to the President of the United States and became the cornerstone of the Social Security Act. On its face, the quoted sentence may be said to give some support to appellee's claim that 'involuntariness' was intended to be the key to eligibility. A reading of the entire Report and consideration of the sentence in context, however, show that Congress did not intend to require that the States give coverage to every person involuntarily unemployed.

"The Report recognized that federal definition of the scope of coverage would probably prove easier to administer than individualized state plans, *id.*, at 1323, but it nonetheless recommended the form of unemployment compensation scheme that exists today, namely, federal involvement primarily through tax incentives to encourage state-run programs. The Report's section entitled 'Outline of Federal Act' concludes with the statement:

" 'The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States. The Federal Government, however, should assist the States in setting up their administrations and in the solution of the problems they will encounter.' *Id.*, at 1326." 431 U. S., at 482–483.

In addition to undercutting petitioners' general argument that federal law restricts New York's freedom to provide unemployment benefits to

wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area.[29]

The analysis in *Hodory* confirmed this Court's earlier interpretation of Title IX of the Social Security Act in *Steward Machine Co.* v. *Davis*, 301 U. S. 548,[30] and was itself con-

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strikers, this legislative history also belies their more specific claim that *involuntary* unemployment must be "the key to eligibility" under Title IX-qualified programs.

[29] "Indeed, study of the various provisions cited shows that when Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms.[16] There are numerous examples, in addition to the one set forth in n. 16, less related to labor disputes but showing congressional ability to deal with specific aspects of state plans.[17] The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.

"[16] See, for example, 26 U. S. C. § 3304 (a)(5), which from the start has provided:

"'(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

"'(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

"'(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

"'(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.'

"[17] See Employment Security Amendments of 1970, 84 Stat. 695; Emergency Unemployment Compensation Act of 1971, 85 Stat. 811; Emergency Unemployment Compensation Act of 1974, 88 Stat. 1869; Unemployment Compensation Amendments of 1976, 90 Stat. 2667." *Id.*, at 488–489, and nn. 16, 17.

[30] "A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything

firmed by the Court's subsequent interpretation of Title IV of the Act in *Batterton* v. *Francis,* 432 U. S. 416.[31] These cases demonstrate that Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria.[32] It is therefore appropriate to treat

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to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience. . . . They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental." 301 U. S., at 593–594.

[31] In *Batterton,* the Court was faced with the question of whether the eligibility criteria for certain unemployment benefits under Title IV of the Act (AFDC–UF) were to be set nationally by the Secretary of Health, Education, and Welfare or locally by each State. The Court found the presumption in favor of "cooperative federalism" and the free play of "legitimate local policies in determining eligibility" strong enough to overcome considerable "varian[t]" legislative history concerning a recent amendment to the statute. Thus, despite references in the congressional Reports accompanying the amendment to "a uniform" and "a Federal definition of unemployment," the Court concluded that Congress had not intended to replace the various state definitions of unemployment with a federal one, and it specifically left the States free to provide benefits to strikers. This result is the more persuasive in the present context because the *Batterton* Court, citing *Hodory,* commented that the federal restraints imposed on state unemployment programs by Title IX are "not so great"—and thus not as likely pre-emptive—as those imposed by Title IV. 432 U. S., at 419.

[32] The force of the legislative history discussed in *Hodory, Steward,* and *Batterton,* comes close to removing this case from the pre-emption setting altogether. In light of those decisions, the case may be viewed as presenting a potential conflict between two federal statutes—Title IX of the Social Security Act and the NLRA—rather than between federal and

New York's statute with the same deference that we have afforded analogous state laws of general applicability that protect interests "deeply rooted in local feeling and responsibility." With respect to such laws, we have stated "that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244.[33]

III

Pre-emption of state law is sometimes required by the terms of a federal statute. See, *e. g., Ray* v. *Atlantic Richfield Co.,* 435 U. S. 151, 173–179. This, of course, is not such a case. Even when there is no express pre-emption, any proper application of the doctrine must give effect to the intent of Congress. *Malone* v. *White Motor Corp.,* 435 U. S. 497, 504. In this case there is no evidence that the Congress that enacted the National Labor Relations Act in 1935 intended to deny the States the power to provide unemployment benefits for strikers.[34] Cf. *Hodory,* 431 U. S., at 482. Far from the compelling congressional direction on which pre-emption in this case would have to be predicated, the silence of Congress in 1935 actually supports the contrary inference that Congress intended to allow the States to make this policy determination for themselves.

New York was one of five States that had an unemployment insurance law before Congress passed the Social Security

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state regulatory statutes. But however the conflict is viewed, its ultimate resolution depends on an analysis of congressional intent.

[33] See also *Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656 (threats of violence); *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (violence); *Automobile Workers* v. *Russell,* 356 U. S. 634 (violence); *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (libel); *Farmer* v. *Carpenters,* 430 U. S. 290 (intentional infliction of mental distress).

[34] See *Grinnell Corp.,* 475 F. 2d, at 454–457; *Hawaiian Telephone Co.,* 405 F. Supp., at 285–286; *Dow Chemical Co.* v. *Taylor,* 57 F. R. D. 105, 108 (ED Mich. 1972).

and the Wagner Acts in the summer of 1935.[35] Although the New York law did not then assess taxes against employers on the basis of their individual experience, it did authorize the payment of benefits to strikers out of a general fund financed by assessments against all employers in the State. The junior Senator from New York, Robert Wagner, was a principal sponsor of both the National Labor Relations Act and the Social Security Act;[36] the two statutes were considered in Congress simultaneously and enacted into law within five weeks of one another; and the Senate Report on the Social Security bill, in the midst of discussing the States' freedom of choice with regard to their unemployment compensation laws, expressly referred to the New York statute as a qualifying example.[37] Even though that reference did not mention the subject of benefits for strikers, it is difficult to believe that

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[35] See generally *Steward,* 301 U. S., at 593–594.

[36] Wagner was also a prominent advocate of local freedom of choice with respect to unemployment benefits programs. In introducing the bill that became the Social Security Act to the Senate Committee on Finance, he stated:

"With growing recognition of the need for unemployment insurance, there has come considerable sentiment for the enactment of a single and uniform national system. Its proponents advance the argument, among others, that only in this way can a worker who migrates from New York to New Mexico be kept under the same law at all times. This, of course, is true. But there are an infinitely greater number of workers, and industries, that remain permanently within the boundaries of these two States, respectively, and that are permanently subjected to entirely different industrial conditions. European experience with unemployment insurance has demonstrated that every major attempt, except in Russia, has been successful and has been continued. But it has also shown that widely varying systems have been applied to divergent economic settings. Our own extent of territory is so great, and our enterprises so dissimilar in far-flung sections, that we should, at least for a time, experiment in 48 separate laboratories." Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 3 (1935).

[37] See S. Rep. No. 628, 74th Cong., 1st Sess., 13 (1935).

Senator Wagner [38] and his colleagues were unaware of such a controversial provision, particularly at a time when both unemployment and labor unrest were matters of vital national concern.

Difficulty becomes virtual impossibility when it is considered that the issue of public benefits for strikers became a matter of express congressional concern in 1935 during the hearings and debates on the Social Security Act.[39] As already noted, the scheme of the Social Security Act has always allowed the States great latitude in fashioning their own programs. From the beginning, however, the Act has contained a few specific requirements for federal approval. One of these provides that a State may not deny compensation to an otherwise qualified applicant because he had refused to accept work as a strikebreaker, or had refused to resign from a union as a condition of employment.[40] By contrast, Congress rejected the suggestions of certain advisory members of the Roosevelt administration as well as some representatives of citizens and business groups that the States be prohibited

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[38] Senator Wagner, in particular, had long taken an active interest and role in the design of social welfare and labor legislation in his home State of New York. Before leaving that State's legislature for the national one, for example, he had been the moving force behind such landmark statutes as New York's workmen's compensation law. See Webster's American Biographies 1081 (C. Van Doren & R. McHenry eds. 1974).

[39] This controversy, in fact, had troubled the National Government for at least two years preceding the passage of the Social Security and Wagner Acts. In July 1933, the Federal Emergency Relief Administration ruled that unemployed strikers would be eligible for relief benefits, a policy that was carried out amid considerable outcry from the press and the business community during the textile strike of September 1934. I. Bernstein, Turbulent Years: A History of the American Worker, 1933–1941, p. 307 (1970). During the same weeks as the newspapers carried stories about the strike, in fact, Senator Wagner was revising previously offered labor-relations proposals into a new bill that became the NLRA. *Id.*, at 323.

[40] This provision, 26 U. S. C. § 3304 (a)(5), is quoted in n. 29, *supra*.

from providing benefits to strikers.[41] The drafters of the Act apparently concluded that such proposals should be addressed to the individual state legislatures "without dictation from Washington." [42]

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[41] During the hearings on the Social Security Act, written submissions offered by both Edwin Witte, Director of the President's Committee on Economic Security, on behalf of that Committee's Advisory Council, and Abraham Epstein, representing the American Association for Social Security, a citizen's group devoted to promoting social security legislation, recommended withholding benefits from strikers during a strike. Hearings on S. 1130, *supra* n. 36, at 228, 472. An even stronger suggestion, which would have disqualified strikers even after the strike was over, was made by a spokesman for the National Association of Manufacturers.

It is also probative that just two weeks after the Social Security Act became law Congress, in its capacity as the legislature for the District of Columbia, passed an unemployment program for that locality which expressly precluded strikers from receiving benefits so long as a labor dispute was in "active progress." Act of Aug. 28, 1935, ch. 794, § 10 (a), 49 Stat. 950. That it included the restriction in the local Social Security Act, but not in the national one, suggests the strength of its commitment to free local choice. That it did so is also important evidence that it neither assumed nor intended that its passage of the NLRA seven weeks earlier would pre-empt the payment of benefits to strikers in any case.

Of these four antistriker proposals considered by Congress during 1935, it is interesting to note that three allowed former strikers to receive benefits once the strike was ended. In light of these provisions, it seems clear that Congress perceived the opposition to such benefits not simply as a reflection of the view that voluntary unemployment should never be compensated but also as a concern with the nonneutral impact of such benefits on labor disputes. Its refusal explicitly to go along with that opposition on the national level with respect to the Social Security Act is thus all the more relevant to its intent in passing the NLRA several weeks earlier.

[42] "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. Of the 5 States which have thus far enacted unemployment compensation laws, 2 require

Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments.[43]

Subsequent events confirm our conclusion that the congressional silence in 1935 was not evidence of an intent to pre-empt the States' power to make this policy choice. On several occasions since the 1930's Congress has expressly addressed the question of paying benefits to strikers, and especially the effect of such payments on federal labor policy.[44] On none of these occasions has it suggested that such

employee contributions, and 3 do not. Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States, being twice as great in some States as in others." S. Rep. No. 628, *supra* n. 37, at 13.

[43] The contemporaneous interpretation of Title IX by the Social Security Board, the administrative agency originally charged by Title IX of the Act with qualifying state statutes for federal funds, bears out this conclusion. Within a short time after the Act was passed, the Board approved the New York statute which provided benefits to strikers. The Labor Department has periodically followed suit since it took over authority in the area. 566 F. 2d 388, 393–394.

[44] Congress twice has considered and rejected amendments to existing laws that would have excluded strikers from receiving unemployment benefits. The House version of the Labor Management Relations Act of 1947 included a provision denying § 7 rights under the NLRA to any striking employee who accepted unemployment benefits from the State. H. R. 3020, § 2 (3), 80th Cong., 1st Sess. (1947). This provision, which responded to public criticism of Pennsylvania's payment of benefits to striking miners in 1946, was rejected by the Senate and deleted by the Conference Committee. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32–33 (1947). Although the deletion was not explained, the House Minority Report suggests a reason: "Under the Social Security Act, however, the determination [of eligibility] was advisedly left to the States." H. R. Rep. No. 245, 80th Cong., 1st Sess., 68 (1947).

In 1969, the Nixon Administration proposed an amendment to the

payments were already prohibited by an implicit federal rule of law. Nor, on any of these occasions has it been willing to supply the prohibition. The fact that the problem has been discussed so often supports the inference that Congress was well aware of the issue when the Wagner Act was passed in 1935, and that it chose, as it has done since, to leave this aspect of unemployment compensation eligibility to the States.

In all events, a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress. New York has not sought to regulate private conduct that is subject to the regulatory jurisdiction of the National Labor Relations Board. Nor, indeed, has it sought to regulate any private conduct of the parties to a labor dispute. Instead, it has sought to administer its unemployment compensation program in a manner

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Social Security Act that would have excluded strikers from unemployment compensation eligibility. Speaking in opposition to the proposal, Congressman Mills made the following comment:

"We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States.

"For example, there are two States, I recall, which will pay unemployment benefits when employees are on strike, but only two out of 50 make that decision. That is their privilege to do so. . . . I would not vote for it . . . , but if the State wants to do it we believe they ought to be given latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (1969).

Congress rejected the proposal.

On two other occasions, Congress has confronted the problem of providing purely federal unemployment and welfare benefits to persons involved in labor disputes. In both instances, it has drawn the eligibility criteria broadly enough to encompass strikers. 45 U. S. C. § 354 (a–2) (iii) (Railroad Unemployment Insurance Act); 7 U. S. C. § 2014 (c) (Food Stamp Act). It thereby rejected the argument that such elibility forces the Federal Government "to take sides in labor disputes." H. R. Rep. No. 91–1402, p. 11 (1970).

that it believes best effectuates the purposes of that scheme. In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN, concurring in the result.

I agree that the New York statute challenged in this case does not regulate or prohibit private conduct that is either arguably protected by § 7 or arguably prohibited by § 8 of the NLRA. Any claim that the New York law is pre-empted must therefore be based on the principles applied in *Teamsters* v. *Morton,* 377 U. S. 252 (1964), and *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976). Although I agree that the "statutory policy" articulated in those cases has some limits, I am not completely at ease with the distinctions employed by my Brother STEVENS in this case to define those limits.* However, since I agree with my Brother

*My Brother STEVENS correctly observes that our past pre-emption cases have dealt with statutes that regulate private conduct, rather than confer public benefits, but does not make clear why these different objectives justify different levels of scrutiny. Furthermore, although the distinction between laws of general applicability and laws directed particularly at labor-management relations perhaps has more significance in the application of the principles of *Machinists* than in the application of pre-emption principles where Congress has arguably protected or prohibited conduct, see Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1355–1356 (1972), I am not at all sure that the New York statute is a law of general applicability. See *id.,* at 1356; POWELL, J., dissenting, *post,* at 557, and n. 10. I find more substance in my Brother STEVENS' conclusion that the legislative history of the Social Security Act supports the argument that New York's law should be accorded a deference not unlike that accorded state

BLACKMUN's conclusion that the legislative histories of the NLRA and the Social Security Act reviewed in my Brother STEVENS' opinion provide sufficient evidence of congressional intent to decide this case without relying on those distinctions, I see no reason at this time either to embrace the distinctions or to deny that they may have relevance to pre-emption analysis in other cases.

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

I concur in the result. I agree with that portion of Part III of the plurality's opinion where the conclusion is reached that Congress has made its decision to permit a State to pay unemployment benefits to strikers. (Whether Congress has made that decision wisely is not for this Court to say.) Because I am not at all certain that the plurality's opinion is fully consistent with the principles recently enunciated in *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U. S. 132 (1976), I refrain from joining the opinion's pre-emption analysis.

The plurality recognizes, *ante*, at 531, that the economic weapons employed in this case are similar to those under consideration in *Machinists;* there, too, the Court concluded that Congress intended to leave the employment of such weapons to the free play of economic forces, and not subject to regulation by either the State or the NLRB. And the opinion also recognizes, *ante,* at 531–532, as the District Court and the Court of Appeals both found, that New York's statutory policy of paying unemployment benefits to strikers does indeed alter the economic balance between labor and management. See *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115, 123–124 (1974).

But the plurality now appears to hold, *ante,* at 532–533, that

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laws touching interests deeply rooted in local feeling and responsibility. Indeed, he may be correct in suggesting that this case is more a case of conflicting federal statutes than a pre-emption case, *ante,* at 539–540, n. 32.

the analysis developed in *Machinists* and in its predecessor case, *Teamsters* v. *Morton*, 377 U. S. 252 (1964), is inapplicable in the evaluation of the New York statute at issue here. The plurality seems to say that since the state statute does not purport to regulate private conduct in labor-management relations, but rather is intended to serve the State's general purpose of providing benefits to certain members of the public in order to insure employment security, the *Machinists-Morton* analysis is not controlling. Relying on decisions of this Court indicating that Congress has been sensitive to the need to allow the States leeway in fashioning unemployment programs (see *Batterton* v. *Francis*, 432 U. S. 416 (1977); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471 (1977); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937)), the opinion then finds it appropriate to treat the New York statute with the deference afforded general state laws that protect state interests "deeply rooted in local feeling and responsibility." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959). Accordingly, the opinion concludes that " 'in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power' " to establish unemployment compensation programs like that of New York, *ante*, at 540, quoting *Garmon*, 359 U. S., at 244.

This requirement that petitioners must demonstrate "compelling congressional direction" in order to establish pre-emption is not, I believe, consistent with the pre-emption principles laid down in *Machinists*. In that case, to repeat, the Court recognized that Congress had committed the use of economic self-help weapons to the free play of economic forces, and held that Wisconsin's attempt to regulate what the federal law had failed to curb denied one party a weapon Congress meant that party to have available to it. 427 U. S., at 150. I believe, however, that *Machinists* indicates that the States are *not* free, entirely and always, directly to enhance

the self-help capability of one of the parties to such a dispute so as to result in a significant shift in the balance of bargaining power struck by Congress. Where the exercise of state authority to curtail, prohibit, or enhance self-help " 'would frustrate effective implementation of the Act's processes,' " *id.*, at 148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969), I believe *Machinists* compels the conclusion that Congress intended to pre-empt such state activity, unless there is evidence of congressional intent to tolerate it.

The difference between *Machinists* and this case, it seems to me, is in the initial premise. In the present case, the plurality appears to be saying that there is no pre-emption unless "compelling congressional direction" indicates otherwise. The premise is therefore one of assumed priority on the state side. In *Machinists,* on the other hand, the Court said, I thought, that there *is* pre-emption unless there is evidence of congressional intent to tolerate the state practice. That premise, therefore, is one of assumed priority on the federal side. The distinction is not semantic.

Despite the distinction, however, either approach leads to the same result in the present case. The evidence recited in Part III of the plurality's opinion establishes that Congress has decided to tolerate any interference caused by an unemployment compensation statute such as New York's. But this fortuity should not obscure a difference in reasoning that could prove important in some other pre-emption case. Where evidence of congressional intent to tolerate a State's significant alteration of the balance of economic power is lacking, *Machinists* might still require a holding of pre-emption notwithstanding the lack of compelling congressional direction that the state statute be pre-empted.

I believe this conclusion to be applicable to a case where a State alters the balance struck by Congress by conferring a benefit on a broadly defined class of citizens rather than by

regulating more explicitly the conduct of parties to a labor-management dispute. The crucial inquiry is whether the exercise of state authority "frustrate[s] effective implementation of the Act's processes," not whether the State's purpose was to confer a benefit on a class of citizens. I therefore see no basis for determining the question "whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes," *Super Tire,* 416 U. S., at 124, other than in the very manner set out in *Machinists* in the evaluation of the more direct regulation of labor-management relations at issue in that case.

Nor do I agree that we should depart from the principles of *Machinists* on the ground that "our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity." *Ante,* at 533. The Court recognized in *Garmon,* 359 U. S., at 244, that it has not "mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations." See *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180, 193–195, and n. 24 (1978); *Farmer* v. *Carpenters,* 430 U. S. 290, 296–301 (1977). It is true, of course, that the Court has also recognized an exception to the *Garmon* principle and "allowed a State to enforce certain laws of general applicability even though aspects of the challenged conduct were arguably prohibited" where, for example, "the Court has upheld state-court jurisdiction over conduct that touches 'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' " *Sears,* 436 U. S., at 194–195, quoting *Garmon,* 359 U. S., at 244. But as the cases make clear, the Court has not extended this exception beyond a limited number of state interests that are at the core of the States' duties

and traditional concerns. See, *e. g., Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (1957) (violence); *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966) (libel); *Farmer* v. *Carpenters, supra* (intentional infliction of mental distress). I do not think the New York statute here at issue fits within the pre-emption exception carved out by those cases, and I therefore would not apply the requirement, found in those cases, that "compelling congressional direction" be established before pre-emption can be found.

In summary, in the adjudication of this case, I would not depart from the path marked out by the Court's decision in *Machinists.* Because, however, I believe the evidence justifies the conclusion that Congress has decided to permit New York's unemployment compensation law, notwithstanding its impact on the balance of bargaining power, I concur in the Court's judgment.

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

The Court's decision substantially alters, in the State of New York, the balance of advantage between management and labor prescribed by the National Labor Relations Act (NLRA). It sustains a New York law that requires the employer, after a specified time, to pay striking employees as much as 50% of their normal wages. In so holding, the Court substantially rewrites the principles of pre-emption that have been developed to protect the free collective bargaining which is the essence of federal labor law.

I

The Policy of Free Collective Bargaining

Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA. Of the numerous actions that labor or management may take during collective bargaining

to bring economic pressure to bear in support of their respective demands, the NLRA protects or prohibits only some. The availability and usefulness of many others depend entirely upon the relative economic strength of the parties.[1]

What Congress left unregulated is as important as the regulations that it imposed. It sought to leave labor and management essentially free to bargain for an agreement to govern their relationship.[2] Congress also intended, by its limited regulation, to establish a fair balance of bargaining power. That balance, once established, obviates the need for substantive regulation of the fairness of collective-bargaining agreements: whatever agreement emerges from bargaining between fairly matched parties is acceptable.[3] Thus, the NLRA's regulations not only are limited in scope but also must be viewed as carefully chosen to create the congressionally desired balance in the bargaining relationship. As the Court observed in *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 286 (1971), the primary impetus for enactment of "a comprehensive national labor law" was the need to stabilize labor relations by "equitably and delicately structuring the balance of power among competing forces so as to further the common good." [4]

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[1] See *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, 134–135, 140–148 (1976).

[2] The tension between the value of freedom of contract and the legal ordering of the collective-bargaining relationship is discussed in H. Wellington, Labor and the Legal Process, ch. 2 (1968).

[3] See NLRA § 8 (d), 29 U. S. C. § 158 (d); *Porter Co.* v. *NLRB,* 397 U. S. 99, 102–104 (1970); *Teamsters* v. *Oliver,* 358 U. S. 283, 295–296 (1959); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45 (1937).

[4] "An appreciation of the true character of the national labor policy expressed in the [NLRA] indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same

Because the NLRA's limits represent a clear congressional choice with respect to the freedom and fairness of the bargaining process, the Court has been alert to prevent interference with collective bargaining that is unwarranted by the NLRA. For example, in *NLRB* v. *Insurance Agents,* 361 U. S. 477 (1960), the Court rejected the conclusion of the National Labor Relations Board (Board) that certain on-the-job conduct undertaken by employees to support their bargaining demands was inconsistent with the union's duty to bargain in good faith. The Court, noting that the NLRA did not prohibit such actions, *id.,* at 498, concluded that allowing the Board to regulate the availability of such economic weapons would intrude on the area deliberately left unregulated by Congress.[5]

The Court employed the same analysis in reversing the Board's determination that the NLRA was violated by a lockout conducted to bring economic pressure to bear in support of the employer's bargaining position. *American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 308 (1965). It rejected the Board's suggestion that, in enforcing the employer's duty to bargain in good faith, the Board could deny to the employer the use of certain economic weapons not otherwise proscribed by § 8.

> "While a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management, it sought

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interests." Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972).

[5] The Court stated:

"[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the [Board] to act at large in equalizing disparities of bargaining power between employer and union." 361 U. S., at 490.

> to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers. . . . Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. [The NLRA does] not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." 380 U. S., at 316–317.

The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters,* 346 U. S. 485, 500 (1953). In *Teamsters* v. *Morton,* 377 U. S. 252, 259–260 (1964), the Court held that a state law allowing damages for peaceful secondary picketing was pre-empted because "the inevitable result [of its application] would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.,* at 259–260. The Court followed the same approach in *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976), where it held pre-empted a state law under which the union had been enjoined from a concerted refusal to work overtime. Its prior decisions, the Court concluded, indicated that such activities, "whether of employer or employees, were not to be regulable by States any

more than by the NLRB, for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.'" *Id.*, at 149, quoting *NLRB* v. *Insurance Agents, supra,* at 498.

II

Free Collective Bargaining and the New York Statute

The plurality's opinion, after acknowledging that the payment of benefits financed ultimately by the employer was "a substantial factor" in the employees' decision to strike and remain on strike, *ante,* at 525, further concedes—as it must—that the New York law "has altered the economic balance" between management and labor. *Ante,* at 532. During the strike out of which the present controversy arose, the petitioners' employees collected more than $49 million in unemployment compensation. All but a small fraction of these benefits were paid from the petitioners' accounts in the New York unemployment insurance fund; because of these payments, the petitioners' tax rates were increased in subsequent periods.[6] The challenged provisions of the New York statute thus had a "twofold impact" on the bargaining process (*ante,*

[6] Petitioner TELCO's employees collected $43 million in compensation. Of this amount, approximately $40 million was paid from TELCO's account in the unemployment insurance fund. 566 F. 2d 388, 390 (CA2 1977); 434 F. Supp. 810, 812–813 (SDNY 1977). The proportion of the $6 million in compensation paid to employees of the other petitioners from the accounts of their employers does not appear in the record. But the overall element of nonemployer financing of compensation is so small that the Court of Appeals simply stated that "New York's unemployment insurance system is financed entirely by employer contributions, so the cost of making these payments was borne by the struck employers." 566 F. 2d, at 391.

The petitioners' own tax rates are tied directly to the payments made to their employees by the so-called "experience rating system." Under that system, an employer's rate in any given period varies from the standard of 2.7% primarily according to the amount of benefits paid to its employees during prior periods. N. Y. Lab. Law § 581 (McKinney 1977 and Supp. 1978–1979).

at 526 n. 5, 531–532): they substantially cushioned the economic impact of the lengthy strike on the striking employees, and also made the strike more expensive for the employers.[7]

Nothing in the NLRA or its legislative history indicates that Congress intended unemployment compensation for strikers, let alone employer financing of such compensation, to be part of the legal structure of collective bargaining.[8] The New York law therefore alters significantly the bargaining balance prescribed by Congress in that law. The decision upholding it cannot be squared with *Morton* and *Machinists,*

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[7] The impact of unemployment compensation for strikers on the collective-bargaining process could be reduced significantly if such payments were funded from general tax revenues. The disruptive effect also would be lessened, though not as markedly, if such payments were funded by the unemployment compensation tax but were not taken into account in calculating experience ratings of individual employers. New York has eschewed both of these middle paths, however, in favor of a system in which such payments are financed directly by the struck employer.

New York is not alone in the course it has chosen. Although New York and Rhode Island are the only States that provide unemployment compensation for all covered employees idled by a strike, a number of other States pay unemployment compensation to strikers under varying conditions. See *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449, 457, and n. 7 (CA1), cert. denied, 414 U. S. 858 (1973); *Albuquerque-Phoenix Exp., Inc.* v. *Employment Security Comm'n,* 88 N. M. 596, 600–601, 544 P. 2d 1161, 1165–1166 (1975), appeal dismissed *sub nom. Kimbell, Inc.* v. *Employment Security Comm'n,* 429 U. S. 804 (1976); U. S. Dept. of Labor, Comparison of State Unemployment Insurance Laws 4–41 (1972). All of those States appear to fund such payments from the unemployment compensation taxes paid by employers and calculated under an experience rating system. Staff Study of House Committee on Ways and Means, Information Relating to Federal-State Unemployment Compensation Laws 2–3 (1974).

[8] At the time that Congress enacted the NLRA, unemployment compensation laws had been enacted in only five States, and only in Wisconsin had the State's program gone into operation, a year earlier. S. Rep. No. 628, 74th Cong., 1st Sess., 11 (1935). Wisconsin and three of the other States denied unemployment compensation to strikers. The New York law, with its limited provision for compensation to striking employees, would not pay any benefits for another two years. It is not at all remark-

where far less intrusive state statutes were invalidated because they "upset the balance of power between labor and management expressed in our national labor policy." *Morton,* 377 U. S., at 260.[9]

The plurality's opinion seeks to avoid this conclusion by ignoring the fact that the petitioners are not challenging the entire New York unemployment compensation law but only that portion of it that provides for benefits for striking employees. Although the plurality characterizes the State's unemployment compensation law as "a law of general applicability" that "implement[s] a broad state policy that does not primarily concern labor-management relations," *ante,* at 533, 534, this description bears no relation to reality when applied to the challenged provisions of the law. Those provisions are "of general applicability" only if that term means—contrary to what the plurality itself says—generally applicable only to labor-management relations. It would be difficult to think of a law more specifically focused on labor-management relations than one that compels an employer to finance a strike against itself.[10]

Even if the challenged portion of the New York statute properly could be viewed as part of a law of "general applica-

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able, therefore, that Congress overlooked the subject of unemployment compensation for strikers under these novel state programs during its consideration of the NLRA. Nor did Congress discuss the subject during its deliberations on the Social Security Act, which deals directly with state unemployment compensation programs. See Part III, *infra.*

[9] The State's adjustment of the relative economic strength of the parties to the collective-bargaining relationship is equally effective, and equally disruptive of the balance established by the NLRA, whether it takes the form of restricting or supporting a party's activities in furtherance of its bargaining demands.

[10] This assessment and readjustment of the collective-bargaining relationship by the state legislature is especially obvious in the challenged New York statute, which contains a special eligibility rule requiring strikers to wait seven weeks longer than other unemployed workers before collecting compensation. See *ante,* at 523 n. 3.

bility," this generality of the law would have little or nothing to do with whether it is pre-empted by the NLRA. A state law with purposes and applications beyond the area of industrial relations nonetheless may impinge upon congressional policy when it is applied to the collective-bargaining relationship.[11] The Court has recognized accordingly that pre-emption must turn not on the generality of purpose or applicability of a state law but on the effect of that law when applied in the context of labor-management relations. The "crucial inquiry regarding pre-emption" is whether the application of the state law in question " 'would frustrate effective implementation of the [NLRA's] processes.' " *Machinists,* 427 U. S., at 147–148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369, 380 (1969). As the Court stated in *Farmer* v. *Carpenters,* 430 U. S. 290, 300 (1977):

> "[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption. '[I]t [has not] mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.' *Garmon,* 359 U. S., at 244. Instead, the cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." (Footnote omitted.)

Accord, *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S. 180, 193, and n. 22 (1978). It is self-evident that the "potential [of the New York law] for interference" (*Morton, supra,* at

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[11] In reviewing the history of the analogous decisions on the pre-emption of state-court jurisdiction, the Court has observed that "some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate labor relations, which were pre-empted," but that this approach had been unsatisfactory. *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 290–291 (1971).

260) with the federally protected economic balance between management and labor is direct and substantial.[12]

The Court has identified several categories of state laws whose application is unlikely to interfere with federal regulatory policy under the NLRA. *Farmer* v. *Carpenters, supra,* at 296–297. Mr. Justice Frankfurter described one of these categories in broad terms in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 243–244 (1959):

> "[States retain authority to regulate] where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

The plurality, attempting to draw support from the foregoing generalization, mistakenly treats New York's requirement that employers pay benefits to striking employees as state action "deeply rooted in local feeling and responsibility." [13] But

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[12] The District Court found that the availability of unemployment compensation had a significant effect on the willingness of the petitioners' employees to remain on strike.

"Notwithstanding the State's adamant position to the contrary, I regard it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. This being a truism, one therefore would expect to find confirmation of it everywhere. One does." 434 F. Supp., at 813–814.

The Court of Appeals accepted this finding by the District Court. 566 F. 2d, at 390. The plurality's opinion, as already noted, *supra,* at 555–556, also accepts without question the District Court's findings on this point.

[13] The plurality supports this approach to the New York law by reference to the Social Security Act, which commits to the States broad control over eligibility requirements for unemployment compensation. This aspect of the Social Security Act, the plurality concludes, makes it

"appropriate to treat New York's statute with the same deference that we have afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.' With respect

the broad language from *Garmon* has been applied only to a narrow class of cases. In *Garmon,* Mr. Justice Frankfurter identified, as typical of the kind of state law that would not be pre-empted, "the traditional law of torts." *Id.,* at 247; cf. *id.,* at 244 n. 2. The Court has adhered to this understanding of the "local feeling and responsibility" exception formulated in *Garmon.* See *Machinists,* 427 U. S., at 136, and n. 2 ("Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States"); *id.,* at 151 n. 13; *Farmer* v. *Carpenters, supra,* at 296–300; cf. *Sears, supra,* at 194–197. The provisions of the New York law at issue here have nothing in common with the state laws protecting against personal torts or violence to property that have defined the "local feeling and responsibility" exception to pre-emption.

III

The Lack of Evidence of Congressional Intent to Alter the Policy of the NLRA

The challenged provisions of the New York law cannot, consistently with prior decisions of this Court, be brought within the "local feeling and responsibility" exception to the pre-emption doctrine. The principles of *Morton* and *Machinists* therefore require pre-emption in this case unless in some other law Congress has modified the policy of the NLRA. The plurality, acknowledging the need to look beyond the NLRA to support its conclusion, relies primarily on the Social Security Act. In that Act, adopted only five weeks after the passage of the NLRA, it finds an indication that Congress did intend that the States be free to make unemployment compensation payments part of the collective-bargaining relation-

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to such laws, we have stated 'that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act,' *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 244." *Ante,* at 539–540.

ship structured by the NLRA. But it is extremely unlikely that little over a month after enacting a detailed and carefully designed statute to structure industrial relations, the Congress would alter so dramatically the balance struck in that law. It would be even more remarkable if such a change were made, as the plurality suggests, without any explicit statutory expression, and indeed absent any congressional discussion whatever of the problem.

The Social Security Act, as the plurality acknowledges, *ante,* at 540, is silent on the question, neither authorizing the States to provide unemployment compensation for strikers nor prohibiting the States from making such aid available. Congress did explicitly forbid the States to condition unemployment compensation benefits upon acceptance of work as strikebreakers, or membership in a company union, or nonmembership in any labor union,[14] thereby indicating an intention to prohibit interference with the collective-bargaining balance struck in the NLRA.

Nor does the legislative history of the Social Security Act reflect any congressional intention to allow unemployment compensation for strikers.[15] Senator Wagner, a sponsor of

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[14] To qualify under federal law, a State's unemployment compensation program must, among other things, provide that:

"(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

"(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

. . . . . .

"(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." Social Security Act § 903 (a)(5), 49 Stat. 640, 26 U. S. C. § 3304 (a)(5).

[15] The Court of Appeals for the First Circuit, after reviewing the legislative history, also concluded that "unambiguous Congressional intent is lacking" regarding the authorization of state unemployment compensation for striking employees. *Grinnell Corp.* v. *Hackett,* 475 F. 2d, at 457. As

the proposed legislation, made no reference to any such feature of the Social Security Act in his remarks to the Senate Finance Committee. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1–30 (1935).[16] Although the suggestion that the Act should contain an explicit prohibition of unemployment compensation to strikers was included in several written submissions to the Senate Committee, there is no evidence whatever that the Committee considered the suggestion.[17] Indeed, it is clear that the prob-

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one commentator has concluded, "the absence of legislation and the absence of any discussion in the committee reports relating to this legislation are indicative [that] Congress did not anticipate in detail the problems which would arise when workers claimed benefits when their own unemployment was related either directly or indirectly to a labor dispute." Haggart, Unemployment Compensation During Labor Disputes, 37 Neb. L. Rev. 668, 674 (1958).

[16] The plurality also finds support for its holding by noting that Senator Wagner, a principal sponsor of both the NLRA and the Social Security Act, was familiar with New York's unemployment compensation law, and that the Senate Report on the Social Security bill—in the portion thereof discussing the States' freedom of choice with respect to such laws—expressly mentioned the New York statute as an example. The plurality's opinion then reasons:

"Even though that reference [in the Senate Report] did not mention the subject of benefits for strikers, it is difficult to believe that Senator Wagner and his colleagues were unaware of such a controversial provision . . . ." *Ante,* at 541–542.

I agree with the plurality that any provision for unemployment compensation for strikers would have been controversial. Indeed, it strains credulity to think that the entire Congress and the scores of witnesses who testified with respect to this legislation ignored so controversial an issue. On a question of this importance, especially in its relation to the NLRA, there would have been hearings, testimony, lobbying, and debate. I am unwilling to assume that Senator Wagner was "aware of [this] controversial provision" and elected to avoid, by remaining silent, the normal democratic processes of legislation. In any event, the unexpressed awareness of Senator Wagner hardly can be imputed to other Members of the Congress.

[17] Contrary to the implication in the plurality's opinion, *ante,* at 543 n. 41, Mr. Witte, the Executive Director of the President's Committee on

lem never received congressional attention, for the subject is mentioned nowhere in the Committee Reports or the congressional debates on the Social Security Act. H. R. Rep. No. 615, 74th Cong., 1st Sess. (1935); S. Rep. No. 628, 74th Cong., 1st Sess. (1935); 79 Cong. Rec. 5467–5478, 5528–5563, 5579–5606, 5678–5715, 5768, 5771–5817, 5856–5909, 5948–5994, 6037–6068, 9191, 9267–9273, 9282–9297, 9351–9362, 9366, 9418–9438, 9440, 9510–9543, 9625–9650, 11320–11343 (1935).[18]

Economic Security, did not recommend withholding benefits from strikers during a strike. The issue of unemployment compensation for strikers never arose during Mr. Witte's testimony. The plurality's reference is to a Report of the Advisory Council to the Committee on Economic Security, a group of 23 "laymen" assembled to "give practical advice to the committee [on Economic Security]." Hearings on S. 1130, at 225. See H. R. Rep. No. 615, 74th Cong., 1st Sess., App. (1935). Mr. Witte did not appear before the Senate Committee to support the report of the Advisory Council, and placed it in the record only at the request of the Senate Committee. The Report of the Committee on Economic Security did not refer to or comment on the subject of compensation for strikers, except perhaps indirectly in its statement that "[t]o serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed." Report of the President's Committee on Economic Security 21 (1935).

Similarly, the question of compensation for striking workers did not arise during the examination of the other two witnesses whose written submissions included suggestions that the Social Security Act should contain an explicit disqualification of strikers. See Hearings on S. 1130, *supra,* at 458–478, 919–959. The Court should be "extremely hesitant to presume general congressional awareness" of the issue of unemployment compensation for strikers "based only upon a few isolated statements in the thousands of pages of legislative documents." *SEC* v. *Sloan,* 436 U. S. 103, 121 (1978).

[18] Subsequent congressional inaction does not demonstrate an understanding that the Social Security Act modified the NLRA to allow payment of unemployment compensation to strikers. See *ante,* at 544–545, and n. 44. As the plurality acknowledges, *ibid.,* the 1947 Conference Committee gave no reason for its rejection of an amendment to the NLRA that would have excluded strikers from the statute's coverage if they collected unemployment compensation. The Committee may have decided that the amend-

Faced with the absence of any specific indications in the Social Security Act or its legislative history that Congress intended for the States to have the authority to upset the NLRA's collective-bargaining relationship by paying compensation to strikers, the plurality relies on the general policy embodied in the Social Security Act of leaving to the States the determination of eligibility requirements for compensation. *Ante,* at 537–538, 542, and n. 42.[19] That policy sup-

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ment was redundant, and so not worth the controversy it might provoke if included in the final bill sent to Congress: the House Report approving the amendment had stated that it was recommended to halt the "perversion" of the purposes of social security legislation. H. R. Rep. No. 245, 80th Cong., 1st Sess., 12 (1947). The comments in 1969 of a single Congressman, delivered long after the original passage of the Social Security Act, are of no aid in determining congressional intent on this matter.

[19] The plurality also cites the Railroad Unemployment Insurance Act (RUIA) and the Food Stamp Act, as evidence that Congress intended to allow the States to require employers to finance unemployment compensation to their striking employees. See *ante,* at 544–545, n. 44. These statutes are simply irrelevant to the question raised by this case. The RUIA, together with the Railway Labor Act, is part of a special system of labor-management relations separate and distinct from the general structure established in the NLRA. The availability of unemployment compensation for strikers within the jurisdiction of the RUIA is conditioned upon their compliance with restrictions on the right to strike that are much more onerous than those imposed by the NLRA. See *Detroit & Toledo Shore Line R. Co.* v. *Transportation Union,* 396 U. S. 142, 148–153 (1969); *Railway & Steamship Clerks* v. *Railroad Retirement Bd.,* 99 U. S. App. D. C. 217, 222–223, 239 F. 2d 37, 42–43 (1956).

Unlike unemployment compensation, which is linked only to an interruption in the employee's income, food stamps and other general welfare programs are available only when income *and* assets have become insufficient to supply necessities. See, *e. g.,* 7 U. S. C. § 2014 (a) (1976 ed., Supp. III) ("Participation in the food stamp program shall be limited to those households whose incomes and other financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet"). Such welfare programs are funded out of general revenues rather than by taxes levied on the employers of those using the stamps. Moreover, when 7 U. S. C. § 2014 (c) was amended in 1977, the Congress

ports the narrow interpretation of the few conditions on eligibility imposed on the States by the Social Security Act itself. *Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471, 475 n. 3, 482–489 (1977). But there is no indication in that Act or its legislative history that Congress thought that this general policy relieved the States of constraints imposed by other federal statutes such as the NLRA.[20] In particular, it would be difficult indeed to infer from this feature of the Act that Congress intended to leave the States free to require employers to fund unemployment compensation for their striking employees without regard to the effect on the bargaining relationship structured by the NLRA.

The plurality holds, nonetheless, that New York may require employers to pay unemployment compensation to strikers amounting to some 50% of their average wage. Nothing in the plurality's opinion, moreover, limits such compensation to 50% of average wages, for the plurality indicates that the Social Security Act gives the States complete control over this aspect of their unemployment compensation programs. Accordingly, New York and other States are free not only to increase compensation to 100% but also to eliminate the waiting period now imposed on striking employees.[21] The plurality's

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deleted the proviso that "[r]efusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment." See 7 U. S. C. § 2014 (c) (1976 ed., Supp. III).

[20] Cf. *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235, 239 (1967) (eligibility requirement in the State's unemployment compensation law, interfering with NLRA's policy of protection for employees filing unfair labor practice charges with the Board, held pre-empted).

[21] The Solicitor General would escape this implication of the plurality's construction of the Social Security Act by concluding that at some point between 50% and 100% of weekly wages, or between an 8-week waiting period and none at all, the policy of the Social Security Act would give way to that of the NLRA.

"It is unnecessary to determine in this case the ultimate scope of the states' freedom to make payments to strikers that may intrude on or dis-

sweeping view of the Act thus lays open the way for any State to undermine completely the collective-bargaining process within its borders.

A much more cautious approach to implied amendments of the NLRA is required if the Court is to give proper effect to the legislative judgments of the Congress. Having once resolved the balance to be struck in the collective-bargaining relationship, and having embodied that balance in the NLRA, Congress should not be expected by the Court to reaffirm the balance explicitly each time it later enacts legislation that may touch in some way on the collective-bargaining relationship. Absent explicit modification of the NLRA, or clear inconsistency between the terms of the NLRA and a subsequent statute, the Court should assume that Congress intended to leave the NLRA unaltered.[22] This assumption is especially

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rupt the collective bargaining process. . . . For example, a statute requiring an employer to pay its employees—through the state unemployment compensation system—100 percent of wages from the beginning of a strike to the end would appear to be so far beyond the focus of the Social Security Act and so destructive of the principles of the NLRA as to be beyond the contemplation of Congress in permitting some freedom of choice to the states." Brief for United States as *Amicus Curiae* 25 n. 25.

But the Solicitor General is no more successful in identifying the source of this limitation on the modification of the NLRA by the Social Security Act than is the plurality in identifying the source of the modification itself. The plurality refrains from compounding insupportable inferences, apparently accepting instead the open-ended implications of its conclusion that New York is free to pay such unemployment benefits to strikers as it desires.

[22] See *Malone* v. *White Motor Corp.*, 435 U. S. 497, 515–516 (1978) (STEWART, J., dissenting) ("I do not believe, however, that inferences drawn largely from what Congress did *not* do in enacting the Disclosure Act are sufficient to override the fundamental policy of the national labor laws to leave undisturbed 'the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving . . . .' *Teamsters* v. *Oliver*, 358 U. S. 283, 296"). This Court has often stated that implied repeals and modifications of statutes by subsequent congres-

appropriate in considering the intent of Congress when it enacted the Social Security Act just five weeks after completing its deliberations on the NLRA.

IV

The effect of the New York statute is to require an employer to pay a substantial portion of the wages of employees who are performing no services in return because they have voluntarily gone on strike. This distorts the core policy of the NLRA—the protection of free collective bargaining. Whether that national policy should be subject to such substantial alteration by any state legislature is a decision that the Congress should make after the plenary consideration and public debate that customarily accompany major legislation. The financing of striking employees by employers under unemployment compensation systems such as that of New York has never received any such consideration by Congress. The Court today, finding nothing in any statute, congressional committee report, or debate that indicates any intention to allow States to alter the balance of collective bargaining in this major way, rests its decision on inferences drawn from only the most fragmentary evidence.

I would hold, as it seems to me our prior decisions compel, that the New York statute contravenes federal law. It would then be open to the elected representatives of the people in Congress to address this issue in the way that our system contemplates.

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sional enactments are justified only when the two statutes are otherwise irreconcilable. *Morton* v. *Mancari,* 417 U. S. 535, 550 (1974); *United States* v. *Welden,* 377 U. S. 95, 103 n. 12 (1964); *United States* v. *Borden Co.,* 308 U. S. 188, 198–199 (1939); cf. *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 758 (1961) (a specific statute controls over a general one without regard to priority of enactment).

NEW YORK CITY TRANSIT AUTHORITY ET AL. *v.* BEAZER ET AL.

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

No. 77-1427. Argued December 6, 1978—Decided March 21, 1979

Petitioner, New York City Transit Authority (TA), which, in operating the subway system and certain bus lines in New York City, employs about 47,000 persons, of whom many are employed in positions that involve danger to themselves or to the public, enforces a general policy against employing persons who use narcotic drugs. TA interprets its drug regulation to encompass current users of methadone, including those receiving methadone maintenance treatment for curing heroin addiction. Respondents, two former employees of TA who were dismissed while they were receiving methadone treatment, and two persons who were refused employment because they were receiving methadone treatment, brought a class action, alleging, *inter alia*, that TA's blanket exclusion of all former heroin addicts receiving methadone treatments was illegal under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The District Court found that TA's blanket methadone policy violates the Equal Protection Clause, and granted injunctive relief which, however, authorized TA to exclude methadone users from specific categories of safety-sensitive positions and also to condition eligibility on satisfactory performance in a methadone program for at least a year. Subsequently, the District Court also held that TA's drug policy violates Title VII because even though the policy was not adopted with a discriminatory purpose, it nevertheless was not related to any of TA's business needs. The Court of Appeals affirmed the District Court's constitutional holding without reaching the statutory question. *Held:*

1. An amendment to the Rehabilitation Act of 1973 after certiorari was granted, even if construed to proscribe TA's enforcement of a general rule denying employment to methadone users, does not render the case moot, since respondents' claims arose even before that Act itself was passed, and they have been awarded monetary relief. More importantly, however this Court might construe that Act, the concerns that prompted the grant of certiorari—the lower courts' departure from the procedure normally followed in addressing statutory and constitutional questions in the same case, and the concern that those courts

erroneously decided the merits of such questions—would still merit this Court's attention. Pp. 580–581.

2. The statistical evidence on which respondents and the District Court relied does not support the conclusion that TA's regulation prohibiting the use of narcotics, or its interpretation of that regulation to encompass users of methadone, violated Title VII. Pp. 583–587.

(a) The statistic that 81% of the employees referred to TA's medical director for suspected violations of its narcotics rule were either black or Hispanic indicates nothing about the racial composition of the employees suspected of using methadone, and respondents have only challenged the rule to the extent that it is construed to apply to methadone users. Nor does the record provide any information about the number of black, Hispanic, or white persons who were dismissed for using methadone. Pp. 584–585.

(b) The statistic that about 63% of the persons in New York City receiving methadone maintenance in *public* programs are black or Hispanic does not indicate how many of these persons ever worked or sought to work for TA; tells nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year, the only class improperly excluded by TA's policy under the District Court's analysis; and affords no data on the 14,000 methadone users in *private* programs, leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City. Pp. 585–586.

(c) Even if respondents' statistical showing is considered to be sufficient to establish a prima facie case of discrimination, it is rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is "job related." The District Court's finding that the rule was not motivated by racial animus forecloses any claim that it was merely a pretext for intentional discrimination. P. 587.

3. TA's blanket exclusion of persons who regularly use narcotic drugs, including methadone, does not violate the Equal Protection Clause for failing to include more precise special rules for methadone users who have progressed satisfactorily with their treatment for one year and who, when examined individually, satisfy TA's employment criteria for nonsensitive jobs. Pp. 587–594.

(a) An employment policy such as TA's that postpones eligibility for employment until the methadone treatment has been completed, rather than accepting an intermediate point on an uncertain line—such as one year of treatment—is rational and is neither unprincipled nor

invidious in the sense that it implies disrespect for the excluded subclass. Pp. 590–592.

(b) Even assuming that TA's rule is broader than necessary to exclude those methadone users who are not actually qualified to work for TA, and that it is probably unwise for a large employer like TA to rely on a general rule instead of individualized considerations of every job applicant, nevertheless under the circumstances of this case such assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause. Pp. 592–593.

558 F. 2d 97, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 594. BRENNAN, J., filed a dissenting statement, *post*, p. 597. WHITE, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 597.

Joan Offner argued the cause for petitioners. With her on the briefs were *Alphonse E. D'Ambrose* and *Helen R. Cassidy*.

Deborah M. Greenberg argued the cause for respondents. With her on the brief were *Eric D. Balber, Michael Meltsner,* and *Mark C. Morril.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

The New York City Transit Authority refuses to employ persons who use methadone. The District Court found that this policy violates the Equal Protection Clause of the Fourteenth Amendment. In a subsequent opinion, the court also held that the policy violates Title VII of the Civil Rights Act of 1964. The Court of Appeals affirmed without reaching the statutory question. The departure by those courts from the procedure normally followed in addressing statutory and con-

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**W. Stell Huie* and *David E. Fox* filed a brief for the American Public Transit Assn. as *amicus curiae* urging reversal.

Robert B. Stites filed a brief for the National Association of State Alcohol and Drug Abuse Directors as *amicus curiae* urging affirmance.

Stuart P. Herman filed a brief for the Western Law Center for the Handicapped as *amicus curiae*.

stitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously, led us to grant certiorari.[1] 438 U. S. 904. We now reverse.

The Transit Authority (TA) operates the subway system and certain bus lines in New York City. It employs about 47,000 persons, of whom many—perhaps most—are employed in positions that involve danger to themselves or to the public. For example, some 12,300 are subway motormen, towermen, conductors, or bus operators. The District Court found that these jobs are attended by unusual hazards and must be performed by "persons of maximum alertness and competence." 399 F. Supp. 1032, 1052 (SDNY 1975). Certain other jobs, such as operating cranes and handling high-voltage equipment, are also considered "critical" or "safety sensitive," while still others, though classified as "noncritical," have a potentially important impact on the overall operation of the transportation system.[2]

TA enforces a general policy against employing persons

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[1] This Court's Rule 19 provides:

"Considerations governing review on certiorari

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

. . . . . .

"(b) Where a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

[2] Thus, about 13,400 employees are involved in the maintenance of subway cars, buses, track, tunnels, and structures. Another 5,600 work in subway stations, and over 2,000 are engaged in office tasks that include the handling of large sums of money. TA hires about 3,000 new employees each year.

who use narcotic drugs. The policy is reflected in Rule 11 (b) of TA's Rules and Regulations.

> "Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System."

Methadone is regarded as a narcotic within the meaning of Rule 11 (b). No written permission has ever been given by TA's medical director for the employment of a person using methadone.[3]

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[3] By its terms, Rule 11 (b) does not apply to persons who formerly used methadone or any other drug, and the District Court did not find that TA had any general policy covering former users. On the contrary, the court found that "[t]he situation is not entirely clear with respect to the policy of the TA regarding persons who have successfully concluded participation in a methadone program." 399 F. Supp., at 1036.

Although it did not settle the question of what policy TA enforces in this respect, the District Court included former users in the plaintiff class. It then afforded them relief from any blanket exclusionary policy that TA *might* enforce, although, again, the supporting factual findings were admittedly "not [based on] a great deal" of evidence. *Id.*, at 1051.

TA contends that the meager evidence received at trial on the "former users" issue was insufficient to support either the class or relief determinations made with respect to those persons. We go further. As far as we are aware there was *no* evidence offered at trial, and certainly none relied upon by the District Court, that TA actually refused employment to any former user entitled to relief under the injunction ordered by that court. (As we point out in n. 12, *infra*, the one named plaintiff, Frasier, who was a former user when the complaint was filed was clearly a *current* user at the time he first applied for a job with TA and may well have been properly perceived as a current user when he next applied, notwithstanding his assertion of successful completion during the intervening three weeks. In any case, he had not completed a full year of methadone maintenance and could therefore be excluded under the District Court's injunction.)

It follows that neither the findings of fact, nor the record evidence, squarely presents any issue with respect to former users that must be

The District Court found that methadone is a synthetic narcotic and a central nervous system depressant. If injected into the bloodstream with a needle, it produces essentially the same effects as heroin.[4] Methadone has been used legitimately in at least three ways—as a pain killer, in "detoxification units" of hospitals as an immediate means of taking addicts off of heroin,[5] and in long-range "methadone maintenance programs" as part of an intended cure for heroin addiction. See 21 CFR § 310.304 (b) (1978). In such programs the methadone is taken orally in regular doses for a prolonged period. As so administered, it does not produce euphoria or any pleasurable effects associated with heroin; on the contrary, it prevents users from experiencing those effects

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resolved in order to dispose of this litigation. And, of course, it is those findings and that evidence, rather than statements of the parties on appeal and even offhand and clearly erroneous characterizations of the findings and evidence by the Court of Appeals, see opinion of MR. JUSTICE POWELL, *post*, at 594–595, that determine the issues properly before this Court. A policy excluding all former users would be harder to justify than a policy applicable only to persons currently receiving treatment. A court should not reach out to express an opinion on the constitutionality of such a policy unless necessary to adjudicate a concrete dispute between adverse litigants. We shall therefore confine our consideration to the legality of TA's enforcement of its Rule 11 (b) against *current* users of methadone.

[4] "Heroin is a narcotic which is generally injected into the bloodstream by a needle. It is a central nervous system depressant. The usual effect is to create a 'high'—euphoria, drowsiness—for about thirty minutes, which then tapers off over a period of about three or four hours. At the end of this time the heroin user experiences sickness and discomfort known as 'withdrawal symptoms.' There is intense craving for another shot of heroin, after which the cycle starts over again. A typical addict will inject heroin several times a day." 399 F. Supp., at 1038.

[5] The District Court found that detoxification is accomplished "by switching a heroin addict to methadone and gradually reducing the doses of methadone to zero over a period of about three weeks. The patient thus detoxified is drug free. Moreover, it is hoped that the program of gradually reduced doses of methadone leaves him without the withdrawal symptoms, or the 'physical dependence' on a narcotic." *Ibid.*

when they inject heroin, and also alleviates the severe and prolonged discomfort otherwise associated with an addict's discontinuance of the use of heroin.

About 40,000 persons receive methadone maintenance treatment in New York City, of whom about 26,000 participate in the five major public or semipublic programs,[6] and 14,000 are involved in about 25 private programs.[7] The sole purpose of all these programs is to treat the addiction of persons who have been using heroin for at least two years.

Methadone maintenance treatment in New York is largely governed by regulations promulgated by the New York State Drug Abuse Control Commission. Under the regulations, the newly accepted addict must first be detoxified, normally in a hospital. A controlled daily dosage of methadone is then prescribed. The regulations require that six doses a week be administered at a clinic, while the seventh day's dose may be taken at home. If progress is satisfactory for three months, additional doses may be taken away from the clinic, although

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[6] "The five major public or semi-public methadone maintenance programs in New York City are:
"(1) The Beth Israel program . . . with 35 clinics treating 7100 patients;
"(2) A program administered by the City of New York with 39 clinics treating 12,400 patients (hereafter referred to as 'the City program');
"(3) A program administered by the Bronx State Hospital and the Albert Einstein College of Medicine, with 7 clinics treating about 2400 patients;
"(4) A program operated by the Addiction Research and Treatment Center (ARTC) with 6 clinics treating about 1200 patients; and
"(5) A program operated by the New York State Drug Abuse Control Commission (DACC), with 8 clinics treating about 1100 patients.
"The total number of patients treated in public or semi-public programs is about 26,000. It appears that these programs are financed almost entirely by federal, state and city funds." *Id.*, at 1040.

[7] "[V]ery little specific information was provided [at trial] regarding the private clinics." *Id.*, at 1046. What evidence there was indicated that those clinics were likely to be less successful and less able to provide accurate information about their clients than the public clinics. *Id.*, at 1046, 1050.

throughout most of the program, which often lasts for several years, there is a minimum requirement of three clinic appearances a week. During these visits, the patient not only receives his doses but is also counseled and tested for illicit use of drugs.[8]

The evidence indicates that methadone is an effective cure for the physical aspects of heroin addiction. But the District Court also found "that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone." 399 F. Supp., at 1039. The crucial indicator of successful methadone maintenance is the patient's abstinence from the illegal or excessive use of drugs and alcohol. The District Court found that the risk of reversion to drug or alcohol abuse declines dramatically after the first few months of treatment. Indeed, "the strong majority" of patients who have been on methadone maintenance for at least a year are free from illicit drug use.[9] But a significant

[8] Although the United States Food and Drug Administration has also issued regulations in this area, 21 CFR §§ 291.501, 291.505 (1978), the New York State regulations are as or more stringent and thus effectively set the relevant standards for the authorized methadone maintenance programs involved in this case. Under those regulations, in-clinic ingestion of methadone must be observed by staff members, 14 NYCRR § 2021.13 (b) (1976), and must occur with a frequency of six days a week during the first three months, no less than three days a week thereafter through the second year of treatment, and two days a week thereafter. § 2021.13 (c) (1). Tests are required to prevent hoarding of take-home doses, excessive use of methadone, and illicit use of other drugs or alcohol, any of which, if found, can result in increased clinic-visit frequency or in separation from the program. §§ 2021.13 (c) (2), 2021.13 (g). The programs are also required to include "a comprehensive range of rehabilitative services on-site under professional supervision," § 2021.13 (e), although participation in many of these services is voluntary and irregular.

[9] "I conclude from all the evidence that the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking." 399 F. Supp., at 1047.

number are not. On this critical point, the evidence relied upon by the District Court reveals that even among participants with more than 12 months' tenure in methadone maintenance programs, the incidence of drug and alcohol abuse may often approach and even exceed 25%.[10]

This litigation was brought by the four respondents as a class action on behalf of all persons who have been, or would in the future be, subject to discharge or rejection as employees of TA by reason of participation in a methadone maintenance program. Two of the respondents are former employees of TA who were dismissed while they were receiving methadone treatment.[11] The other two were refused employment by TA, one both shortly before and shortly after the successful conclusion of his methadone treatment,[12] and the other while he

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[10] Thus, for example:

"Dr. Trigg of Beth Israel testified that about 5,000 out of the 6,500–7,000 patients in his clinics have been on methadone maintenance for a year or more. He further testified that 75% of this 5,000 are free from illicit drug use." *Id.*, at 1046.

Similarly, although the figures may be somewhat higher for the city and Bronx State Hospital programs, only 70% of the ARTC patients with a year's tenure or more were found to be free from illicit drug or alcohol use. It is reasonable to infer from this evidence that anywhere from 20% to 30% of those who have been on maintenance for over a year have drug or alcohol problems.

[11] Respondent Beazer was dismissed in November 1971 when his heroin addiction became known to TA and shortly after he had enrolled in a methadone maintenance program; he successfully terminated his treatment in November 1973. Respondent Reyes began his methadone treatment in 1971 and was dismissed by TA in 1972. At the time of trial, in 1975, he was still participating in a methadone program.

[12] Respondent Frasier was on methadone maintenance for only five months, from October 1972 until March 1973. TA refused to employ him as a bus operator in March 1973 and as a bus cleaner in April 1973. Frasier did not participate in a methadone program for even half a year. Moreover, he tested positively for methadone use at the time of his March application and only a few weeks before his April application was rejected under Rule 11 (b). See 399 F. Supp., at 1034; App. 32A. Under these

was taking methadone.[13] Their complaint alleged that TA's blanket exclusion of all former heroin addicts receiving methadone treatment was illegal under the Civil Rights Act of 1866, Rev. Stat. § 1977, 42 U. S. C. § 1981, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.

The trial record contains extensive evidence concerning the success of methadone maintenance programs, the employability of persons taking methadone, and the ability of prospective employers to detect drug abuse or other undesirable characteristics of methadone users. In general, the District Court concluded that there are substantial numbers of methadone users who are just as employable as other members of the general population and that normal personnel-screening procedures—at least if augmented by some method of obtaining information from the staffs of methadone programs—would enable TA to identify the unqualified applicants on an individual basis. 399 F. Supp., at 1048–1051. On the other hand, the District Court recognized that at least one-third of the persons receiving methadone treatment—and probably a good many more—would unquestionably be classified as unemployable.[14]

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circumstances, the District Court's characterization of Frasier as a "former" user at the time he applied, and its inclusion of Frasier in the group of "tenured" methadone users for whom it felt relief was appropriate under the Equal Protection Clause, see n. 32, *infra,* are without apparent justification.

[13] Respondent Diaz entered a methadone maintenance program in December 1968 and was still receiving treatment at the time of trial. He was refused employment as a maintenance helper in 1970.

[14] The District Court summarized the testimony concerning one of the largest and most successful public programs:

"The witnesses from the Beth Israel program testified that about one-third of the patients in that program, after a short period of adjustment, need very little more than the doses of methadone. The persons in this category are situated fairly satisfactorily with respect to matters such

After extensively reviewing the evidence, the District Court briefly stated its conclusion that TA's methadone policy is unconstitutional. The conclusion rested on the legal proposition that a public entity "cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed." *Id.*, at 1057. Because it is clear that substantial numbers of methadone users are capable of performing many of the jobs at TA, the court held that the Constitution will not tolerate a blanket exclusion of all users from all jobs.

The District Court enjoined TA from denying employment to any person solely because of participation in a methadone maintenance program. Recognizing, however, the special responsibility for public safety borne by certain TA employees and the correlation between longevity in a methadone maintenance program and performance capability, the injunction authorized TA to exclude methadone users from specific categories of safety-sensitive positions and also to condition eligibility on satisfactory performance in a methadone program for at least a year. In other words, the court held that TA could lawfully adopt general rules excluding all methadone users from some jobs and a large number of methadone users from all jobs.

Almost a year later the District Court filed a supplemental opinion allowing respondents to recover attorney's fees under 42 U. S. C. § 2000e–5 (k). This determination was premised on the court's additional holding that TA's drug policy violated Title VII. Having already concluded that the blanket

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as family ties, education and jobs. Another one-third of the patients at Beth Israel need a moderate amount of rehabilitation service, including vocational assistance, for a period of several months or about a year. A person in this category may, for instance, have finished high school, but may have a long heroin history and no employment record. A final one-third of the patients at Beth Israel need intensive supportive services, are performing in the program marginally, and either will be discharged or will be on the brink of discharge." 399 F. Supp., at 1048.

exclusion was not rationally related to any business needs of TA, the court reasoned that the statute is violated if the exclusionary policy has a discriminatory effect against blacks and Hispanics. That effect was proved, in the District Court's view, by two statistics: (1) of the employees referred to TA's medical consultant for suspected violation of its drug policy, 81% are black or Hispanic; (2) between 62% and 65% of all methadone-maintained persons in New York City are black or Hispanic. 414 F. Supp. 277, 278–279 (SDNY 1976). The court, however, did not find that TA's policy was motivated by any bias against blacks or Hispanics; indeed, it expressly found that the policy was not adopted with a discriminatory purpose. *Id.*, at 279.

The Court of Appeals affirmed the District Court's constitutional holding. 558 F. 2d 97. While it declined to reach the statutory issue, it also affirmed the award of attorney's fees under the aegis of the recently enacted Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which provides adequate support for an award of legal fees to a party prevailing on a constitutional claim.[15]

After we granted certiorari, Congress amended the Rehabilitation Act of 1973, 87 Stat. 357, 29 U. S. C. § 701 *et seq.*, to prohibit discrimination against a class of "handicapped individuals" that arguably includes certain former drug abusers and certain current users of methadone. Pub. L. 95–602, 92 Stat. 2984. Respondents argue that the amendment now

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[15] The Court of Appeals reversed the District Court on one issue relating to relief. The lower court had denied reinstatement and backpay relief to two of the four named plaintiffs because they admitted having violated TA's unquestionably valid rule against taking heroin while being in TA's employ. App. to Pet. for Cert. 77a–78a. The Court of Appeals reversed. It determined that the two plaintiffs' former heroin use and violation of TA's rules on that account were irrelevant because TA explicitly premised their firing exclusively on their use of methadone. 558 F. 2d, at 101.

mandates at least the prospective relief granted by the District Court and the Court of Appeals and that we should therefore dismiss the writ as improvidently granted. We are satisfied, however, that we should decide the constitutional question presented by the petition. Before doing so, we shall discuss (1) the effect of the Rehabilitation Act on this case; and (2) the error in the District Court's analysis of Title VII.

I

Respondents contend that the recent amendment to § 7 (6) of the Rehabilitation Act proscribes TA's enforcement of a general rule denying employment to methadone users.[16] Even if respondents correctly interpret the amendment, and even if they have a right to enforce that interpretation,[17] the case

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[16] Section 504 of the Rehabilitation Act, 87 Stat. 394, as set forth in 29 U. S. C. § 794, provides:

"No otherwise qualified handicapped individual in the United States, as defined in section 706 (6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

It is stipulated that the TA receives federal financial assistance.

In relevant part, § 7 (6) of the Act, 29 U. S. C. § 706 (6), as amended and redesignated, 92 Stat. 2984, 29 U. S. C. § 706 (7)(B) (1976 ed., Supp. III), provides:

"[T]he term 'handicapped individual' . . . means any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

[17] The question whether a cause of action on behalf of handicapped persons may be implied under § 504 of the Rehabilitation Act will be addressed by this Court in *Southeastern Community College* v. *Davis*, No. 78–711, cert. granted, 439 U. S. 1065.

is not moot since their claims arose even before the Act itself was passed,[18] and they have been awarded monetary relief.[19] Moreover, the language of the statute, even after its amendment, is not free of ambiguity,[20] and no administrative or judicial opinions specifically considering the impact of the statute on methadone users have been called to our attention. Of greater importance, it is perfectly clear that however we might construe the Rehabilitation Act, the concerns that prompted our grant of certiorari would still merit our attention.[21] We therefore decline to give the statute its first judicial construction at this stage of the litigation.

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[18] The latest act of alleged discrimination cited in respondents' complaint occurred in April 1973, while the Act was passed on September 26, 1973, Pub. L. 93–112, Title V, and the amendment to § 7 (6) went into effect on November 6, 1978.

[19] See n. 17, *supra.*

[20] In order for the District Court's findings to bring the respondent class conclusively within the Act, we would have to find that denying employment to a methadone user because of that use amounts to excluding an "otherwise qualified handicapped individual . . . solely by reason of his handicap." Among other issues, this would require us to determine (1) whether heroin addicts or current methadone users qualify as "handicapped individual[s]"—*i. e.*, whether that addiction or use is (or is perceived as) a "physical . . . impairment which substantially limits one or more . . . major life activities"; (2) whether methadone use prevents the individual "from performing the duties of the job" or "would constitute a direct threat to property or the safety of others"; and (3) whether the members of the respondent class are "otherwise qualified"—the meaning of which phrase is at issue in *Southeastern Community College* v. *Davis, supra.*

[21] See n. 1, *supra,* and accompanying text. Respondents may exaggerate the degree to which the recent amendment altered the law as it existed when we granted certiorari. Even before the Court of Appeals heard argument in this case, in fact, the Attorney General of the United States had issued an interpretation of the Act as it then existed which concluded that the Act "does in general prohibit discrimination against alcoholics and drug addicts in federally-assisted programs . . . ." Opinion of the Honorable Griffin B. Bell, Attorney General of the United States, to the Honorable Joseph A. Califano, Secretary, Department of Health,

II

Although respondents have consistently relied on both statutory and constitutional claims, the lower courts focused primarily on the latter. Thus, when the District Court decided the Title VII issue, it did so only as an afterthought in order to support an award of attorney's fees; the Court of Appeals did not even reach the Title VII issue. We do not condone this departure from settled federal practice. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105. Before deciding the constitutional question, it was incumbent on those courts to consider whether the statutory grounds might be dispositive.[22] What-

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Education, and Welfare, Apr. 12, 1977. Respondents brought this interpretation to our attention before we granted certiorari. App. to Brief in Opposition A5–A6.

[22] "From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co.* v. *Timken-Detroit Axle Co.*[, 329 U. S. 129,] and the Hatch Act case[, *United Public Workers* v. *Mitchell,* 330 U. S. 75,] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U. S. Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a con-

ever their reasons for not doing so,[23] we shall first dispose of the Title VII issue.[24]

The District Court's findings do not support its conclusion

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struction of the statute is fairly possible by which the question may be avoided." *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–569 (footnotes omitted), quoting *Ashwander* v. *TVA,* 297 U. S. 288, 346 (Brandeis, J., concurring).

[23] Respondents suggest that the lower courts properly reached the constitutional issue first because only under the Equal Protection Clause could all of the class members, including white methadone users (who presumably do not have standing in this case under Title VII or § 1981) obtain all of the relief including backpay, sought in their complaint. In addition, they point to TA's argument that Title VII and § 1981 are unconstitutional insofar as they authorize relief against a state subdivision without any direct allegation or proof of intentional discrimination. Cf. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445; *National League of Cities* v. *Usery,* 426 U. S. 833; *Washington* v. *Davis,* 426 U. S. 229; *Fry* v. *United States,* 421 U. S. 542; *Katzenbach* v. *Morgan,* 384 U. S. 641. Under this latter point, it is argued that the District Court quite properly decided to address the constitutionality of a municipal agency's hiring practices before addressing the constitutionality of two Acts of Congress.

Whatever the theoretical validity of respondents' explanations for the actions of the District Court and the Court of Appeals, the fact remains that we are forced to speculate about what motivated them because they never explained their haste to address a naked constitutional issue despite the presence in the case of alternative statutory theories. It also bears noting that in its second opinion the District Court *did* decide that TA's policy violated a federal statute, and its decision, without addressing any constitutional issue, provided a statutory basis for virtually all of the relief that it ultimately awarded. Had it confronted the issue, therefore, it presumably would have concluded that it could have decided the case without addressing the constitutional issue on which it initially decided the case.

[24] The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue. Cf. *University of California Regents* v. *Bakke,* 438 U. S. 265. We conclude that it is appropriate to reach the issue in this case, rather than remand it to the Court of Appeals, because it was fully aired before the District Court, it involves the application of settled legal principles to uncontroversial facts, and it has been carefully briefed in

that TA's regulation prohibiting the use of narcotics, or its interpretation of that regulation to encompass users of methadone, violated Title VII of the Civil Rights Act.

A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities. Even assuming that respondents have crossed this threshold, when the entire record is examined it is clear that the two statistics on which they and the District Court relied do not prove a violation of Title VII.[25]

First, the District Court noted that 81% of the employees referred to TA's medical director for suspected violation of its narcotics rule were either black or Hispanic. But respondents

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this Court without any of the parties' even suggesting the possibility of a remand.

Moreover, our treatment of the Title VII claim also disposes of the § 1981 claim without need of a remand. Although the exact applicability of that provision has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII.

[25] "Statistics are . . . competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." *Teamsters* v. *United States,* 431 U. S. 324, 339–340 (footnote omitted).

From the time they filed their complaint until their submissions to this Court, respondents have relied on statistics to demonstrate the discriminatory *effect* of TA's methadone policy. They have never attempted to present a discriminatory *purpose* case and would be hard pressed to do so in the face of the District Court's explicit finding that no animus motivated TA in establishing its policy, 414 F. Supp. 277, 279 (SDNY 1976), and in the face of TA's demonstration in forms filed with the Equal Employment Opportunity Commission that the percentage of blacks and Hispanics in its work force is well over twice that of the percentage in the work force in the New York metropolitan area.

Because of our conclusion on the merits of respondents' Title VII claim, we need not address the constitutional challenge made by TA to Title VII insofar as it authorizes relief against a municipal agency under the circumstances of this case. See n. 23, *supra.*

have only challenged the rule to the extent that it is construed to apply to methadone users, and that statistic tells us nothing about the racial composition of the employees suspected of using methadone.[26] Nor does the record give us any information about the number of black, Hispanic, or white persons who were dismissed for using methadone.

Second, the District Court noted that about 63% of the persons in New York City receiving methadone maintenance in *public* programs—*i. e.*, 63% of the 65% of all New York City methadone users who are in such programs[27]—are black or Hispanic. We do not know, however, how many of these persons ever worked or sought to work for TA. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance

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[26] Indeed, it is probable that none of the employees comprising this 81% were methadone users. The parties stipulated that:

"TA employees showing physical manifestations of drug abuse *other than* the definite presence of morphine or *methadone* or other illicit drug in the urine, are referred for consultation to [the medical director] . . . ." App. 86A (emphasis added).

In view of this stipulation and the District Court's finding that few if any physical manifestations of drug abuse characterize methadone-maintained persons, 399 F. Supp., at 1042–1045, it seems likely that such persons would not be included in the statistical pool referred to by the District Court. It should also be noted that when the dissent refers to the rejection of almost 5% of all applicants "due to the rule," *post*, at 600, the reference is to all narcotics users rather than to methadone users. The record does not tell us how many methadone users were rejected.

[27] The statistic relied upon by the District Court was derived from a study of methadone patients prepared by a researcher at Rockefeller University based upon data supplied by the public methadone clinics in New York City. In that the District Court admittedly received virtually no evidence about the private clinics, their funding, and their participants, see n. 7, *supra*, there is no basis for assuming that the Rockefeller University statistic is applicable to participants in the private programs.

programs for over a year—the only class improperly excluded by TA's policy under the District Court's analysis. The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol [28]—or have received successful assistance in finding jobs with employers other than TA.[29] Finally, we have absolutely no data on the 14,000 methadone users in the *private* programs, leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City.[30]

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[28] To demonstrate employability, the District Court referred to a study indicating that 34% to 59% of the methadone users who have been in a maintenance program for a substantial period of time are employed. The evidence was inconclusive with respect to all methadone users. 399 F. Supp., at 1047. However, the director of the second largest program in New York City testified that only 33% of the entire methadone-patient population in that program were employable. Tr. 345 (Jan. 10, 1975). On the statistics relating to illicit use of drugs and alcohol, see *supra,* at 575–576.

[29] Although "a statistical showing of disproportionate impact [need not] always be based on an analysis of the characteristics of actual applicants," *Dothard* v. *Rawlinson,* 433 U. S. 321, 330, "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants" undermines the significance of such figures. *Teamsters* v. *United States, supra,* at 340 n. 20.

[30] If all of the participants in private clinics are white, for example, then only about 40% of all methadone users would be black or Hispanic—compared to the 36.3% of the total population of New York City that was black or Hispanic as of the 1970 census. Assuming instead that the percentage of those minorities in the private programs duplicates their percentage in the population of New York City, the figures would still only show that 50% of all methadone users are black or Hispanic compared to 36.3% of the population in the metropolitan area. (The 20% figure relied upon by the dissent refers to blacks and Hispanics in the work force, rather than in the total population of the New York City metropolitan area. The reason the total-population figure is the appropriate one is because the 63% figure

At best, respondents' statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is "job related." [31] The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination. 414 F. Supp., at 279. We conclude that respondents failed to prove a violation of Title VII. We therefore must reach the constitutional issue.

III

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject

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relied upon by respondents refers to methadone users in the population generally and not just those in the work force.)

[31] Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. See n. 4, *supra; supra,* at 575–576, and nn. 9–10; 577, and n. 14; n. 28, *supra.* The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive." See *supra,* at 578. Finally, the District Court noted that those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions. See nn. 33, 37, *infra.* The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 432. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425. Whether or not respondents' weak showing was sufficient to establish a prima facie case, it clearly failed to carry respondents' ultimate burden of proving a violation of Title VII.

to its jurisdiction does the question whether this principle is violated arise.

In this case, TA's Rule 11 (b) places a meaningful restriction on all of its employees and job applicants; in that sense the rule is one of general applicability and satisfies the equal protection principle without further inquiry. The District Court, however, interpreted the rule as applicable to the limited class of persons who regularly use narcotic drugs, including methadone. As so interpreted, we are necessarily confronted with the question whether the rule reflects an impermissible bias against a special class.

Respondents have never questioned the validity of a special rule for all users of narcotics. Rather, they originally contended that persons receiving methadone should not be covered by that rule; in other words, they should not be included within a class that is otherwise unobjectionable. Their constitutional claim was that methadone users are entitled to be treated like most other employees and applicants rather than like other users of narcotics. But the District Court's findings unequivocally establish that there are relevant differences between persons using methadone regularly and persons who use no narcotics of any kind.[32]

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[32] The District Court found that methadone is a narcotic. See 399 F. Supp., at 1038. See also *id.*, at 1044 ("The evidence is that, during the time patients are being brought up to their constant dosage of methadone (a period of about six weeks), there may be complaints of drowsiness, insomnia, excess sweating, constipation, and perhaps some other symptoms"). Moreover, every member of the class of methadone users was formerly addicted to the use of heroin. None is completely cured; otherwise, there would be no continuing need for treatment. All require some measure of special supervision, and all must structure their weekly routines around mandatory appearances at methadone clinics. The clinics make periodic checks as long as the treatment continues in order to detect evidence of drug abuse. Employers must review, and sometimes verify, these checks; since the record indicates that the information supplied by treatment centers is not uniformly reliable, see n. 7, *supra,* the employer

Respondents no longer question the need, or at least the justification, for special rules for methadone users. Indeed, they vigorously defend the District Court's opinion which expressly held that it would be permissible for TA to have a special rule denying methadone users any employment unless they had been undergoing treatment for at least a year, and another special rule denying even the most senior and reliable methadone users any of the more dangerous jobs in the system.

The constitutional defect in TA's employment policies, according to the District Court, is not that TA has special rules for methadone users, but rather that *some* members of the class should have been exempted from *some* requirements of the special rules. Left intact by its holding are rules requiring special supervision of methadone users to detect evidence of drug abuse, and excluding them from high-risk employment. Accepting those rules, the District Court nonetheless concluded that employment in nonsensitive jobs could not be denied to methadone users who had progressed satisfactorily with their treatment for one year, and who, when examined individually, satisfied TA's employment criteria. In short, having recognized that disparate treatment of methadone users simply because they are methadone users is permissible—and having excused TA from an across-the-board requirement of individual consideration of such persons—the District Court construed the Equal Protection Clause as requiring TA to adopt additional and more precise special rules for that special class.

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has a special and continuing responsibility to review the condition of these persons.

In addition, a substantial percentage of persons taking methadone will not successfully complete the treatment program. The findings do not indicate with any precision the number who drop out, or the number who can fairly be classified as unemployable, but the evidence indicates that it may well be a majority of those taking methadone at any given time. See nn. 14 and 28, *supra*.

But any special rule short of total exclusion that TA might adopt is likely to be less precise—and will assuredly be more costly [33]—than the one that it currently enforces. If eligibility is marked at any intermediate point—whether after one year of treatment or later—the classification will inevitably discriminate between employees or applicants equally or

[33] The District Court identified several significant screening procedures that TA would have to adopt specially for methadone users if it abandoned its rule. For example, the court noted that current methadone users (but no other applicants) would have to

"demonstrate that they have been on a reliable methadone program for a year or more; that they have faithfully abided by the rules of the program; [and] that, according to systematic tests and observations, they have been free of any illicit drug or alcohol abuse for the entire period of treatment, excluding a possible adjustment period . . . ." 399 F. Supp., at 1049.

The District Court also recognized that verifying the above demonstrations by the methadone user would require special efforts to obtain reliable information from, *and about,* each of the many different methadone maintenance clinics—a task that it recognized could be problematic in some cases. *Id.,* at 1050; see n. 7, *supra.* Furthermore, once it hired a methadone user, TA would have a continuing duty to monitor his progress in the maintenance program and would have to take special precautions against his promotion to any of the safety-sensitive positions from which the District Court held he may be excluded.

The dissent is therefore repeatedly mistaken in attributing to the District Court a finding that TA's "normal screening process without additional effort" would suffice in the absence of the "no drugs" rule. *Post,* at 608. See *post,* at 608 n. 14. Aggravating this erroneous factual assumption is a mistaken legal proposition advanced by the dissent—that TA can be faulted for failing to prove the unemployability of "successfully maintained methadone users. *Post,* at 605. Aside from the misallocation of the burden of proof that underlies this argument, it is important to note, see *post,* at 606, that TA *did* prove that 20% to 30% of the class afforded relief by the District Court are *not* "successfully maintained," and hence are assuredly not employable. Even assuming therefore that the percentage of employable persons in the remaining 70% is the same as that in the class of TA applicants who do not use methadone, it is respondents who must be faulted for failing to prove that the offending 30% could be excluded as cheaply and effectively in the absence of the rule.

almost equally apt to achieve full recovery.[34] Even the District Court's opinion did not rigidly specify one year as a constitutionally mandated measure of the period of treatment that guarantees full recovery from drug addiction.[35] The uncertainties associated with the rehabilitation of heroin addicts precluded it from identifying any bright line marking the point at which the risk of regression ends.[36] By contrast, the "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists.[37] Accordingly, an employment policy that postpones

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[34] It may well be, in fact, that many methadone users who have been in programs for something less than a year are actually more qualified for employment than many others who have been in a program for longer than a year.

[35] "The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such as requiring satisfactory performance in a program for a period of time such as a year . . . ." 399 F. Supp., at 1058.

[36] These uncertainties are evident not only in the District Court's findings but also in legislative consideration of the problem. See *Marshall* v. *United States,* 414 U. S. 417, 425–427.

[37] The completion of the program also marks the point at which the employee or applicant considers himself cured of drug dependence. Moreover, it is the point at which the employee/applicant no longer must make regular visits to a methadone clinic, no longer has access to free methadone that might be hoarded and taken in excessive and physically disruptive doses, and at which a simple urine test—as opposed to a urine test followed up by efforts to verify the bona fides of the subject's participation in a methadone program, and of the program itself—suffices to prove compliance with TA's rules.

Respondents argue that the validity of these considerations is belied by TA's treatment of alcoholics. Although TA refuses to hire new employees with drinking problems, it continues in its employ a large number of persons who have either been found drinking on the job or have been deemed unfit for duty because of prior drinking. These situations give rise to discipline but are handled on an individual basis. But the fact that TA has the resources to expend on one class of problem employees

eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

At its simplest, the District Court's conclusion was that TA's rule is broader than necessary to exclude those methadone users who are not actually qualified to work for TA. We may assume not only that this conclusion is correct but also that it is probably unwise for a large employer like TA to rely on a general rule instead of individualized consideration of every job applicant. But these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause.[38] As the District Court recognized, the special classification created by TA's rule serves the general objectives of safety and efficiency.[39] Moreover, the exclusionary line challenged by respondents "is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice . . . made by that branch of Government vested with the power to make such choices." *Marshall* v. *United States,* 414 U. S. 417, 428.

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does not by itself establish a constitutional duty on its part to come up with resources to spend on all classes of problem employees.

[38] The District Court also concluded that TA's rule violates the Due Process Clause because it creates an "irrebuttable presumption" of unemployability on the part of methadone users. 399 F. Supp., at 1057. Respondents do not rely on the due process argument in this Court, and we find no merit in it.

[39] "[L]egislative classifications are valid unless they bear no rational relationship to the State's objectives. *Massachusetts Bd. of Retirement* v. *Murgia,* [427 U. S. 307, 314]. State legislation 'does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect.' *Dandridge* v. *Williams,* 397 U. S. 471, 485." *Washington* v. *Yakima Indian Nation,* 439 U. S. 463, 501–502. See also *Vance* v. *Bradley, ante,* at 108, quoting *Phillips Chemical Co.* v. *Dumas School District,* 361 U. S. 376, 385 ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required' ").

Because it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority.[40] Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole. *Mathews* v. *Diaz,* 426 U. S. 67, 83–84.[41]

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[40] Since *Barbier* v. *Connolly,* 113 U. S. 27, the Court's equal protection cases have recognized a distinction between "invidious discrimination," *id.,* at 30—*i. e.,* classifications drawn "with an evil eye and an unequal hand" or motivated by "a feeling of antipathy" against, a specific group of residents, *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373–374; *Soon Hing* v. *Crowley,* 113 U. S. 703, 710; see also *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Holden* v. *Hardy,* 169 U. S. 366, 398—and those special rules that "are often necessary for general benefits [such as] supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects." *Barbier, supra,* at 31. See also *Washington* v. *Davis,* 426 U S. 229, 239–241. Quite plainly, TA's Rule 11 (b) was motivated by TA's interest in operating a safe and efficient transportation system rather than by any special animus against a specific group of persons. Cf. 414 F. Supp., at 279. Respondents recognize this valid general motivation, as did the District Court, and for that reason neither challenges TA's rule as it applies to *all* narcotic users, or even to *all* methadone users. Because respondents merely challenge the rule insofar as it applies to *some* methadone users, that challenge does not even raise the question whether the rule falls on the "invidious" side of the *Barbier* distinction. Accordingly, there is nothing to give rise to a presumption of illegality and to warrant our especially "attentive judgment." Cf. *Truax* v. *Corrigan,* 257 U. S. 312, 327.

[41] "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 41 (Holmes, J., dissenting).

No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus-drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision. The judgment of the Court of Appeals is

Reversed.

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

The opinion of the Court addresses, and sustains, the policy of the Transit Authority under its Rule 11 (b) only insofar as it applies to employees and applicants for employment who *"are receiving methadone treatment"* (emphasis supplied). *Ante,* at 572–573, n. 3, and *ante,* this page. I concur in the opinion of the Court holding that there is no violation of the Equal Protection Clause or Title VII when the Authority's policy is applied to employees or applicants who are currently on methadone.

But in my view the question presented by the record and opinions of the courts below is not limited to the effect of the rule on present methadone users. Indeed, I had thought it conceded by all concerned that the Transit Authority's policy of exclusion extended beyond the literal language of Rule 11 (b) to persons currently free of methadone use but who had been on the drug within the previous five years. The District Court was unsure whether all past users were excluded but indicated that the policy of exclusion covered at least persons who had been free of methadone use for less than five years. 399 F. Supp. 1032, 1036 (SDNY 1975).[1] The Court of

[1] The District Court also noted that the Authority "contends that it cannot afford to take what it considers the risks of employing *present or past* methadone maintained persons, except possibly those who have been successfully withdrawn from methadone for several years." 399 F. Supp., at 1052 (emphasis supplied).

Appeals for the Second Circuit was unequivocal. It understood that the rule constituted a "blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs." 558 F. 2d 97, 99 (1977).

Petitioners' brief in this Court states, in effect, that the Authority will consider only applicants for employment who have been free of a drug problem for "at least five years":

> "[T]he Authority will give individual consideration to people with a past history of drug addiction including those who have completed either a drug free or a methadone maintenance program, and who have been completely drug free and have had a stable history for at least five years." Brief for Petitioners 5.

There was a similar recognition of the Authority's policy in the petition for a writ of certiorari.[2]

Despite this unanimity among the parties and courts below as to the question presented, the Court today simply chooses to limit its decision to the policy with respect to employees and applicants currently receiving methadone treatment. The explanation given is that "neither the findings of fact, nor the record evidence, squarely presents any issue with respect to former users that must be resolved in order to dispose of this litigation." *Ante,* at 572–573, n. 3. But the only support the Court cites for this statement is a lack of proof as to the policy's actual application. In light of the express admission

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[2] In petitioners' statement of the case the affected class was said to include former addicts "who are participants in or *have completed* a methadone maintenance program." Pet. for Cert. 4 (emphasis supplied).

The brief for respondents similarly described the Transit Authority's policy:

"The Transit Authority's blanket denial of employment to fully rehabilitated heroin addicts who are being or ever have been treated in methadone maintenance programs violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment." Brief for Respondents 59.

of the Transit Authority to the District Court that the policy extended to at least some former users,[3] evidence of the past application of the policy was irrelevant to the fashioning of prospective relief.[4]

I conclude that the Court has decided only a portion of the case presented, and has failed to address what it recognizes as the more difficult issue. *Ante,* at 572–573, n. 3, 591–592, and n. 37. We owe it to the parties to resolve all issues properly presented, rather than to afford no guidance whatever as to whether former drug and methadone users may be excluded from employment by the Authority. I agree with the courts below that there is no rational basis for an absolute bar against the employment of persons who have completed successfully a methadone maintenance program and who otherwise

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[3] See, *e. g.,* 3 Court of Appeals Joint App. in No. 76–7295, pp. 1106a–1112a.

[4] The Court seems to imply that because the Transit Authority's policy with respect to former methadone users had not been invoked against any of the named plaintiffs, it was improper for the District Court to certify a class of former users who would be affected by the policy. *Ante,* at 572–573, n. 3, 576–577, n. 12. Even if one were to consider it proper for this Court to disregard the District Court's explicit finding that plaintiff Frasier "was rejected because of his *former* methadone use," 399 F. Supp., at 1034 (emphasis supplied), the Court overlooks the further finding:

"[I]t is unquestioned that there are many methadone maintenance patients who successfully withdraw from methadone and stay clear of drug abuse thereafter. Plaintiff Beazer is such a person, having ceased using methadone almost two years ago.

"There is no rational reason for maintaining an absolute bar against the employment of these persons regardless of their individual merits." *Id.,* at 1051.

It is clear that Beazer both was a proper representative of the class of former users and was interested in Transit Authority employment, inasmuch as reinstatement was part of the relief he sought. In light of the Transit Authority's unequivocal policy of not employing persons in Beazer's position, it was unnecessary for him to engage in the futile ritual of reapplying for employment after terminating his methadone use in order to have standing to attack the policy.

are qualified for employment. See *Vance* v. *Bradley, ante,* at 111; *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 314 (1976); *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 40 (1973). I therefore would affirm the judgment below with respect to the class of persons who are former methadone users.

MR. JUSTICE BRENNAN, dissenting.

I would affirm for the reasons stated in Part I of MR. JUSTICE WHITE's dissenting opinion.

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

Although the Court purports to apply settled principles to unique facts, the result reached does not square with either Title VII or the Equal Protection Clause. Accordingly, but respectfully, I dissent.

I

As an initial matter, the Court is unwise in failing to remand the statutory claims to the Court of Appeals. The District Court decided the Title VII issue only because it provided a basis for allowing attorney's fees. 414 F. Supp. 277, 278 (SDNY 1976). The Court of Appeals did not deal with Title VII, relying instead on the intervening passage of the Civil Rights Attorney's Fees Awards Act of 1976,[1] which authorized the award of fees for success on the equal protection claim today held infirm by the Court. 558 F. 2d 97, 99–100 (CA2 1977). In such circumstances, on finding that we disagree with the judgment of the Court of Appeals as to the constitutional question, we would usually remand the unexplored alternative basis for relief.[2] *E. g., Vermont Yankee*

[1] 42 U. S. C. § 1988.

[2] The Court finds it inappropriate to remand because the Title VII question "was fully aired before the District Court, . . . involves the application of settled legal principles to uncontroversial facts, and . . .

Nuclear Power Corp. v. *NRDC*, 435 U. S. 519, 549 (1978). And see *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 271 (1977), which involved nearly identical circumstances. That course would obviate the need for us to deal with what the Court considers to be a factual issue or at least would provide assistance in analyzing the issue.

Because the Court has decided the question, however, I must express my reservations about the merits of that decision. In a disparate-impact hiring case such as this, the plaintiff must show that the challenged practice excludes members of a protected group in numbers disproportionate to their incidence in the pool of potential employees.[3] Respondents made out a sufficient, though not strong, prima facie case by proving that about 63% of those using methadone in the New York City area are black or Hispanic and that only about 20% of the relevant population as a whole belongs to one of those groups.[4] I think it fair to conclude, as the District Court must

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has been carefully briefed in this Court without any of the parties' even suggesting the possibility of a remand." *Ante*, at 583–584, n. 24. The Court is able to overturn the Title VII judgment below, however, only after reversing some of the District Court's key findings of fact, which the parties strongly contest, on grounds that were not aired at all in the District Court or the Court of Appeals. See n. 4, *infra*, and *infra*, at 600 and n. 6.

[3] See *ante*, at 584; *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977). The failure to hire is not "because of" race, color, religion, sex, or national origin if the adverse relationship of the challenged practice to one of those factors is purely a matter of chance—a statistical coincidence. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971); Civil Rights Act of 1964, § 703 (a), 42 U. S. C. § 2000e–2 (a). Beyond the statistically significant relationship between race and participation in methadone programs shown by the figures here, respondents introduced direct evidence that the high frequency of minorities among the disqualified group was not just a chance aberration. See nn. 7 and 15, *infra*.

[4] The Court asserts that the proper percentage is 36.3. Respondents relied upon the 1970 census figures for the New York Standard Metropolitan Statistical Area work force: 15.0% black and 5.1% Hispanic. Petitioners accept the 20% figure. Brief for Petitioners 53. And the

have, that blacks and Hispanics suffer three times as much from the operation of the challenged rule excluding methadone users as one would expect from a neutral practice. Thus, excluding those who are or have been in methadone programs "operate[s] to render ineligible a markedly disproportionate number" of blacks and Hispanics. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429 (1971).

In response to this, the Court says that the 63% statistic was not limited to those who worked for or sought to work for petitioners and to those who have been successfully maintained on methadone, and that it does not include those in private clinics. *Ante,* at 584–586. I suggest, in the first place, that these attacks on facially valid statistics should have been made in the District Court and the Court of Appeals, see *Dothard* v. *Rawlinson,* 433 U. S. 321, 331 (1977); the first contention was not even made in this Court. It also seems to me that petitioners have little to complain about insofar as the makeup of the applicant pool is concerned since they refused on grounds of irrelevancy to allow discovery of the racial background of the applicants denied employment pursuant to the methadone rule.

In any event, I cannot agree with the Court's assertions that this evidence "reveals little if anything," "tells us nothing," and is "virtually irrelevant." *Ante,* at 585–586.[5] There is not a

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District Court apparently did so also. No matter which figure is correct, there is still a disparate impact.

[5] The Court quotes *Teamsters* v. *United States,* 431 U. S. 324, 340 n. 20 (1977), to the effect that " 'evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants' undermines the significance of such figures." *Ante,* at 586, n. 29. Petitioners have not put on such "evidence"; we have only the Court's hypotheses, facially unlikely ones at that. Under the Federal Rules of Evidence, to be admissibly relevant, evidence must only tend to establish a material fact. This evidence does that, and by definition unrebutted probative evidence on *the* material fact is sufficient to make out a prima facie case.

shadow of doubt that methadone users do apply for employment with petitioners, and because 63% of all methadone users are black or Hispanic, there is every reason to conclude that a majority of methadone users who apply are also from these minority groups. Almost 5% of all applicants are rejected due to the rule, and undoubtedly many black and Hispanic methadone users are among those rejected. Why would proportionally fewer of them than whites secure work with petitioners absent the challenged practice? The Court gives no reason whatsoever for rejecting this sensible inference, and where the inference depends so much on local knowledge, I would accept the judgment of the District Court rather than purport to make an independent judgment from the banks of the Potomac. At the very least, as I have said, I would seek the views of the Court of Appeals.

The Court complains that even if minority groups make up 63% of methadone-user applicants this statistic is an insufficient indicator of the composition of the group found by the District Court to have been wrongly excluded—that is, those who have been successfully maintained for a year or more. I cannot, however, presume with the Court that blacks or Hispanics will be less likely than whites to succeed on methadone. I would have thought the presumption, until rebutted, would be one of an equal chance of success, and there has been no rebuttal.

Finally, as to the racial composition of the patients at private clinics, I note first that the District Court found that "[b]etween 62% and 65% of methadone maintained persons in New York City are black and Hispanic . . . ." 414 F. Supp., at 279. The finding was for the total population, not just for public clinics. Even assuming that the Court wishes to overturn this finding of fact as clearly erroneous, I see no support for doing so. The evidence from the Methadone Information Center at Rockefeller University indicated that 61% of all patients in the metropolitan area were black or Puerto Rican (with 5.85% undefined). This was based on a

1,400-patient sample, which, according to the Center, "was drawn on a random basis and very accurately reflects the *total population* for Metropolitan New York City" (emphasis supplied). There is no reason to believe that this study, which in its reporting of the total number of patients of all races included both public and private clinics, did not include private programs in its racial-composition figures.[6] And even if everyone in the private clinics were white, a highly unlikely assumption at best,[7] the challenged rule would still automatically exclude a substantially greater number of blacks and Hispanics than would a practice with a racially neutral effect.

With all due respect, I would accept the statistics as making

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[6] Petitioners suggest that the evidence did not include private clinics since the Center does not receive information from them. Had this objection been raised in the District Court as it should have been, respondents would have had the opportunity to remove any doubt about whether the evidence included private programs. Moreover, in support of their suggestion, petitioners rely upon two isolated statements that do not directly discuss the study in question. Dr. Lukoff testified that the private clinics report to the FDA but not to the "Rockefeller Institute register," and he estimated that there were about *1,500* patients in such unreporting clinics. Tr. 252 (Jan. 9, 1975) (emphasis supplied). Dr. Dole, a professor at Rockefeller University and senior physician at the University Hospital, testified that "the methadone data center . . . maintains the computerized inventory on *all 40,000* patients in treatment" and that "[a]ll of the known programs report, I presume." *Id.*, at 114 (Jan. 7, 1975) (emphasis supplied). He did testify that "[t]he most detailed documentation comes from the major public" programs, which "comprise about 25,000 out of the 40,000" methadone patients. As to the remaining patients, his program still had "simpl[e] registry information . . . ." *Id.*, at 115–116. In short, the majority's unsupported effort to undermine the District Court's findings of fact merely establishes the wisdom of either remanding or, on the Court's evident assumption that the Court of Appeals would have affirmed the Title VII judgment, abiding by the "two-court rule."

[7] The evidence before the District Court established that 80% of heroin addicts in the New York City metropolitan area, the source of clients for both public and private methadone clinics, are black or Hispanic.

a prima facie case of disparate impact. Obviously, the case could have been stronger, but this Court is unjustified in displacing the District Court's acceptance of uncontradicted, relevant evidence. Perhaps sensing that, the Court goes on to say that if such a prima facie showing was made it was rebutted by the fact that the rule is "job related."

Petitioners had the burden of showing job relatedness. They did not show that the rule results in a higher quality labor force, that such a labor force is necessary, or that the cost of making individual decisions about those on methadone was prohibitive. Indeed, as shown in the equal protection discussion *infra,* petitioners have not come close to showing that the present rule is "demonstrably a reasonable measure of job performance." *Griggs,* 401 U. S., at 436. No one could reasonably argue that petitioners have made the kind of showing demanded by *Griggs* or *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975). By petitioners' own stipulation, see n. 14, *infra,* this employment barrier was adopted "without meaningful study of [its] relationship to job-performance ability." *Griggs, supra,* at 431. As we stated in *Washington* v. *Davis,* 426 U. S. 229, 247 (1976), Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ." Therefore, unlike the majority, *ante,* at 587 n. 31, I think it insufficient that the rule as a whole has some relationship to employment so long as a readily identifiable and severable part of it does not.

II

I also disagree with the Court's disposition of the equal protection claim in light of the facts established below. The District Court found that the evidence conclusively established that petitioners exclude from employment all persons who are successfully on methadone maintenance—that is, those who after one year are "free of the use of heroin, other illicit

drugs, and problem drinking," 399 F. Supp. 1032, 1047 (SDNY 1975)—and those who have graduated from methadone programs and remain drug free for less than five years; [8] that past

[8] Because the rule is unwritten in relevant part, there is confusion about its scope. The Court asserts that it does not exclude those who formerly used methadone, and that the District Court "did not settle the question of what policy TA enforces in this respect . . . ." *Ante,* at 572 n. 3. In fact, however, petitioners openly admit that they automatically exclude former methadone users unless they "have been completely drug free and have had a stable history for at least five years." Brief for Petitioners 5. And I quote the District Court's actual finding which in context is unlike that described by the majority:

"It is clear that a relatively recent methadone user would be subject to the blanket exclusionary policy. However, the TA has indicated that there might be some flexibility with respect to a person who had once used methadone, but had been free of such use for a period of five years or more." 399 F. Supp., at 1036.

The Court finds no "concrete dispute between adverse litigants" over the former-users policy because no former user is entitled to relief under the District Court's injunction. *Ante,* at 573 n. 3. But respondent Frasier is a former user, see *ante,* at 576–577, n. 12, and the District Court expressly granted him relief, including backpay from the time he was rejected as a recent former methadone user. App. to Pet. for Cert. 77a–78a. The Court says the District Court erred in finding as facts that Frasier was using no narcotics in April 1973 and that petitioners refused to hire him solely because of his prior, apparently successful methadone treatment. As I read the facts as recited by the Court, the District Court was clearly correct, but in any event petitioners have not preserved this argument in the Court of Appeals or here. See Defendants' Proposed Findings of Fact 6–7 (filed Oct. 18, 1974) (Frasier "purportedly" graduated successfully from the methadone program on March 19, 1973, and, though otherwise eligible, was rejected due to "his drug history" on April 2, 1973). See also *ante,* at 596 n. 4 (POWELL, J., dissenting in relevant part).

The Court apparently reads the District Court's injunction as protecting only those persons who had been in methadone programs for a year or longer before they were cured. It is incredible that the District Court would have punished those persons able to triumph over heroin addiction in less than a year. And the context of the District Court's order, combined with the grant of relief to respondent Frasier, makes it clear that the court intended to protect, and had good reason to do so, *all* former

or present successful methadone maintenance is not a meaningful predictor of poor performance or conduct in most job categories; that petitioners could use their normal employee-screening mechanisms to separate the successfully maintained users from the unsuccessful; and that petitioners do exactly that for other groups that common sense indicates might also be suspect employees.[9] Petitioners did not challenge these factual conclusions in the Court of Appeals, but that court nonetheless reviewed the evidence and found that it overwhelmingly supported the District Court's findings. 558 F. 2d, at 99. It bears repeating, then, that both the District Court and the Court of Appeals found that those who have been maintained on methadone for at least a year and who are free from the use of illicit drugs and alcohol can easily be identified through normal personnel procedures and, for a great many jobs, are as employable as and present no more risk than applicants from the general population.

Though petitioners' argument here is primarily an attack upon the factfinding below, the Court does not directly accept that thesis. Instead, it concludes that the District Court and the Court of Appeals both misapplied the Equal Protection

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methadone users as well as those current users who have been successfully maintained for more than a year.

[9] Respondents presented numerous top experts in this field and large employers experienced with former heroin users treated with methadone. Both sides rested after six days of trial, but the District Court demanded nine more days of further factual development, and an 8-hour inspection of petitioners' facilities, because it did not believe that the evidence could be so one-sidedly in respondents' favor. The court correctly realized its responsibility in a public-law case of this type to demand the whole story before making a constitutional ruling. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). The District Court called six witnesses of its own, and it chose them primarily because they had written articles on methadone maintenance that petitioners asserted had shown the unreliability of that method of dealing with heroin addiction. It also correctly expressed its refusal to base its judgment on shifting medical opinions.

Clause. On the facts as found, however, one can reach the Court's result only if that Clause imposes no real constraint at all in this situation.

The question before us is the rationality of placing successfully maintained or recently cured persons in the same category as those just attempting to escape heroin addiction or who have failed to escape it, rather than in with the general population.[10] The asserted justification for the challenged classification is the objective of a capable and reliable work force, and thus the characteristic in question is employability. "Employability," in this regard, does not mean that any particular applicant, much less every member of a given group of applicants, will turn out to be a model worker. Nor does it mean that no such applicant will ever become or be discovered to be a malingerer, thief, alcoholic, or even heroin addict. All employers take such risks. Employability, as the District Court used it in reference to successfully maintained methadone users, means only that the employer is no more likely to find a member of that group to be an unsatisfactory employee than he would an employee chosen from the general population.

Petitioners had every opportunity, but presented nothing to negative the employability of successfully maintained methadone users as distinguished from those who were unsuccessful. Instead, petitioners, like the Court, dwell on the methadone failures—those who quit the programs or who remain but turn to illicit drug use. The Court, for instance, makes much of the drug use of many of those in methadone programs, including those who have been in such programs for more than one year. *Ante,* at 576, and n. 10. But this has little force

[10] The rule's treatment of those who succeed is at issue here, since the District Court effectively amended the complaint to allege discrimination against that subgroup, see Fed. Rule Civ. Proc. 15 (b), and implicitly found no constitutional violation with respect to others burdened by the practice.

since those persons are not "successful," can be and have been identified as such, see *ante,* at 574–575,[11] and, despite the Court's efforts to put them there, see *ante,* at 590 n. 33, are not within the protection of the District Court's injunction. That 20% to 30% are unsuccessful after one year in a methadone program tells us nothing about the employability of the successful group, and it is the latter category of applicants that the District Court and the Court of Appeals held to be unconstitutionally burdened by the blanket rule disqualifying them from employment.

The District Court and the Court of Appeals were therefore fully justified in finding that petitioners could not reasonably have concluded that the protected group is less employable than the general population and that excluding it "has no rational relation to the demands of the jobs to be performed." [12] 399 F. Supp., at 1057. In fact, the Court assumes that petitioners' policy is unnecessarily broad in excluding the successfully maintained and the recently cured, *ante,* at 592, and that a member of that group can be selected with adequate precision. *Ante,* at 574–575. Despite this, the validity of the exclusion is upheld on the rational basis of the uninvolved portion of the rule, that is, that the rule excludes many who are less employable. But petitioners must justify the distinction between groups, not just the policy to which they have attached the classification. The purpose of the rule as a whole is

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[11] The evidence indicates that poor risks will shake out of a methadone maintenance program within six months. 399 F. Supp., at 1048–1049. It is a measure of the District Court's caution that it set a 1-year standard.

[12] A major sponsor of the recent amendments to the Rehabilitation Act, see *ante,* at 580–581, and n. 16, described the congressional determination behind them as being that a public employer "cannot assume that a history of alcoholism or drug addiction, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and of itself to justify exclusion [from employment]. Such an assumption would have no basis in fact . . . ." 124 Cong. Rec. 37510 (1978) (Sen. Williams).

relevant only if the classification within the rule serves the purpose, but the majority's assumption admits that is not so.

Justification of the blanket exclusion is not furthered by the statement that "any special rule short of total exclusion . . . is likely to be less precise" than the current rule. *Ante,* at 590. If the rule were narrowed as the District Court ordered, it would operate more precisely in at least one respect, for many employable persons would no longer be excluded. Nor does the current rule provide a "bright line," for there is nothing magic about the point five years after treatment has ended. There is a risk of "regression" among those who have never used methadone, and the Court cannot overcome the District Court's finding that a readily ascertainable point exists at which the risk has so decreased that the maintained or recently cured person is generally as employable as anyone else.[13]

Of course, the District Court's order permitting total exclusion of all methadone users maintained for less than one year, whether successfully or not, would still exclude some employables and would to this extent be overinclusive. "Overinclusiveness" as to the primary objective of employability is accepted for less successful methadone users because it fulfills a secondary purpose and thus is not "overinclusive" at all. See *Vance* v. *Bradley, ante,* at 109. Although many of those who have not been successfully maintained for a year are employable, as a class they, unlike the protected group, are not as employable as the general population. Thus, even assuming the bad risks could be identified, serving the end of employability would require unusual efforts to determine those more likely to revert. But that legitimate

[13] Though a person free of illicit drug use for one year might subsequently revert, those who have graduated from methadone programs might do so also, and the Court apparently believes that the employment exclusion could not constitutionally be extended to them. See *ante,* at 572–573, n. 3, and 591–592, n. 37. See also *ante,* at 596–597 (POWELL, J., dissenting in relevant part).

secondary goal is not fulfilled by excluding the protected class: The District Court found that the fact of successful participation for one year could be discovered through petitioners' normal screening process without additional effort and, I repeat, that those who meet that criterion are no more likely than the average applicant to turn out to be poor employees.[14] Ac-

[14] Since the District Court found as a fact that the bad risks could be culled from this group through the normal processing of employment applications, the only possible justification for this rule is that it eliminates applications in which petitioners would invest some time and effort before finding the person unemployable. The problem, however, is that not everyone in the general population is employable. Thus, if vacancies are to be filled, individualized hiring decisions must be made in any event.

The fact of methadone use must be determined somehow, so all applications must at least be read, and petitioners require all applicants under 35, and many existing employees, to submit to urinalysis. Reading the applications may disclose not only the fact of methadone use but also whether the person has certain educational or other qualifications and whether he or she has had a stable employment experience or any recent job-related difficulties.

The Court says that petitioners would be burdened by having to verify that a methadone applicant was successful in his program. But the program itself verifies that fact, and the District Court found that all petitioners would have to do is get in touch with the program, and that "this is essentially no different from obtaining relevant references for other types of applicants." 399 F. Supp., at 1050 n. 3. A number of expert witnesses testified that the methadone clinics have far more information about their patients than personnel officers could ordinarily hope to acquire. The Court fears that some of the programs might not be reliable, but the District Court found that most are and ruled that petitioners do not have to hire any applicant "where there is reason to doubt the reliability of" the information furnished by the applicant's clinic. *Id.*, at 1058; accord, *id.*, at 1050 n. 3. Consequently, I see no error at all, much less clear error, in the District Court's finding of fact that petitioners "can perform this screening for methadone maintenance patients in basically the same way as in the case of other prospective employees." *Id.*, at 1048; accord, *id.*, at 1037 and 1050 n. 3.

As to supervision of those who are hired, the fact that they present no greater risk than any other employee eliminates the need for *any* special supervision, except perhaps a notation on their personnel files that they

cordingly, the rule's classification of successfully maintained persons as dispositively different from the general population is left without any justification and, with its irrationality and invidiousness thus uncovered, must fall before the Equal Protection Clause.[15]

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need not be assigned to safety-sensitive positions. The District Court found as a fact that petitioners' methods of monitoring all their employees "can be used for persons on methadone maintenance just as they are used for other persons . . . ." *Id.*, at 1037.

[15] I have difficulty also with the Court's easy conclusion that the challenged rule was "[q]uite plainly" not motivated "by any special animus against a specific group of persons." *Ante,* at 593 n. 40. Heroin addiction is a special problem of the poor, and the addict population is composed largely of racial minorities that the Court has previously recognized as politically powerless and historical subjects of majoritarian neglect. Persons on methadone maintenance have few interests in common with members of the majority, and thus are unlikely to have their interests protected, or even considered, in governmental decisionmaking. Indeed, petitioners stipulated that "[o]ne of the reasons for the . . . drug policy is the fact that [petitioners] fee[l] an adverse public reaction would result if it were generally known that [petitioners] employed persons with a prior history of drug abuse, including persons participating in methadone maintenance programs." App. 83A. It is hard for me to reconcile that stipulation of animus against former addicts with our past holdings that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534 (1973). On the other hand, the afflictions to which petitioners are more sympathetic, such as alcoholism and mental illness, are shared by both white and black, rich and poor.

Some weight should also be given to the history of the rule. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 267–268 (1977). Petitioners admit that it was not the result of a reasoned policy decision and stipulated that they had never studied the ability of those on methadone maintenance to perform petitioners' jobs. Petitioners are not directly accountable to the public, are not the type of official body that normally makes legislative judgments of fact such as those relied upon by the majority today, and are by nature more concerned with business efficiency than with other public policies for which they have no direct responsibility. Cf. *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 103, (1976). But see *ante,* at 592. Both the State and City of New York, which do

Finally, even were the District Court wrong, and even were successfully maintained persons marginally less employable than the average applicant,[16] the blanket exclusion of only these people, when but a few are actually unemployable and when many other groups have varying numbers of unemployable members, is arbitrary and unconstitutional. Many per-

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exhibit those democratic characteristics, hire persons in methadone programs for similar jobs.

These factors together strongly point to a conclusion of invidious discrimination. The Court, however, refuses to view this rule as one "circumscrib[ing] a class of persons characterized by some unpopular trait or affiliation," *ante,* at 593, because it is admittedly justified as applied to many current and former heroin addicts. Because the challenged classification unfairly burdens only a portion of all heroin addicts, the Court reasons that it cannot possibly have been spurred by animus by the "ruling majority." All that shows, however, is that the characteristic in question is a legitimate basis of distinction in some circumstances; heroin addiction is a serious affliction that will often affect employability. But sometimes antipathy extends beyond the facts that may have given rise to it, and when that happens the "stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas,* 427 U. S. 495, 520–521 (1976) (STEVENS, J., dissenting; footnote omitted). That is the case here.

[16] The District Court found that the only common physical effects of methadone maintenance are increases in sweating, insomnia, and constipation, and a decrease in sex drive. 399 F. Supp., at 1044–1045. Those disabilities are unfortunate but are hardly related to inability to be a subway janitor. This Court hints that the employability of even those successfully being maintained on methadone might be reduced by their obligation to appear at their clinics three times a week. *Ante,* at 588–589, n. 32. But all employees have outside obligations, and petitioners have neither argued nor proved that this particular duty would interfere with work.

The District Court did find that a possible but rare effect of methadone is minor impairment of abilities "required for the performance of potentially hazardous tasks, such as driving a car or operating machinery," 399 F. Supp., at 1045, and the court exempted from the relief ordered such positions as subway motorman, which require "unique sensitivity." *Id.,* at 1052. But this does not make rational the blanket exclusion from all jobs, regardless of the qualifications required.

sons now suffer from or may again suffer from some handicap related to employability.[17] But petitioners have singled out respondents—unlike ex-offenders, former alcoholics and mental patients, diabetics, epileptics, and those currently using tranquilizers, for example—for sacrifice to this at best ethereal and likely nonexistent risk of increased unemployability. Such an arbitrary assignment of burdens among classes that are similarly situated with respect to the proffered objectives is the type of invidious choice forbidden by the Equal Protection Clause.[18]

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[17] The District Court found, and petitioners have not challenged, that current problem drinkers present more of an employment risk than do respondents. Petitioners do not automatically discharge employees who are found to have a drinking problem. *Id.*, at 1058.

[18] The Court argues that "the fact that [petitioners have] the resources to expend on one class of problem employees does not by itself establish a constitutional duty on [their] part to come up with resources to spend on all classes of problem employees." *Ante,* at 591–592, n. 37. If respondents were demanding to have the benefit of a rehabilitation program extended to them, petitioners could perhaps argue for freedom to deal with only one problem at a time due to limited resources. See *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955). In that situation, the lack of resources, or the desire to experiment in a limited field, might be a legitimate objective explaining the classification. But respondents are not asking for special, beneficial treatment; they are asking why they should be absolutely excluded from the opportunity to compete for petitioners' jobs.

CONNOR ET AL. *v.* COLEMAN, JUDGE, UNITED STATES COURT OF APPEALS, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

No. 78–1013. Decided March 26, 1979

A motion for leave to file a petition for a writ of mandamus to require the District Court for the Southern District of Mississippi to adopt immediately a plan reapportioning the Mississippi Legislature for the 1979 elections, as previously directed by this Court, is granted. This is a better course than waiting (as the District Court would do by staying its proceedings) to see if a plan fashioned by the legislature is approved by May 7, 1979, in a separate suit brought by the State under the Voting Rights Act of 1965 in the District Court for the District of Columbia, because, in the unlikely event that a legislative plan should supersede the court plan before May 7, potential candidates would have more than a month before the June 7 filing deadline for the 1979 elections, whereas if the legislative plan does not go into effect and the court plan is not filed until May 7 this Court will be faced with requests for emergency review that, if granted, could force changes only days before the June 7 deadline. Consideration of the petition for a writ of mandamus, however, is continued for 30 days.

PER CURIAM.

Petitioners are plaintiffs in a suit seeking reapportionment of the Mississippi Legislature. In the most recent of the Court's decisions in this extended litigation, *Connor* v. *Finch,* 431 U. S. 407, 426 (1977), it reversed the judgment of the District Court and directed that court to draw a new reapportionment plan for the 1979 elections "with a compelling awareness of the need for its expeditious accomplishment."

On remand, and after further proceedings, the parties developed a settlement plan. Negotiations broke down, however, over the wording of a consent decree. In the meantime, the State had adopted a new statutory reapportionment plan fashioned by the legislature. Because the Attorney General of the United States, acting pursuant to the Voting Rights

Act of 1965, 42 U. S. C. § 1973c, refused to approve the legislature's plan, the State brought suit under the Act in the United States District Court for the District of Columbia, seeking a declaration that the plan does not have a discriminatory purpose or effect.

Acting on the state defendants' motion, the District Court in this case determined to stay all proceedings until judgment was entered in the District of Columbia litigation. If upheld, the statutory plan would supersede any court-ordered one. See *Wise* v. *Lipscomb,* 437 U. S. 535, 539–542 (1978). Petitioners then submitted this motion for leave to file a petition for a writ of mandamus to require the District Court to adopt a plan. Petitioners contend that some reapportionment scheme must be in effect by June 7, the filing deadline for the 1979 elections. Petitioners argue that the legislature's plan may not be in effect by that date, and that, unless the court files its plan now, time limitations effectively will preclude them from obtaining review of that order in this Court. It is argued in response that immediate filing would be unduly disruptive if the filed plan were supplanted before June 7. The District Court has indicated, however, that, absent the conclusion of the District of Columbia suit, it will order a plan into effect on May 7.

The only issue here, therefore, is whether this Court should require the District Court to file its plan now rather than on May 7; we do not question the good faith of the District Court. We believe, however, that the better course is to file its plan now. In the unlikely event that a legislative plan should supersede the court plan before May 7, potential candidates would have more than a month to reassess their prospects. If, on the other hand, the legislative plan does not go into effect and the court plan is filed only on May 7, this Court will be faced with requests for emergency review that, if granted, could force changes only days before the June 7 deadline.

Leave to file the petition is therefore granted. The District Court is instructed, forthwith and without further delay, to adopt a final plan for the reapportionment of the Mississippi Legislature. Our consideration of the petition for a writ of mandamus is continued for 30 days. See *Connor* v. *Coleman,* 425 U. S. 675, 679 (1976).

*It is so ordered.**

MR. JUSTICE POWELL took no part in the decision of this motion.

MR. JUSTICE MARSHALL, dissenting.

For 13 years, the three-judge District Court for the Southern District of Mississippi has avoided implementing an apportionment plan for that State which satisfies the requirements of the Equal Protection Clause. The case now comes before us for the eighth time, after the District Court chose to ignore our directive, issued nearly 22 months ago, that it resolve this controversy expeditiously. In my view, the Court cannot tolerate such defiance. Accordingly, not only would I grant plaintiffs' motion, which the United States supports, for leave to file a petition for writ of mandamus, but I would issue the writ as well.

This litigation began in 1965 when private plaintiffs successfully challenged the extreme population variances of the existing legislative apportionment. *Connor* v. *Johnson,* 256 F. Supp. 962 (1966). After the legislature enacted a reapportionment that failed to meet constitutional standards, the District Court formulated its own temporary plan for the 1967 quadrennial elections. Under the plan, 34 of the 52 house districts and 10 of the 36 senate districts were multimember. See *Connor* v. *Finch,* 431 U. S. 407, 410 n. 3 (1977). The variance from absolute population equality

*[REPORTER'S NOTE: The petition for a writ of mandamus was denied on May 21, 1979. 441 U. S. 792.]

between the largest and smallest house districts was 20.83%, and the variance in senate districts was 23.24%. *Connor* v. *Johnson,* 265 F. Supp. 492, 504–507 (1967). On appeal, this Court affirmed without opinion use of the temporary plan. 386 U. S. 483 (1967).

The District Court struck down a second legislative reapportionment in 1971. In its place, the court devised a final plan for the 1971 elections which authorized multimember representation for most house districts and almost half of the senate districts. *Connor* v. *Johnson,* 330 F. Supp. 506 (1971). The court failed to formulate a final plan for the State's three largest counties, instead ordering interim multimember representation in those areas.

Upon the plaintiffs' motion, this Court stayed the judgment of the District Court. Emphasizing that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter" because they more closely reflect voter preferences, *Connor* v. *Johnson,* 402 U. S. 690, 692 (1971), we ruled that the District Court could have implemented single-member districts for one of the three counties before the June 4 filing deadline. We therefore instructed the court to extend the deadline to June 14, 1971, and, "absent insurmountable difficulties," to "devise and put into effect" a single-member district plan for the county by that date. *Ibid.* On remand, however, the court did not institute single-member districts because it found that the difficulties were in fact insurmountable. *Connor* v. *Johnson,* 330 F. Supp. 521 (1971). This Court denied further interlocutory relief. 403 U. S. 928 (1971).

The case came here again on direct appeal after the 1971 elections. We unanimously concluded that the 18.9% variance between the largest and smallest senate districts, and the 19.7% variance between the largest and smallest house districts "raise[d] substantial questions concerning the constitu-

tionality of the District Court's plan as a design for permanent apportionment." *Connor* v. *Williams,* 404 U. S. 549, 550 (1972). Nevertheless, the Court declined to invalidate elections that had already been held. *Id.,* at 550–551. Similarly, we found it unnecessary to determine the prospective validity of the plan because the District Court had retained jurisdiction over the three counties in which it had imposed interim multimember representation and had stated that a Special Master would be appointed in January 1972 to consider whether these counties could be divided into districts of substantially equal population for the 1975 and 1979 elections. *Id.,* at 551. Reiterating our preference for single-member districts in judicially fashioned apportionment plans, we summarily vacated and remanded the case with directions that the proceedings before a Special Master "go forward and be *promptly* concluded." *Ibid.* (emphasis added).

Despite our instructions, no Special Master was appointed. See *Connor* v. *Coleman,* 425 U. S. 675, 676 (1976). In April 1973, over a year after our judgment had issued, the Mississippi Legislature enacted a new reapportionment. The plaintiffs immediately filed objections to the plan on April 18. Almost two years later, in February 1975, the District Court finally held a hearing on those objections. While its decision was pending, the court learned that the legislature was considering revisions to the statutory plan. "Heeding the teachings" of *Chapman* v. *Meier,* 420 U. S. 1 (1975), that reapportionment is primarily the responsibility of state legislatures, the District Court further delayed its decision for the expected legislative action. *Connor* v. *Waller,* 396 F. Supp. 1308, 1311 (1975). When the legislature finally acted in April 1975, the court dismissed the plaintiffs' complaint and directed them to file an amended complaint addressing the new reapportionment. *Ibid.* The plaintiffs filed their complaint, and the court entered judgment essentially approving the 1975 legislative plan. *Id.,* at 1332.

In June 1975, this Court summarily and unanimously reversed. *Connor* v. *Waller,* 421 U. S. 656. We held that the Mississippi reapportionment Acts "are not now and will not be effective as laws until and unless cleared pursuant to § 5" of the Voting Rights Act. *Ibid.* Relying on the unambiguous holdings of *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), and *Perkins* v. *Matthews,* 400 U. S. 379 (1971), we ruled that the District Court had erred in deciding the constitutional challenges to the Acts. Under these cases, the only inquiry open to the court was whether § 5 covered a state enactment that had not received the requisite federal scrutiny. 400 U. S., at 383–384; 393 U. S., at 558–561. *Georgia* v. *United States,* 411 U. S. 526 (1973), clearly had held that § 5 encompasses reapportionment Acts, and the Mississippi Act clearly had not been submitted for § 5 clearance. Particularly because two members of the District Court were also on the court that had been reversed in *Perkins* for overstepping the inquiries permitted by § 5, see *Perkins* v. *Matthews,* 301 F. Supp. 565 (SD Miss. 1969), the District Court's undertaking to resolve the constitutionality of this statute was inexcusable.

Our opinion also authorized the District Court to impose a court-ordered reapportionment if it became appropriate to do so. 421 U. S., at 657. Four days after this decision, on June 9, 1975, Mississippi submitted the 1975 Acts to the Attorney General pursuant to § 5. The Attorney General immediately interposed his objection, thereby foreclosing implementation of the plan, on the ground that the State had not demonstrated the absence of a discriminatory purpose or impact. Consequently, the District Court held hearings, and determined that there was insufficient time to formulate a final plan before the August 1975 primary. It therefore adopted a temporary plan that was substantially similar to both the 1971 court-ordered plan previously vacated by this Court and the 1975 legislative plan challenged by the Attorney General. And, once again, despite our admonitions in *Connor*

v. *Johnson,* 402 U. S., at 692, and *Connor* v. *Williams, supra,* at 551, the court's plan relied heavily on multimember districts.[1]

In imposing these temporary measures, the District Court professed its intent to avoid unnecessary delay in preparing a permanent plan for the 1979 state elections. The court's actions, however, belied that representation. On August 1, 1975, the court refused to establish a deadline for approval of a final plan, although it articulated "its firm determination to have this matter out of the way before February 1, 1976." App. to Pet. for Mandamus in *Connor* v. *Coleman,* O. T. 1975, No. 75–1184, p. 4a. On January 26, 1976, the United States moved to set February 10, 1976, as the date for a hearing on the permanent plan. The court, however, denied the motion and deferred further deliberations until this Court decided three pending cases involving reapportionment issues. See *Connor* v. *Coleman,* 425 U. S., at 678.[2]

On May 19, 1976, after two of the three cases had been decided, we allowed the plaintiffs to file a petition for a writ of mandamus, and directed the District Court to

> "carry out the assurance given in its order of January 29, 1976 to 'bring this case to trial forthwith . . .' and schedule a hearing to be held within 30 days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the

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[1] Forty-two of eighty-four house districts and 14 of 39 senate districts were multimember. Brief for United States in *Connor* v. *Coleman,* O. T. 1975, No. 75–1184, p. 9.

[2] The three cases were *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977), *Beer* v. *United States,* 425 U. S. 130 (1976), and *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976).

> November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter." *Id.*, at 679.

The District Court thereupon held the required hearing and entered a judgment adopting a final plan.

This Court reversed the judgment on direct appeal, finding that the plan "fail[ed] to meet *the most elemental requirement* of the Equal Protection Clause in this area—that legislative districts be 'as nearly of equal population as is practicable.' " *Connor* v. *Finch*, 431 U. S., at 409–410 (citations omitted; emphasis added). In spite of our previous holding that court-ordered reapportionment plans ordinarily must achieve population equality with only *de minimis* variation,[3] our invalidation of legislative reapportionments with variations of 5.97%, and 13.1%,[4] and our strong suggestion in *Connor* v. *Williams*, 404 U. S., at 550, that variations near 20% were unacceptable, the District Court's plan countenanced maximum population deviations of 16.5% in the senate districts and 19.3% in the house districts. While the District Court had justified these excessive deviations as preservative of existing political boundaries, this Court found that the plaintiffs had submitted an alternative plan that better served the state policy against fragmenting county boundaries and came closer to achieving population equality. 431 U. S., at 420. Moreover, we observed that

> "unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a

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[3] *Chapman* v. *Meier*, 420 U. S. 1, 26–27 (1975).

[4] *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969); *Wells* v. *Rockefeller*, 394 U. S. 542 (1969). Of course, legislative apportionments are entitled to greater deference than court-ordered plans. *Connor* v. *Finch*, 431 U. S. 407, 415 (1977); *Wise* v. *Lipscomb*, 437 U. S. 535, 541 (1978).

purpose to minimize the voting strength of a minority group." *Id.*, at 425.

Without stating explicitly whether such charges were justified, we directed the court to draw legislative districts that were "reasonably contiguous and compact . . . or explain precisely why in a particular instance that goal cannot be accomplished." *Id.*, at 425–426. Finally, we insisted in no uncertain terms that the District Court resolve this litigation forthwith, stating:

> "The task facing the District Court on remand must be approached not only with great care, but with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them." *Id.*, at 426.

On remand, the parties submitted proposed plans to the District Court. A trial began on November 21, 1977, and concluded on February 14, 1978. Approximately two months later, in April 1978, the Mississippi Legislature enacted a new reapportionment plan, which was filed with the Attorney General. The Attorney General registered his objection on July 31, 1978, and the next day, the State brought suit in the District Court for the District of Columbia seeking a declaratory judgment that the apportionment Act did not have a discriminatory purpose or effect.

Meanwhile, in May 1978, a Special Master previously appointed by the court below filed a final plan. The court ordered a settlement conference in June, and a plan was developed on which all parties agreed.[5] On August 2, however, the defendants filed a motion, opposed by the other

[5] The Joint Apportionment Committee of the Mississippi Legislature polled both houses and determined that a substantial majority of legislators favored the settlement plan if the statutory plan did not receive § 5 clearance. Pet. for Mandamus 10.

parties, to stay the proceedings until the conclusion of the § 5 litigation. Thereafter, in September, the negotiations broke down when the State insisted that the parties agree not to introduce the settlement plan as evidence before the D. C. court.

On October 12, 1978, the plaintiffs requested the District Court to enter final judgment implementing the settlement plan. At a hearing on November 29, 1978, the court, relying on *Wise* v. *Lipscomb,* 437 U. S. 535 (1978), stated it would "not *rush in* with a court-ordered plan . . . when a legislative plan [was] pending." Tr. 3–4 (emphasis added). The court therefore set no deadlines for disposition of the plans before it. When counsel observed that *Connor* v. *Finch,* 431 U. S., at 426, required expeditious action, the District Court appeared to conclude that the intervening actions of the Mississippi Legislature had somehow dissolved the mandate of this Court. Tr. 11–12.

The District Court reiterated at a hearing on January 2, 1979, that "purely on the authority of *Wise* v. *Lipscomb,* . . . we've been waiting to see what the District Court in the District of Columbia would do about the legislative plan." *Id.,* at 7. In their response to petitioners' motion, the judges of the District Court have assured us that if the D. C. court has not acted by May 7, 1979, 31 days before the June 7 filing deadline for the primary elections, they will implement a court-ordered plan.

However, even assuming the District Court met its May 7 deadline, the delay would effectively preclude meaningful review by this Court prior to the August primaries. Given the "painfully protracted" course of this litigation, *Connor* v. *Finch, supra,* at 410, and the dismal record of the District Court, I believe that foreclosing appellate review of its plan before the 1979 primary elections would simply afford the District Court another opportunity to disregard our mandates. Furthermore, the District Court's justifications for its latest

procrastination are as unfounded as those it has previously invoked to evade its judicial responsibilities.

Wise v. *Lipscomb* provides no excuse for ignoring our express directive in *Connor* v. *Finch, supra.* To be sure, MR. JUSTICE WHITE's opinion in *Lipscomb,* which was joined by MR. JUSTICE STEWART, noted that a federal court should give a state legislature a "reasonable opportunity" to fashion an acceptable plan before formulating one itself. 437 U. S., at 540. But this was no novel legal principle. Indeed, the District Court had relied on a similar statement in *Chapman* v. *Meier,* 420 U. S., at 27, when it stayed the proceedings in 1975 and then approved the legislature's plan. See *supra,* at 616. Especially in light of this prior deference, the Mississippi Legislature has had a reasonable opportunity to formulate an acceptable plan over the 13 years of this litigation. In any case, implementation of a court-ordered plan at this point will effect a minimal intrusion on state prerogatives. The legislators have already indicated their provisional approval of the settlement plan, which is one of the options available to the court. See n. 5, *supra.* And, if the D. C. court sustains the legislature's reapportionment, that plan, unless stayed by this Court pending appeal, would supersede whatever plan the Mississippi District Court imposes and would govern the 1979 election. The District Court could easily minimize any inconvenience in the transition by implementing the settlement plan, which largely tracks the 1978 statutory reapportionment with respect to the majority of the legislative districts. Pet. for Mandamus 10 n. 2; Reply Brief for Petitioners 2–3.[6] Moreover, any administrative difficulties would not justify imposition of another temporary, constitutionally infirm plan, as occurred in previous elections.

Nor is there merit to the suggestion that the federal court will exceed its judicial function by formulating a plan before

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[6] Significant differences remain, however, regarding the number of Negro majority districts under the respective plans. *Id.,* at 10–11, n. 2.

resolution of the § 5 litigation. The argument disregards, as the District Court apparently did, MR. JUSTICE WHITE's statement in *Lipscomb:*

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' *Connor* v. *Finch, supra,* at 415, of the federal court to devise and impose a reapportionment plan pending later legislative action.
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> . . . . . .
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> ". . . A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered 'effective as law' . . . until it has been submitted and has received clearance under § 5. . . . Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans." 437 U. S., at 540, 542.

Awaiting the D. C. court's decision could well frustrate the State's electoral processes. Such a course would deny the plaintiffs and the United States an opportunity before the primary elections to have us review the reapportionment plan of a court that has proved demonstrably reluctant to follow our decisions. To permit this delay would further compromise the rights of Mississippi voters by requiring that special elections for vacancies be conducted under ad hoc adaptations of the court's invalid 1975 plan. See, *e. g.,* Brief for United States 14; Reply Brief for Petitioners 2 n. 2.

I believe that the District Court's reliance on *Wise* v. *Lipscomb* is a transparent attempt to avoid the unequivocal command of this Court. Such intransigence, particularly after

13 years of malfeasance, warrants extraordinary sanctions. As we have previously held:

> "When a lower federal court refuses to give effect to, or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. . . . It is well understood that this court has power to do all that is necessary to give effect to its judgments." *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781, 785 (1929).

Accord, *United States* v. *Haley,* 371 U. S. 18 (1962).

The petition should be granted and mandamus should issue forthwith.

Syllabus

COUNTY OF LOS ANGELES ET AL. *v.* DAVIS ET AL.

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

No. 77–1553. Argued December 5, 1978—Decided March 27, 1979

Respondents, representing present and future black and Mexican-American applicants to the Los Angeles County Fire Department, brought a class action against petitioners (Los Angeles County, and the County Board of Supervisors and Civil Service Commission), alleging, *inter alia*, that petitioners' hiring procedure whereby they proposed to interview the top 544 scorers (of whom 492 were white, 10 were black, and 33 were Mexican-American) on a 1972 written civil service examination in order to fill temporary emergency manpower needs in the Fire Department, violated 42 U. S. C. § 1981. The District Court, in 1973, held that the procedure, though not discriminatorily motivated, violated § 1981 because the 1972 examination had not been validated as predictive of job performance, and accordingly the court permanently enjoined all future discrimination and mandated good-faith affirmative-action efforts. The Court of Appeals affirmed. *Held:* The controversy has become moot during the pendency of the litigation. Pp. 631–634.

(a) Jurisdiction, properly acquired, may abate if a case becomes moot because (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. P. 631.

(b) Here the first condition is met because there can be no reasonable expectation that petitioners will use an unvalidated civil service examination for the purposes contemplated in 1972. The temporary emergency firefighter shortage and lack of an alternative means of screening job applicants existing at that time were unique, are no longer present, and are unlikely to recur because, since the commencement of the litigation, petitioners have instituted an efficient and nonrandom method of screening job applicants and increasing minority representation in the Fire Department. Pp. 631–633.

(c) The second condition of mootness is met because petitioners' compliance since 1973 with the District Court's decree and their hiring

of over 50% of new recruits from minorities has completely cured any discriminatory effects of the 1972 proposal. Pp. 633–634.

566 F. 2d 1334, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 634. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 636.

William F. Stewart argued the cause for petitioners. With him on the briefs was *John H. Larson.*

A. Thomas Hunt argued the cause for respondents. With him on the brief were *Timothy B. Flynn* and *Walter Cochran-Bond.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The District Court for the Central District of California determined in 1973 that hiring practices of the County of Los Angeles respecting the County Fire Department violated 42

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*Briefs of *amici curiae* urging reversal were filed by *George Agnost, Burk E. Delventhal,* and *Diane L. Hermann* for the City and County of San Francisco; by *Stephen Warren Solomon* and *Ralph B. Saltsman* for the California Organization of Police and Sheriffs; and by *Robert E. Williams, Douglas S. McDowell,* and *Jeffrey A. Norris* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Burt Neuborne, E. Richard Larson, Fred Okrand,* and *Paul Hoffman* for the American Civil Liberties Union et al.; by *Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy, Norman J. Chachkin, Richard T. Seymour,* and *Richard S. Kohn* for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg, O. Peter Sherwood,* and *Eric Schnapper* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc.

Briefs of *amici curiae* were filed by *Robert A. Helman, Arnold Forster, Jeffrey P. Sinensky,* and *Richard A. Weisz* for the Anti-Defamation League of B'nai B'rith; by *Vilma S. Martinez, Morris J. Baller,* and *Joel G. Contreras* for the Incorporated Mexican American Government Employees et al.; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

U. S. C. § 1981.[1] The District Court in an unreported opinion and order permanently enjoined all future discrimination and entered a remedial hiring order. The Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded the case for further consideration. 566 F. 2d 1334 (1977). We granted certiorari to consider questions presented as to whether the use of arbitrary employment criteria, racially exclusionary in operation, but not purposefully discriminatory, violates 42 U. S. C. § 1981 and, if so, whether the imposition of minimum hiring quotas for fully qualified minority applicants is an appropriate remedy in this employment discrimination case. 437 U. S. 903 (1978). We now find that the controversy has become moot during the pendency of this litigation. Accordingly, we vacate the judgment of the Court of Appeals and direct that court to modify its remand so as to direct the District Court to dismiss the action.

I

In 1969, persons seeking employment with the Los Angeles County Fire Department were required to take a written civil service examination and a physical-agility test. Applicants were ranked according to their performance on the two tests and selected for job interviews on the basis of their scores. Those who passed their oral interviews were then placed on a hiring-eligibility list. Because blacks and Hispanics did poorly on the written examination, this method of screening job applicants proved to have a disparate impact on minority hiring.

The County of Los Angeles has not used the written civil

[1] Revised Stat. § 1977, 42 U. S. C. § 1981, provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

service examination as a ranking device since 1969. The county desisted, prior to the commencement of this litigation, because it felt that the test had a disparate adverse impact on minority hiring, because it feared that this impact might violate Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and because it wished, in any event, to increase minority representation in the Fire Department. See App. to Brief for Respondents 1–4.

In 1971, the county replaced the 1969 procedure with a new method of screening job applicants. A new written test was designed expressly to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews and physical-agility tests. Passing applicants were to be ranked solely on the basis of the results of the physical-agility test and the oral interview. See 566 F. 2d, at 1346 (Wallace J., dissenting).

An examination was conducted, pursuant to this plan, in January 1972. Ninety-seven percent of the applicants passed the written test. There was no disparate adverse impact on minorities and this use of the written examination has not been challenged in this litigation.

After administration of the written test, but before the random selection could be made, an action was filed in state court against the county charging that the random-selection process violated provisions of the county charter and civil service regulations. The county was enjoined from using the random-selection method pending trial on the merits. See *ibid.*

For a time the hiring process came to a halt. The eligibility list drawn from the 1969 examination had been exhausted. The county was unable to devise a nonrandom method of screening job applicants and the county lacked the resources to interview all of the applicants who had passed the 1972 examination.

As a consequence of this unintended hiring freeze, vacancies in the County Fire Department increased and the manpower needs of the Department became critical. Finally, to break the logjam, the County Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black, and 33 Mexican-American. The applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firefighters to meet the immediate urgent requirements of the Fire Department. See *ibid.* But when minority representatives objected to the plan, it was abandoned, uneffectuated, prior to the commencement of this litigation.

In January 1973, respondents, representing present and future black and Mexican-American applicants to the Fire Department, brought a class action against the County of Los Angeles, the Board of Supervisors of the County of Los Angeles, and the Civil Service Commission of the County of Los Angeles (petitioners). Respondents charged that petitioners' 1969 hiring procedures violated 42 U. S. C. § 1981. Respondents also charged that petitioners' plan to interview those applicants who had received the top 544 scores on the 1972 written test violated 42 U. S. C. § 1981.

The District Court found that petitioners had acted without discriminatory intent. Nonetheless, the District Court held that because the 1969 and 1972 written examinations had not been validated as predictive of job performance, petitioners' employment practices had violated 42 U. S. C. § 1981. The court permanently enjoined all future discrimination and mandated good-faith affirmative-action efforts. The court also entered a remedial hiring order whereby at least 20% of all new firefighter recruits were required to be black and another 20% were required to be Mexican-American until the

percentage of blacks and Mexican-Americans in the Los Angeles County Fire Department was commensurate with their percentage in Los Angeles County.[2]

The Court of Appeals reversed the District Court with respect to the 1969 examination: The Court of Appeals held that respondents did not have standing to seek relief on account of the 1969 civil service examination because the plaintiff class, as certified by the District Court, consisted only of present and future job applicants [3] and did not include any persons who had in any way been affected by the 1969 test.[4]

The Court of Appeals affirmed, however, the District

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[2] Despite the fact that the Mexican-American population of Los Angeles County was approximately double the size of the black population, the District Court ordered identical accelerated hiring for both groups due to its finding that the Fire Department's 5'7" height requirement for job applicants was a valid requirement for employment and that this height requirement had the effect of eliminating 41% of the otherwise eligible Mexican-American applicants from consideration. See 566 F. 2d 1334, 1337 (1977). The Court of Appeals reversed the District Court in this respect and ordered a relative increase in the Mexican-American hiring quota. In light of our disposition on grounds of mootness we do not consider this issue.

[3] Respondents contend that their failure to include past applicants in the class was a "mere oversight" which should not be used to vitiate the District Court's decree. But respondents did not cross petition for modification of the judgment of the Court of Appeals reversing the District Court with respect to the 1969 test. The issue of oversight, as a consequence, is not properly before us. See *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976). We intimate no view whether respondents may seek, despite the oversight, to bring a new lawsuit with new and proper parties. See *Gibson* v. *Supercargoes & Checkers*, 543 F. 2d 1259, 1264 (CA9 1976).

[4] The parties stipulated that approximately 100 vacancies occur in the ranks of firemen each year, and testimony at trial established that 187 applicants were placed on an eligibility list following the 1969 test. Based on this evidence the Court of Appeals concluded that the 1969 list had been exhausted before plaintiffs applied for employment as firefighters in October 1971. See 566 F. 2d, at 1338.

Court's holding with respect to the 1972 proposal to use an unvalidated civil service examination.

II

The only question remaining in this case, then, concerns petitioners' 1972 plan to interview the top 544 scorers on the 1972 written examination in order to fill temporary emergency manpower needs. We find that this controversy became moot during the pendency of this litigation.

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack,* 395 U. S. 486, 496 (1969). We recognize that, as a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.,* does not make the case moot." *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632 (1953). But jurisdiction, properly acquired, may abate if the case becomes moot because

(1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, see *id.,* at 633; see also *SEC* v. *Medical Committee For Human Rights,* 404 U. S. 403 (1972), and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, *e. g., DeFunis* v. *Odegaard,* 416 U. S. 312 (1974); *Indiana Employment Security Div.* v. *Burney,* 409 U. S. 540 (1973).

When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

The burden of demonstrating mootness "is a heavy one." See *United States* v. *W. T. Grant Co., supra,* at 632–633. Nevertheless, that burden is fully met on this record.

The first condition is met because there can be no reasonable expectation that petitioners will use an unvalidated civil

service examination for the purposes contemplated in 1972. Petitioners have not used an unvalidated written examination to rank job applicants since 1969. Petitioners considered employing such a procedure in 1972 only because of a temporary emergency shortage of firefighters and only because petitioners then had no alternative means of screening job applicants. Those conditions were unique, are no longer present, and are unlikely to recur because, since the commencement of this litigation, petitioners have succeeded in instituting an efficient and nonrandom method of screening job applicants and increasing minority representation in the Fire Department. The new procedures are as follows:

To fill each group of vacancies petitioners interview 500 applicants who passed their written examination, including the highest scoring 300 whites, 100 blacks, and 100 Mexican-Americans. The number interviewed is several times the number of actual vacancies. The interviewers rate each of these applicants on his or her merits without regard to race or national origin. Thereafter applicants are hired solely on the basis of the score given by the interviewer, again without regard to race or national origin. Those hired are not hired from separate lists, no quotas are used, and the same rating standards are applied to all applicants. The interviewers are not authorized to give extra points because of an applicant's race or national origin, but are directed only to be alert for talented minority applicants. This procedure has resulted every year since 1972 in a minority hiring level which consistently, though by varying amounts, exceeded 50%.

There has been no suggestion by any of the parties, nor is there any reason to believe, that petitioners would significantly alter their present hiring practices if the injunction were dissolved. See also Brief for N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 7. *A fortiori,* there is no reason to believe that petitioners would replace their present hiring procedures with procedures that they re-

garded as unsatisfactory even before the commencement of this litigation. Under these circumstances we believe that this aspect of the case has "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals,* 396 U. S. 45, 48 (1969).

The second condition of mootness is met because petitioners' compliance during the five years since 1973 with the District Court's decree and their hiring of over 50% of new recruits from minorities has completely cured any discriminatory effects of the 1972 proposal. Indeed, it is extremely doubtful, from this record, that the 1972 proposal had any discriminatory effects to redress. The plan, it must be remembered, was never carried out. As a consequence, there has been no finding that any minority job applicant was excluded from employment as a result of the proposal. Cf. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976).[5] Nor has there been a finding that any prospective minority job applicant was deterred from applying for employment with the Fire Department as a result of the proposed application of the examination. Cf. *Teamsters* v. *United States,* 431 U. S. 324, 365–367 (1977). Nor has there been a finding that the 1972 proposal reflected a racial animus that might have tainted other employment practices. Cf. *Keyes* v. *School Dist. No. 1, Denver, Colo.,* 413 U. S. 189 (1973). On the contrary the District Court expressly found:

> "Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. To the contrary, several of Defendants' officials engaged

[5] Moreover, there appears to be no possibility that persons hired pursuant to the District Court's order will be terminated in consequence of our vacation of the Court of Appeals' judgment as moot. Cf. *DeFunis* v. *Odegaard,* 416 U. S. 312 (1974).

in efforts designed to increase the minority representation in the Los Angeles County Fire Department." App. 41.

All of these circumstances, taken together, persuade us that, whatever might have been the case at the time of trial, the controversy has become moot during the pendency of this litigation. Accordingly, we vacate the judgment of the Court of Appeals and remand to that court for entry of an appropriate order directing the District Court to dismiss the action as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).[6]

So ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court of Appeals dealt with three alleged instances of discrimination by the petitioners in hiring firemen: a minimum-height requirement, the use of a written test in 1969 to establish hiring priorities, and the threatened reliance on the results of a test administered in 1972. The Court of Appeals ruled that the height requirement violated federal law. That ruling has not been challenged here. It concluded that these respondents did not have standing to challenge the 1969 test results. All Members of this Court agree. Thus, only the third claim remains in this case.

At least some of the respondents do have standing to challenge the threatened use of the 1972 test. They had applied for employment with the county in 1971 and took the 1972 test. Clearly, they would be affected by the county's decision to use the results of that test to select applicants for interviews. If the county's proposed use of the test was illegal, those respondents were threatened with injury in fact.

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[6] Of necessity our decision "vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . ." *O'Connor* v. *Donaldson*, 422 U. S. 563, 577–578, n. 12 (1975). See also *A. L. Mechling Barge Lines* v. *United States*, 368 U. S. 324, 329–330 (1961).

For the reasons expressed by MR. JUSTICE POWELL, I believe that their controversy with the county is still alive.

I cannot agree with MR. JUSTICE POWELL, however, that the § 1981 question is properly presented in this case. The respondents' second amended complaint alleged that the county had violated Title VII of the Civil Rights Act of 1964. The complaint included copies of "right to sue" letters from the Equal Employment Opportunity Commission. Title VII became applicable to local governmental units in March 1972. The county decided to use the 1972 test to rank applicants at the end of 1972. The District Court held that the county had violated both § 1981 and Title VII. The Court of Appeals expressly affirmed that decision.

> "Of course, this continued threat to use the 1972 test as part of the selection process right up to the filing of the complaint in this case is admittedly a violation of Title VII." 566 F. 2d 1334, 1341 n. 14.

MR. JUSTICE POWELL concludes that the Court of Appeals did not make a considered judgment on the Title VII issue. While it is true that the text of the court's opinion dealt almost exclusively with § 1981, the court clearly held that Title VII standards apply to alleged violations of § 1981. Under the court's analysis, if a violation of § 1981 were made out and the conduct occurred while the defendant was covered by Title VII, Title VII must have been violated also. As the dissenting opinion in the Court of Appeals recognized, the decision on Title VII thus made completely unnecessary the court's discussion of whether § 1981 requires proof of discriminatory intent. 566 F. 2d, at 1347.

The petitioners did not question the ruling of the Court of Appeals on the Title VII claim,* and any opinion this Court

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*The second question presented in the petition for certiorari does bear on Title VII, but not in a sense relevant to this question:

"Is a racial quota hiring order to be effective until the entire fire

might render on the § 1981 question would not affect the judgment below that petitioners' action was illegal under Title VII. Thus, it would truly be an advisory opinion.

It is clear, however, that the only violation remaining in this case, the threatened use of the 1972 test to rank job applicants, cannot justify the extensive remedy ordered by the District Court. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U. S. 1, 16. A simple order enjoining the illegal use of the 1972 test would seem sufficient to remedy the only violation of which the respondents had standing to complain. Therefore, I would vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to narrow the scope of the remedy substantially.

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

Today the Court orders dismissal of a suit challenging the hiring practices of the Los Angeles County Fire Department.

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department achieves current racial parity with the general population beyond the jurisdiction of the court when:

. . . . .

"c. The plaintiffs had no standing to represent any pre-March 24, 1972 applicants and no discriminatory *hiring* has occurred subsequent to Title VII's effective date." (Emphasis added.)

This does not challenge the holding of the Court of Appeals that the threatened use of the 1972 test was itself a Title VII violation, nor, in fact, does it challenge any finding of violation at all. Rather, it is addressed solely to the remedy.

In their brief the petitioners argue that the mere threat to use the test results to rank applicants cannot constitute a violation of Title VII and that a pattern or practice of discrimination must be shown. They also urge that Title VII cannot be applied to local governmental units absent some showing of discriminatory intent. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 323 n. 1; *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 306 n. 12. Because these issues were not raised in the petition for certiorari, it is unnecessary to address them.

The dismissal is predicated on the view that the case has become moot. This disposition of the case is opposed by petitioners, and is not urged by respondents either in their briefs or oral argument. But apart from this, I believe the Court's decision misapplies settled principles of mootness, and think the case is properly before us. We should reach, rather than seek a questionable means of avoiding, the important question—heretofore unresolved by this Court—whether cases brought under 42 U. S. C. § 1981, like those brought directly under the Fourteenth Amendment, require proof of racially discriminatory intent or purpose.

This suit was brought to eliminate the effects of alleged racial discrimination in the Los Angeles County Fire Department. The plaintiffs, respondents here, were persons who applied unsuccessfully for fireman jobs in 1971; the class they represented was certified to include present and future, but not past, black and Mexican-American job applicants to the Fire Department. The county was accused of a variety of employment practices said to discriminate against minorities, including the use of "written tests as a promotion and hiring selection device" even though the tests had "disproportionate detrimental impact" on blacks and Mexican-Americans. App. 4. The named plaintiffs had taken the most recent of these tests, which was administered in January 1972. The use of the tests, together with other actions of the county that plaintiffs described as discriminatory,[1] was alleged to be re-

[1] The complaint also alleged that Fire Department personnel had engaged in nepotistic and "word-of-mouth" recruitment, employed a discriminatory interview procedure, used other procedures, practices, and standards that disfavored minorities, and refused to take affirmative action to correct the effects of past discrimination. App. 4–5. The District Court found that the written tests and the Department's failure to take affirmative steps to overcome a reputation of discrimination among blacks and Mexican-Americans constituted illegal discrimination, but held that the use of a 5′7″ height requirement for firemen was job related and not discriminatory. *Id.*, at 39. The opinion of the Court of Appeals relied

sponsible for substantially fewer blacks and Mexican-Americans being employed by the Fire Department than were present in the population it served.

The District Court found that the county had engaged in employment discrimination and imposed a comprehensive racially based hiring order.[2] In granting this relief, the court apparently acted under the assumption that the plaintiff class had standing to attack acts of discrimination that occurred before any of the class members applied for employment in 1971. The Court of Appeals for the Ninth Circuit reversed this determination. As no past applicants were included in the plaintiff class, the court held that respondents could not challenge the legality of employment practices which had no effect on post-1971 hiring. Respondents therefore were held to lack standing to challenge the civil service test administered in 1969, as the list of eligible applicants drawn up on the basis of that test had been exhausted before any of the class members had sought employment. 566 F. 2d 1334, 1337–1338 (1977). A majority of the panel nonetheless affirmed the District Court's hiring order. *Id.*, at 1343–1344.

Respondents have not sought review of the determination of standing by the court below. Accordingly, the county's

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entirely on the county's written examinations as the basis for sustaining the District Court's remedial order. 566 F. 2d 1334, 1342–1344 (1977).

In addition, the Court of Appeals reversed as clearly erroneous the finding that the height requirement was job related and suggested that the District Court could take further steps to offset the allegedly discriminatory effect of this standard. *Id.*, at 1341–1342, 1343. Petitioners have not sought review of that question; rather they contend that the court below applied the wrong legal standards in assessing generally the legality of their employment practices.

[2] The order required the county to select a minimum of 20% of its new firemen from black applicants and another 20% from Mexican-American applicants until the percentage of members of these racial groups in the fireman work force equaled the percentages in the general population of the county. The county also was required to file annual reports with the court on fireman hiring.

use of the 1972 test is the only employment practice now before us. This narrows the controversy considerably from its original dimensions, but it does not follow that a case or controversy between the county and respondents no longer exists. This is evident from a review of the facts.

The 1972 test was the same as the one administered in 1969, except that some attempt had been made to screen out questions thought to reflect cultural bias. After grading the test, the county announced it would interview only the 544 applicants with the highest scores, rather than the 2,338 applicants who achieved a passing score. On January 8, 1973, five days after interviews began, the county changed its plans and decided to interview all applicants who had passed.[3] Respondents filed this suit on January 11, 1973. In their second amended complaint, filed on April 16, 1973, respondents alleged that the county decided not to use the 1972 test as a screening device only because suit was about to be filed, App. 5, and that the county would reinstitute such use unless an injunction were issued, *id.*, at 7. The District Court found that the 1972 test was among the discriminatory employment practices in which the county engaged,[4] and that the county had dropped its plan to tie interviews to test performance because of the then pending suit. *Id.*, at 39.

The court below agreed that the county's attempt to use the 1972 test as a selection device "had an adverse impact on the

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[3] A stipulation signed by the parties in the District Court incorrectly stated that the change in plans took place on January 8, 1972. It is clear from the face of the stipulation, however, that the 1973 date was meant: The county could not have scheduled interviews to take place on or after January 3, 1972, on the basis of a test administered some time in January 1972. No party has contended here that the 1972 date was correct.

[4] According to the stipulated facts, 19.8% of the applicants who took the 1972 test were black or Mexican-American, but only 8.9% of those 544 applicants who initially were scheduled for interviews were minority group members.

racial class of plaintiffs." 566 F. 2d, at 1338 n. 6. In its view, respondents therefore had standing to attack this conduct. After determining what it considered to be the proper standard for liability under § 1981, the court held that "the district court properly found defendants' use of the 1972 written examination as a selection device to be a violation of § 1981." 566 F. 2d, at 1341. Turning to the scope of the relief ordered, a majority of the panel expressed its approval of the District Court's remedial order. Looking at the judicial "power under § 1981," *id.*, at 1342, the majority ruled that "the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination." *Id.*, at 1343.[5]

In addition to requiring an affirmative employment program to achieve specified racial percentages in hiring, the District Court ordered that petitioners "are permanently enjoined and restrained from engaging in any employment practice which discriminates on the basis of race or national origin against the class represented by Plaintiffs in this Action . . . ."

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[5] MR. JUSTICE STEWART agrees that the case is not moot, but argues that the § 1981 issue is not properly presented in this case. He thinks the court below also rested its holding on a finding that petitioners' conduct violated Title VII of the Civil Rights Act of 1964. While the matter is not free from doubt, it seems most unlikely that the court below based its affirmance of the District Court's sweeping injunction on its cryptic and offhand conclusion that "[o]f course" the "continued threat" to base hiring on test performance "is admittedly a violation of Title VII," 566 F. 2d, at 1341 n. 14. As the language quoted in the text illustrates, the court grounded its decision expressly on § 1981. The one-sentence reference to Title VII is divorced from any discussion of the relationship between the purported violation and the relief granted. Although the basis of the court's affirmance of the injunction is not clear, see 566 F. 2d, at 1342–1344, it apparently believed the District Court properly took into account pre-Title VII violations of § 1981 in determining the scope of the remedial order, in spite of respondents' lack of standing to seek relief for themselves. Thus, the decision of the Court of Appeals seems to have been based on a conclusion that independent violations of § 1981 had occurred.

App. 45. If the District Court was correct, as the court below held, in ruling that the *threatened* use of the 1972 test was an employment practice that discriminated on the basis of race, then an order to prevent the county from carrying out its threat would have been appropriate. The fact that wrongful conduct has not yet transpired does not leave a court powerless to prevent the threatened wrong, if the likelihood of harm is sufficiently substantial. *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–932 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). Cf. *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).[6]

The Court nonetheless holds that this case has become moot, because "there can be no reasonable expectation that petitioners will use an unvalidated civil service examination for the purposes contemplated in 1972," *ante*, at 631–632. This assumption is contrary to findings of fact by the courts below, is opposed by the parties who are subject to the order to be dismissed, and manifestly is at odds with the record in this case.

Neither of the courts below regarded the county's planned use of the 1972 test as solely a response to what the Court characterizes as a "temporary emergency shortage of firefighters." *Ante*, at 632. The District Court, in assessing whether petitioners' announced intention to use the 1972 test as a

[6] Petitioners challenged the standing of respondents to seek the relief that was granted. The court below rejected this challenge in part, holding that respondents could attack the threatened use of the 1972 test. 566 F. 2d, at 1338 n. 6; *id.*, at 1347 n. 2 (Wallace, J., dissenting). The Court approves this holding today. *Ante*, at 631. I agree that respondents alleged injuries in fact, and sought relief, adequate to meet our standing requirements, even though they lacked standing to seek all of the relief accorded them by the courts below. See *Nyquist* v. *Mauclet*, 432 U. S. 1, 6 n. 7 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261–264 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41–42 (1976); *Warth* v. *Seldin*, 422 U. S., at 498–502; *Linda R. S.* v. *Richard D.*, 410 U. S., at 617. Cf. *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U. S. 395, 404 (1977).

selection device violated § 1981, found that this lawsuit was responsible for the county's change in hiring procedures from interviewing only high scorers to considering everyone who passed the test. App. 39. The Court of Appeals agreed, and held: "[Petitioners'] decision, prompted solely by the filing of this lawsuit, to abandon the written exam as a selection device does not moot the claim." 566 F. 2d, at 1341.

Nor have petitioners altered their position on the legality of their use of testing since the decision below. Rather, petitioners strongly assert that the controversy is still a live one. The only suggestion of mootness that has been raised in this case comes from the N. A. A. C. P. Legal Defense and Educational Fund, an organization which is an *amicus curiae* here but has not participated previously in this litigation. Petitioners have attacked this assertion and the factual assumptions on which it rests:

> "The NAACP in reliance on statements of fact that appear absolutely nowhere in the record, gratuitously advance the novel theory that the petitioners have not been hiring under compulsion of the quota order since it was entered in 1973. This contention is not only irrelevant to the issue of the validity of the quota order, but is simply not correct. The *amicus*' factual representation itself describes a quota when it states that all applicants are reduced down to three groups of whites, blacks and Mexican-Americans in exact proportion to the 1–1–3 hiring order." Reply Brief for Petitioners 20 n. 7.

Petitioners continue to use civil service examinations as a threshold barrier for employment consideration, and the record is silent on their validation. To comply with the District Court's order, petitioners have added additional steps to the hiring process to take account of the race of the applicants. The test scores of applicants are ranked separately within each racial group, and the highest scorers are selected for

interviews in the exact racial proportions specified by the court order. Among those applicants who receive an interview, preference is given to minority group members. But these steps clearly are the product of the injunction at issue here and do not represent, as the Court's opinion states, a voluntary affirmative-action program.

The fact that the county, upon pain of contempt, has substantially altered its use of examinations by the addition of other steps that take account of applicants' race hardly can support a finding that "there is no reasonable expectation" the county will abandon its additional procedures once the court order requiring them is dismissed. Our previous decisions make clear that a case does not become moot simply because a court order redressing the alleged grievance has been obeyed. *NLRB* v. *Raytheon Co.*, 398 U. S. 25 (1970); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271 (1938). In *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), on which the court below relied and which the Court today attempts to distinguish, it was stated:

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances, *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (1945), *e. g.*, a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union* v. *Labor Board*, 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. *United States* v. *Trans-Missouri*

Freight Assn., supra, at 309, 310. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, *Labor Board* v. *General Motors Corp.,* 179 F. 2d 221 (1950). The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

"The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. *Such a profession does not suffice to make a case moot* although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.,* at 632–633 (footnotes omitted; emphasis supplied).[7]

In my view, there is far less to the mootness issue here than to that presented in *W. T. Grant Co.* Petitioners, the subject of the lower court's injunction, hotly dispute any suggestion that no live issues remain. Furthermore, they did not cease voluntarily their allegedly illegal conduct and have not disclaimed an intention to resume their use of civil service tests as a primary hiring criterion.[8] Nor, in light of this

[7] As we further observed in *United States* v. *Oregon State Medical Soc.,* 343 U. S. 326, 333 (1952), "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."

[8] Los Angeles, along with the city of San Diego, filed an *amicus* brief in a case before this Court which involved personnel testing. In their statement of interest, these *amici* declared:

"The Cities of Los Angeles and San Diego are municipal corporations within the State of California. The interests of those cities arise from their positions as public sector employers which have charter requirements to hire individuals based on merit. Pursuant to merit principles, both

record, could a disclaimer—were it made—satisfy the "heavy burden" imposed upon a defendant seeking to have a suit dismissed as moot.[9]

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cities use various personnel tests to hire and to promote individuals in the classified civil service.

. . . . .

"Thus, both cities before this Court as Amici Curiae have interests in maintaining personnel testing programs to fulfill the merit system requirements of their municipal charters, as well as interests in sustaining those personnel tests in litigation." Brief for City of Los Angeles et al. as *Amici Curiae* in *Detroit Edison Co.* v. *NLRB*, O. T. 1978, No. 77–968, pp. 2, 4.

[9] The assertion of the Court that "there can be no reasonable expectation" that petitioners will base hiring on unvalidated aptitute tests, *ante*, at 631, lacks any record support and is contrary to the assumptions upon which the courts below based their actions. There has been no change in circumstances of any relevance to the Court's conclusion since petitioners attempted to use their unvalidated 1972 test as a hiring device. Title VII, which the Court appears to suggest as an intervening factor, applied with full force to petitioners when in January 1973 they sought to limit hiring to applicants with the highest scores on the 1972 test. Under *W. T. Grant Co.*, the burden is on petitioners to demonstrate that there is little chance they will resume their allegedly illegal conduct. Petitioners have not attempted to meet that burden here. The Court's assumption that in the future the county will seek to validate its tests before relying on them not only is unsubstantiated by the record facts, it also reverses the presumption we normally apply in mootness cases. See, *e. g.*, *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 98, and n. 14 (1976) (federal agency's new hiring regulation forbidding challenged practice does not moot claim for injunctive and declaratory relief).

It is instructive to compare the facts of this case with those of *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974). Here petitioners have made no change in their hiring procedures except in response to the court order, and have put on this record no evidence that they contemplate any further changes. The Court's belief that petitioners will not resume their use of unvalidated tests rests solely on speculation. In *DeFunis*, by contrast, the law school had admitted DeFunis to his final quarter in school and represented to this Court that it would make no attempt to rescind this registration. Unlike the case at bar, DeFunis had not brought a class action; hence only his individual right not to be discriminated against in law school admissions was at stake. *Id.*, at 317. Because it was virtually certain

Furthermore, the Court's avoidance of the merits of this controversy by its novel view of mootness leaves the county in a quandary. Although it is not unreasonable to assume, following dismissal of this suit as moot, that the county will again base hiring on unvalidated aptitude tests, it also is possible that the county may believe that hiring procedures of the sort previously required by the order under review are necessary to ensure compliance with federal law. The Court's disposition today will leave the decision of the Court of Appeals on the merits as the most pertinent statement of the governing law, even if that decision is not directly binding.[10] Therefore, any future litigation against the county, including the suit to assert the rights of pre-1971 applicants that the Court seems to contemplate, *ante,* at 630 n. 3, is likely to be controlled by the decision of that court.

In sum, the Court's disposition leaves all of the parties in positions of uncertainty: Respondents lack protection against the resumption of the county's alleged discrimination, and the county lacks a conclusive determination of the legality of its conduct. All of these considerations militate against a determination of mootness. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U. S. 519, 535–537, n. 14 (1978). Accordingly, I conclude that the question of whether petitioners violated § 1981 is before

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that DeFunis never again would need to submit to the admission process he challenged, we held that the case had become moot. *Id.,* at 318. Even the very slight chance that DeFunis might not receive his degree was considered sufficiently substantial by four Members of the Court to render the case a live controversy.

[10] Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, *O'Connor* v. *Donaldson,* 422 U. S. 563, 577–578, n. 12 (1975); *A. L. Mechling Barge Lines* v. *United States,* 368 U. S. 324, 329–330 (1961); *United States* v. *Munsingwear, Inc.,* 340 U. S. 36 (1950), the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the Ninth Circuit.

us.[11] I would reach this issue and determine whether § 1981, like the Equal Protection Clause of the Fourteenth Amendment, prohibits only purposefully discriminatory conduct.[12]

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[11] I cannot agree with MR. JUSTICE STEWART that the question whether petitioners had violated § 1981 in the past was a matter of indifference to the court below and would be immaterial upon remand. See n. 5, *supra*. In exercising its "broad" equitable discretion as to granting any prophylactic relief, see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), the District Court could consider whether the county's conduct was a single, isolated instance of illegality or part of a pattern of unlawful conduct. This would rest on a determination of the requirements of § 1981 prior to the 1972 amendment of Title VII. Thus, a decision now on the § 1981 issue could affect the substantial rights of the parties and would not be an advisory opinion.

[12] I am in agreement with MR. JUSTICE STEWART that, regardless of the proper construction of § 1981, the only arguably illegal conduct in this case could not justify the sweeping remedy ordered by the District Court.

DELAWARE *v.* PROUSE

CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 77–1571. Argued January 17, 1979—Decided March 27, 1979

A patrolman in a police cruiser stopped an automobile occupied by respondent and seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment. The Delaware Supreme Court affirmed. *Held:*

1. This Court has jurisdiction in this case even though the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but also was impermissible under the Delaware Constitution. That court's opinion shows that even if the State Constitution would have provided an adequate basis for the judgment below, the court did not intend to rest its decision independently on the State Constitution, its holding instead depending upon its view of the reach of the Fourth and Fourteenth Amendments. Pp. 651–653.

2. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. Pp. 653–663.

(a) Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Pp. 653–655.

(b) The State's interest in discretionary spot checks as a means of ensuring the safety of its roadways does not outweigh the resulting intrusion on the privacy and security of the persons detained. Given the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents, cf. *United States* v. *Brignoni-Ponce,* 422 U. S. 873; *United States* v. *Martinez-Fuerte,* 428 U. S. 543, the marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law enforcement officials. Pp. 655–661.

(c) An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalk; nor are they shorn of those interests when they step from the sidewalks into their automobiles. Pp. 662–663.

(d) The holding in this case does not preclude Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. Pp. 663.

382 A. 2d 1359, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which POWELL, J., joined, *post,* p. 663. REHNQUIST, J., filed a dissenting opinion, *post,* p. 664.

Charles M. Oberly III argued the cause for petitioner. With him on the brief were *Richard R. Wier, Jr.,* Attorney General of Delaware, and *Carolyn Berger, Fred S. Silverman,* and *Kathleen Molyneux,* Deputy Attorneys General.

David M. Lukoff argued the cause for respondent. With him on the brief were *Richard M. Baumeister, Frank Askin,* and *Eric Neisser.**

**Frank Carrington, Wayne W. Schmidt, Glen R. Murphy,* and *James P. Costello* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question is whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

I

At 7:20 p. m. on November 30, 1976, a New Castle County, Del., patrolman in a police cruiser stopped the automobile occupied by respondent.[1] The patrolman smelled marihuana smoke as he was walking toward the stopped vehicle, and he seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana seized as a result of the stop, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. Characterizing the stop as "routine," the patrolman explained, "I saw the car

[1] In its opinion, the Delaware Supreme Court referred to respondent as the operator of the vehicle, see 382 A. 2d 1359, 1361 (1978). However, the arresting officer testified: "I don't believe [respondent] was the driver. . . . As I recall, he was in the back seat . . . ," App. A12; and the trial court in its ruling on the motion to suppress referred to respondent as one of the four "occupants" of the vehicle, *id.*, at A17. The vehicle was registered to respondent. *Id.*, at A10.

in the area and wasn't answering any complaints, so I decided to pull them off." App. A9. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment.

The Delaware Supreme Court affirmed, noting first that "[t]he issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court," 382 A. 2d 1359, 1362 (1978) (emphasis in original). The court held that "a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution." *Id.*, at 1364. We granted certiorari to resolve the conflict between this decision, which is in accord with decisions in five other jurisdictions,[2] and the contrary determination in six jurisdictions[3] that the Fourth Amendment does not prohibit the kind of automobile stop that occurred here. 439 U. S. 816 (1978).

II

Because the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but also

[2] *United States* v. *Montgomery,* 182 U. S. App. D. C. 426, 561 F. 2d 875 (1977); *People* v. *Ingle,* 36 N. Y. 2d 413, 330 N. E. 2d 39 (1975); *State* v. *Ochoa,* 23 Ariz. App. 510, 534 P. 2d 441 (1975), rev'd on other grounds, 112 Ariz. 582, 544 P. 2d 1097 (1976); *Commonwealth* v. *Swanger,* 453 Pa. 107, 307 A. 2d 875 (1973); *United States* v. *Nicholas,* 448 F. 2d 622 (CA8 1971). See also *United States* v. *Cupps,* 503 F. 2d 277 (CA6 1974).

[3] *State* v. *Holmberg,* 194 Neb. 337, 231 N. W. 2d 672 (1975); *State* v. *Allen,* 282 N. C. 503, 194 S. E. 2d 9 (1973); *Palmore* v. *United States,* 290 A. 2d 573 (D. C. App. 1972), aff'd on jurisdictional grounds only, 411 U. S. 389 (1973); *Leonard* v. *State,* 496 S. W. 2d 576 (Tex. Crim. App. 1973); *United States* v. *Jenkins,* 528 F. 2d 713 (CA10 1975); *Myricks* v. *United States,* 370 F. 2d 901 (CA5), cert. dismissed, 386 U. S. 1015 (1967).

was impermissible under Art. I, § 6, of the Delaware Constitution, it is urged that the judgment below was based on an independent and adequate state ground and that we therefore have no jurisdiction in this case. *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210 (1935). At least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification as to the ground upon which the judgment rested. *California* v. *Krivda,* 409 U. S. 33, 35 (1972). Based on our reading of the opinion, however, we are satisfied that even if the State Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution and that we have jurisdiction of this case.

As we understand the opinion below, Art I, § 6, of the Delaware Constitution will automatically be interpreted at least as broadly as the Fourth Amendment;[4] that is, every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments will, without further analysis, be held to be contrary to Art. I, § 6. This approach, which is consistent with previous opinions of the Delaware Supreme Court,[5] was followed in this case. The court ana-

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[4] The court stated:

"The Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former." 382 A. 2d, at 1362, citing *State* v. *Moore,* 55 Del. 356, 187 A. 2d 807 (1963).

Moore was decided less than two years after *Mapp* v. *Ohio,* 367 U. S. 643 (1961), applied to the States the limitations previously imposed only on the Federal Government. In setting forth the approach reiterated in the opinion below, *Moore* noted not only the common purposes and wording of the Fourth Amendment and the state constitutional provision, but also the overriding effect of the former. See 55 Del., at 362–363, 187 A. 2d, at 810–811.

[5] We have found only one case decided after *State* v. *Moore, supra,* in which the court relied solely on state law in upholding the validity of a search or seizure, and that case involved not only Del. Const. Art. I, § 6,

lyzed the various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the State Constitution was therefore also infringed. This is one of those cases where "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977). Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the State Constitution might have provided an independent and adequate state ground. *Ibid.* The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments. If the state court misapprehended federal law, "[i]t should be freed to decide . . . these suits according to its own local law." *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

III

The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556–558 (1976); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); cf. *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968). The essential purpose of the proscriptions in the Fourth Amendment is to impose a stand-

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but also state statutory requirements for issuance of a search warrant. *Rossitto* v. *State*, 234 A. 2d 438 (1967). Moreover, every case holding a search or seizure to be contrary to the state constitutional provision relies on cases interpreting the Fourth Amendment and simultaneously concludes that the search or seizure is contrary to that provision. See, *e. g.*, *Young* v. *State*, 339 A. 2d 723 (1975); *Freeman* v. *State*, 317 A. 2d 540 (1974); cf. *Bertomeu* v. *State*, 310 A. 2d 865 (1973).

ard of "reasonableness" [6] upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .' " *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978), quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967).[7] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.[8] Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," [9] whether this be probable cause [10] or a less stringent test.[11] In those situations in which the balance of interests precludes insistence upon "some quantum

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[6] See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 315 (1978); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *Cady* v. *Dombrowski*, 413 U. S. 433, 439 (1973); *Terry* v. *Ohio*, 392 U. S. 1, 20–21 (1968); *Camara* v. *Municipal Court*, 387 U. S. 523, 539 (1967).

[7] See also *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976); *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 270 (1973); *Beck* v. *Ohio*, 379 U. S. 89, 97 (1964); *McDonald* v. *United States*, 335 U. S. 451, 455–456 (1948).

[8] See, *e. g.*, *United States* v. *Ramsey*, 431 U. S. 606, 616–619 (1977); *United States* v. *Martinez-Fuerte*, *supra*, at 555; cases cited in n. 6, *supra*.

[9] *Terry* v. *Ohio*, *supra*, at 21. See also *Scott* v. *United States*, 436 U. S. 128, 137 (1978); *Beck* v. *Ohio*, *supra*, at 96–97.

[10] See, *e. g.*, *United States* v. *Santana*, 427 U. S. 38 (1976); *United States* v. *Watson*, 423 U. S. 411 (1976); *Ker* v. *California*, 374 U. S. 23 (1963) (warrantless arrests requiring probable cause); *United States* v. *Ortiz*, *supra*; *Warden* v. *Hayden*, 387 U. S. 294 (1967); *Carroll* v. *United States*, 267 U. S. 132 (1925) (warrantless searches requiring probable cause). See also *Gerstein* v. *Pugh*, 420 U. S. 103 (1975).

[11] See *Terry* v. *Ohio*, *supra*; *United States* v. *Brignoni-Ponce*, *supra*.

In addition, the Warrant Clause of the Fourth Amendment generally requires that prior to a search a neutral and detached magistrate ascertain that the requisite standard is met, see, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385 (1978).

of individualized suspicion," [12] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field," *Camara* v. *Municipal Court,* 387 U. S., at 532. See *id.,* at 534–535; *Marshall* v. *Barlow's, Inc., supra,* at 320–321; *United States* v. *United States District Court,* 407 U. S. 297, 322–323 (1972) (requiring warrants).

In this case, however, the State of Delaware urges that patrol officers be subject to no constraints in deciding which automobiles shall be stopped for a license and registration check because the State's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained.

IV

We have only recently considered the legality of investigative stops of automobiles where the officers making the stop have neither probable cause to believe nor reasonable suspicion that either the automobile or its occupants are subject to seizure under the applicable criminal laws. In *United States* v. *Brignoni-Ponce, supra,* Border Patrol agents conducting roving patrols in areas near the international border asserted statutory authority to stop at random any vehicle in order to determine whether it contained illegal aliens or was involved in smuggling operations. The practice was held to violate the Fourth Amendment, but the Court did not invalidate all warrantless automobile stops upon less than probable cause. Given "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border," 422 U. S., at 881, the Court analogized the roving-patrol stop to the on-the-street encounter addressed in *Terry* v. *Ohio, supra,* and held:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are

[12] *United States* v. *Martinez-Fuerte, supra,* at 560.

> aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 U. S., at 884 (footnote omitted).

Because "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators," *id.*, at 883, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Ibid.*

The constitutionality of stops by Border Patrol agents was again before the Court in *United States* v. *Martinez-Fuerte, supra,* in which we addressed the permissibility of checkpoint operations. This practice involved slowing all oncoming traffic "to a virtual, if not a complete, halt," 428 U. S., at 546, at a highway roadblock, and referring vehicles chosen at the discretion of Border Patrol agents to an area for secondary inspection. See *id.*, at 546, 558. Recognizing that the governmental interest involved was the same as that furthered by roving-patrol stops, the Court nonetheless sustained the constitutionality of the Border Patrol's checkpoint operations. The crucial distinction was the lesser intrusion upon the motorist's Fourth Amendment interests:

> "[The] objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *Id.*, at 558.

Although not dispositive,[13] these decisions undoubtedly pro-

[13] In addressing the constitutionality of Border Patrol practices, we reserved the question of the permissibility of state and local officials stopping

vide guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case. We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway and that it bears greater resemblance to a permissible stop and secondary detention at a checkpoint near the border. In this regard, we note that *Brignoni-Ponce* was not limited to roving-patrol stops on limited-access roads, but applied to any roving-patrol stop by Border Patrol agents on any type of roadway on less than reasonable suspicion. See 422 U. S., at 882–883; *United States* v. *Ortiz,* 422 U. S. 891, 894 (1975). We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id.,* at 894–895, quoted in *United States* v. *Martinez-Fuerte,* 428 U. S., at 558.

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motorists for document questioning in a manner similar to checkpoint detention, see 428 U. S., at 560 n. 14, or roving-patrol operations, see *United States* v. *Brignoni-Ponce,* 422 U. S., at 883 n. 8.

V

But the State of Delaware urges that even if discretionary spot checks such as occurred in this case intrude upon motorists as much as or more than do the roving patrols held impermissible in *Brignoni-Ponce,* these stops are reasonable under the Fourth Amendment because the State's interest in the practice as a means of promoting public safety upon its roads more than outweighs the intrusion entailed. Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life [14] and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle.[15] The registration requirement and, more pointedly, the related annual inspection requirement in Delaware [16] are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program. Furthermore, we note that the State of Delaware requires a minimum amount of insurance

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[14] In 1977, 47,671 persons died in motor vehicle accidents in this country. U. S. Dept. of Transportation, Highway Safety A–9 (1977).

[15] See, *e. g.,* Del. Code Ann., Tit. 21, §§ 2701, 2707 (1974 and Supp. 1977); § 2713 (1974) (Department of Public Safety "shall examine the applicant as to his physical and mental qualifications to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property . . .").

[16] § 2143 (a) (1974).

coverage as a condition to automobile registration,[17] implementing its legitimate interest in seeing to it that its citizens have protection when involved in a motor vehicle accident.[18]

The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained. Furthermore, drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves.[19] Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers. If this were not so, licensing of drivers would hardly be an effective means of promoting roadway safety. It seems common sense that the

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[17] § 2118 (Supp. 1977); State of Delaware, Department of Public Safety, Division of Motor Vehicles, Driver's Manual 60 (1976).

[18] It has been urged that additional state interests are the apprehension of stolen motor vehicles and of drivers under the influence of alcohol or narcotics. The latter interest is subsumed by the interest in roadway safety, as may be the former interest to some extent. The remaining governmental interest in controlling automobile thefts is not distinguishable from the general interest in crime control.

[19] Cf. *United States* v. *Brignoni-Ponce, supra,* at 883.

percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best. Furthermore, and again absent something more than mere assertion to the contrary, we find it difficult to believe that the unlicensed driver would not be deterred by the possibility of being involved in a traffic violation or having some other experience calling for proof of his entitlement to drive but that he would be deterred by the possibility that he would be one of those chosen for a spot check. In terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.

Much the same can be said about the safety aspects of automobiles as distinguished from drivers. Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately. Furthermore, in Delaware, as elsewhere, vehicles must carry and display current license plates,[20] which themselves evidence that the vehicle is properly registered;[21] and, under Delaware law, to qualify for annual registration a vehicle must pass the annual safety inspection[22] and be properly insured.[23] It does not appear, therefore, that a stop of a Delaware-registered vehicle is necessary in order to ascertain compliance with the State's registration requirements; and, because there is nothing to

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[20] Del. Code Ann., Tit. 21, § 2126 (1974).

[21] §§ 2121 (b), (d) (1974).

[22] See n. 16, *supra*; § 2109 (1974).

[23] See n. 17, *supra;* § 2109 (1974).

show that a significant percentage of automobiles from other States do not also require license plates indicating current registration, there is no basis for concluding that stopping even out-of-state cars for document checks substantially promotes the State's interest.

The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." *Terry* v. *Ohio,* 392 U. S., at 22. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations [24]—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 270 (1973); *Camara* v. *Municipal Court,* 387 U. S., at 532–533.

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[24] See, *e. g.,* §§ 4101–4199B (1974 and Supp. 1977).

VI

The "grave danger" of abuse of discretion, *United States* v. *Martinez-Fuerte,* 428 U. S., at 559, does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact, *Cady* v. *Dombrowski,* 413 U. S. 433, 441 (1973). Only last Term we pointed out that "if the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall* v. *Barlow's, Inc.,* 436 U. S., at 312–313. There are certain "relatively unique circumstances," *id.,* at 313, in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. See *United States* v. *Biswell,* 406 U. S. 311 (1972) (federal regulation of firearms); *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." *Marshall* v. *Barlow's, Inc., supra,* at 323.

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.[25] Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the

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[25] Cf. *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978) (warrant required for federal inspection under interstate commerce power of health and safety of workplace); *See* v. *Seattle,* 387 U. S. 541 (1967) (warrant required for inspection of warehouse for municipal fire code violations); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967) (warrant required for inspection of residence for municipal fire code violations).

individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry* v. *Ohio, supra,* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See *Adams* v. *Williams,* 407 U. S. 143, 146 (1972).

VII

Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.[26] Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. The judgment below is affirmed.

So ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

The Court, *ante,* this page, carefully protects from the reach of its decision other less intrusive spot checks "that do not in-

[26] Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

volve the unconstrained exercise of discretion." The roadblock stop for all traffic is given as an example. I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop. And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court's balancing process, and the value factors under consideration, would be quite different.

With this understanding, I join the Court's opinion and its judgment.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds, in successive sentences, that absent an articulable, reasonable suspicion of unlawful conduct, a motorist may not be subjected to a random license check, but that the States are free to develop "methods for spot checks that . . . do not involve the unconstrained exercise of discretion," such as "[q]uestioning . . . all oncoming traffic at roadblock-type stops . . . ." *Ante*, at 663. Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence. The rule becomes "curiouser and curiouser" as one attempts to follow the Court's explanation for it.

As the Court correctly points out, people are not shorn of their Fourth Amendment protection when they step from their homes onto the public sidewalks or from the sidewalks into

their automobiles. But a random license check of a motorist operating a vehicle on highways owned and maintained by the State is quite different from a random stop designed to uncover violations of laws that have nothing to do with motor vehicles.* No one questions that the State may require the licensing of those who drive on its highways and the registration of vehicles which are driven on those highways. If it may insist on these requirements, it obviously may take steps necessary to enforce compliance. The reasonableness of the enforcement measure chosen by the State is tested by weighing its intrusion on the motorists' Fourth Amendment interests against its promotion of the State's legitimate interests. *E. g., United States* v. *Brignoni-Ponce,* 422 U. S. 873, 878 (1975).

In executing this balancing process, the Court concludes that given the alternative mechanisms available, discretionary spot checks are not a "sufficiently productive mechanism" to safeguard the State's admittedly "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." *Ante,* at 659, 658. Foremost among the alternative methods of enforcing traffic and vehicle

*Indeed, this distinction was expressly recognized in *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 883 n. 8 (1975):

"Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are neccessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

safety regulations, according to the Court, is acting upon observed violations, for "drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves." *Ante,* at 659. Noting that "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers," *ibid.,* the Court concludes that the contribution to highway safety made by random stops would be marginal at best. The State's primary interest, however, is in traffic safety, not in apprehending unlicensed motorists for the sake of apprehending unlicensed motorists. The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.

Nor is the Court impressed with the deterrence rationale, finding it inconceivable that an unlicensed driver who is not deterred by the prospect of being involved in a traffic violation or other incident requiring him to produce a license would be deterred by the possibility of being subjected to a spot check. The Court arrives at its conclusion without the benefit of a shred of empirical data in this record suggesting that a system of random spot checks would fail to deter violators. In the absence of such evidence, the State's determination that random stops would serve a deterrence function should stand.

On the other side of the balance, the Court advances only the most diaphanous of citizen interests. Indeed, the Court does not say that these interests can never be infringed by the State, just that the State must infringe them en masse rather than citizen by citizen. To comply with the Fourth Amendment, the State need only subject *all* citizens to the same "anxiety" and "inconvenien[ce]" to which it now subjects only a few.

For constitutional purposes, the action of an individual law enforcement officer is the action of the State itself, *e. g., Ex parte Virginia,* 100 U. S. 339, 346–347 (1880), and state acts are accompanied by a presumption of validity until shown otherwise. See, *e. g., McDonald* v. *Board of Election,* 394 U. S. 802 (1969). Although a system of discretionary stops could conceivably be abused, the record before us contains no showing that such abuse is probable or even likely. Nor is there evidence in the record that a system of random license checks would fail adequately to further the State's interest in deterring and apprehending violators. Nevertheless, the Court concludes "[o]n the record before us" that the random spot check is not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." *Ante,* at 659. I think that the Court's approach reverses the presumption of constitutionality accorded acts of the States. The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not. "On this record" respondent has failed to make such a demonstration.

Neither the Court's opinion, nor the opinion of the Supreme Court of Delaware, suggests that the random stop made in this case was carried out in a manner inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Absent an equal protection violation, the fact that random stops may entail "a possibly unsettling show of authority," *ante,* at 657, and "may create substantial anxiety," *ibid.,* seems an insufficient basis to distinguish for Fourth Amendment purposes between a roadblock stopping all cars and the random stop at issue here. Accordingly, I would reverse the judgment of the Supreme Court of Delaware.

LEO SHEEP CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 77-1686. Argued January 15, 16, 1979—Decided March 27, 1979

The Union Pacific Act of 1862 granted public land to the Union Pacific Railroad for each mile of track that it laid, and this was done under a system whereby land surrounding the railroad right-of-way was divided into "checkerboard" blocks, with odd-numbered lots being granted to the railroad and even-numbered lots being reserved for the Government. Petitioners, the railroad's successors in fee to certain odd-numbered lots in Wyoming lying in the vicinity of a reservoir area used by the public for fishing and hunting, brought an action to quiet title against the United States after the Government had cleared a road across the Leo Sheep Co.'s land to afford the public access to the reservoir area. The District Court granted petitioners' motion for summary judgment, but the Court of Appeals reversed, holding that when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections held by the Government. *Held:* The Government does not have an implied easement to build a road across petitioners' land. Pp. 678–688.

(a) The tenuous relevance of the common-law doctrine of easement by necessity to the Government's asserted reserved right here is insufficient to overcome the inference prompted by the omission of any reference in the 1862 Act to such a right. Pp. 679–682.

(b) Nor does the canon of construction that, when grants to federal lands are at issue, any doubts "are resolved for the Government, not against it," *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 617, support the Government's position, since such grants "are not to be so construed as to defeat the intent of the legislature," *United States* v. *Denver & Rio Grande R. Co.*, 150 U. S. 1, 14. Pp. 682–683.

(c) Nor is the Unlawful Inclosures of Public Lands Act of 1885 of any significance in this case, since petitioners' unwillingness to entertain a public road without compensation cannot be considered a violation of that Act, it having been recognized in *Camfield* v. *United States*, 167 U. S. 518, that obstruction of access to even-numbered lots by individually fenced odd-numbered lots was not a violation of the Act. Pp. 683–687.

570 F. 2d 881, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except WHITE, J., who took no part in the consideration or decision of the case.

Clyde O. Martz argued the cause for petitioners. With him on the briefs were *Howard L. Boigon, John A. MacPherson,* and *T. Michael Golden.*

Sara Sun Beale argued the cause for respondents. With her on the brief were *Peter R. Steenland, Jr., Raymond N. Zagone,* and *Edward J. Shawaker.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This is one of those rare cases evoking episodes in this country's history that, if not forgotten, are remembered as dry facts and not as adventure. Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad. But that issue is posed against the backdrop of a fascinating chapter in our history. As this Court noted in another case involving the Union Pacific Railroad, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." *United States* v. *Union Pacific R. Co.,* 91 U. S. 72, 79 (1875). In this spirit we relate the events underlying passage of the Union Pacific Act of 1862.

**Russell H. Carpenter, Jr., Stuart C. Stock, C. George Niebank,* and *Alan C. Furth* filed a brief for Union Pacific Land Resources Corp. et al. as *amici curiae* urging reversal.

Henry A. Burgess, William C. Farmer, and *David M. Bridges* filed a brief for Energy Transportation Systems, Inc., as *amicus curiae* urging affirmance.

I

The early 19th century—from the Louisiana Purchase in 1803 to the Gadsden Purchase in 1853—saw the acquisition of the territory we now regard as the American West.[1] During those years, however, the area remained a largely untapped resource for the settlers on the eastern seaboard of the United States did not keep pace with the rapidly expanding western frontier. A vaguely delineated area forbiddingly referred to as the "Great American Desert" can be found on more than one map published before 1850, embracing much of the United States' territory west of the Missouri River. As late as 1860, for example, the entire population of the State of Nebraska was less than 30,000 persons, which represented one person for every five square miles of land area within the State.

With the discovery of gold at Sutter's Mill in California in 1848, the California gold rush began and with it a sharp increase in settlement of the West. Those in the East with visions of instant wealth, however, confronted the unenviable choice among an arduous 4-month overland trek, risking yellow fever on a 35-day voyage via the Isthmus of Panama, and a better than 4-month voyage around Cape Horn. They obviously yearned for another alternative, and interest focused on the transcontinental railroad.

The idea of a transcontinental railroad predated the California gold rush. From the time that Asa Whitney had proposed a relatively practical plan for its construction in 1844, it had, in the words of one of this century's leading historians of the era, "engaged the eager attention of promoters and politicians

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[1] Except as otherwise noted, this historical discussion draws on C. Ames, Pioneering the Union Pacific (1969); R. Athearn, Union Pacific Country (1971); R. Howard, The Great Iron Trail (1962); J. McMaster, A History of the People of the United States During Lincoln's Administration (1927); 2 A. Nevins, Ordeal of the Union (1947); H. White, History of the Union Pacific Railway (1895).

until dozens of schemes were in the air." [2] The building of the railroad was not to be the unalloyed product of the free-enterprise system. There was indeed the inspiration of men like Thomas Durant and Leland Stanford and the perspiration of a generation of immigrants, but animating it all was the desire of the Federal Government that the West be settled. This desire was intensified by the need to provide a logistical link with California in the heat of the Civil War. That the venture was much too risky and much too expensive for private capital alone was evident in the years of fruitless exhortation; private investors would not move without tangible governmental inducement.[3]

In the mid-19th century there was serious disagreement as

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[2] 2 Nevins, *supra* n. 1, at 82.

[3] That exhortation came from some of the great visionaries of the 19th century. On the floor of the House, Thomas Hart Benton compared eastern Kansas to Egypt and extolled the wealth that would be shared by a private railroad to California. Athearn, *supra* n. 1, at 22–23. Senator William H. Seward of New York, a man not known for his timidity, proclaimed "that a railroad is necessary, and ought to be built; and I think it has been scientifically demonstrated . . . that not only one such road is feasible, but that at least three, four, or five routes offer the necessary facilities for the security of this great object." Cong. Globe, 35th Cong., 1st Sess., 1584 (1858). In his book An Overland Journey, Horace Greeley was equally enthusiastic. He went so far as to calculate the economic feasibility of the proposed railroad line by estimating potential revenue, based on the value of current shipments of gold from California, passenger fares that could be obtained, and the cost to the Government of transporting and maintaining an army in the West and providing mail services. H. Greeley, An Overland Journey 310–316 (C. Duncan ed. 1964).

But despite his enthusiasm Greeley appreciated that the effort was beyond private capital alone. "The amount is too vast; the enterprise too formidable; the returns too remote and uncertain." "[W]hat assurance could an association of private citizens have that, having devoted their means and energies to the construction of such a road, it would not be rivaled and destroyed by a similar work on some other route?" *Id.*, at 324.

to the forms that inducement could take. Mr. Justice Story, in his Commentaries on the Constitution, described one extant school of thought which argued that "internal improvements," such as railroads, were not within the enumerated constitutional powers of Congress.[4] Under such a theory, the direct subsidy of a transcontinental railroad was constitutionally suspect—an uneasiness aggravated by President Andrew Jackson's 1830 veto of a bill appropriating funds to construct a road from Maysville to Lexington within the State of Kentucky.[5]

The response to this constitutional "gray" area, and source of political controversy, was the "checkerboard" land-grant scheme. The Union Pacific Act of 1862 granted public land to the Union Pacific Railroad for each mile of track that it laid.[6] Land surrounding the railway right-of-way was divided into "checkerboard" blocks. Odd-numbered lots were granted to the Union Pacific; even-numbered lots were reserved by the Government. As a result, Union Pacific land in the area of the right-of-way was usually surrounded by public land, and vice versa. The historical explanation for this peculiar disposition is that it was apparently an attempt to disarm the "internal improvement" opponents by establishing a grant scheme with "demonstrable" benefits. As one historian notes in describing an 1827 federal land grant intended to facilitate private construction of a road between Columbus and Sandusky, Ohio:

> "Though awkwardly stated, and not fully developed in the Act of 1827, this was the beginning of a practice to be followed in most future instances of granting land for the

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[4] 2 J. Story, Commentaries on the Constitution 166–172 (5th ed. 1891). See Cong. Globe, 35th Cong., 2d Sess., 579–585 (1859) (Sen. Andrew Johnson).

[5] 2 J. Richardson, A Compilation of the Messages and Papers of the Presidents 1789–1897, pp. 483–493 (1896).

[6] Act of July 1, 1862, 12 Stat. 489.

> construction of specific internal improvements: donating alternate sections or one half of the land within a strip along the line of the project and reserving the other half for sale. . . . In later donations the price of the reserved sections was doubled so that it could be argued, as the *Congressional Globe* shows *ad infinitum,* that by giving half the land away and thereby making possible construction of the road, canal, or railroad, the government would recover from the reserved sections as much as it would have received from the whole." P. Gates, History of Public Land Law Development 345–346 (1968).[7]

In 1850 this technique was first explicitly employed for the subsidization of a railroad when the Illinois delegation in Congress, which included Stephen A. Douglas, secured the enactment of a bill that granted public lands to aid the construction of the Illinois Central Railroad.[8] The Illinois Central and proposed connecting lines to the south were granted nearly three million acres along rights of way through Illinois, Mississippi, and Alabama, and by the end of 1854 the main line of the Illinois Central from Chicago to Cairo, Ill., had been put into operation. Before this line was constructed, public lands had gone begging at the Government's minimum price; within a few years after its completion, the railroad had disposed of more than one million acres and was rapidly

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[7] Government grants to aid the development of transportation facilities gained momentum during the administration of John Quincy Adams, who did not share Madison's and Monroe's reservations about the constitutionality of the Government's involvement in such activities. Checkerboard land grants achieved currency during the canal era. Apparently the first such grant was to aid construction of the Wabash and Erie Canal in Indiana. See P. Gates, History of Public Land Law Development 341–356 (1968).

[8] Act of Sept. 20, 1850, 9 Stat. 466. This was not, however, the first time land grants were used to subsidize a railroad. In 1833, Congress permitted a grant that had been intended for canal construction to be used instead for the building of a railroad. Gates, *supra* n. 7, at 357.

selling more at prices far above those at which land had been originally offered by the Government.

The "internal improvements" theory was not the only obstacle to a transcontinental railroad. In 1853 Congress had appropriated moneys and authorized Secretary of War Jefferson Davis to undertake surveys of various proposed routes for a transcontinental railroad. Congress was badly split along sectional lines on the appropriate location of the route—so badly split that Stephen A. Douglas, now a Senator from Illinois, in 1854 suggested the construction of a northern, central, and southern route, each with connecting branches in the East.[9] That proposal, however, did not break the impasse.

The necessary impetus was provided by the Civil War. Senators and Representatives from those States which seceded from the Union were no longer present in Congress, and therefore the sectional overtones of the dispute as to routes largely disappeared. Although there were no major engagements during the Civil War in the area between the Missouri River and the west coast which would be covered by any transcontinental railroad, there were two minor engagements which doubtless made some impression upon Congress of the necessity for being able to transport readily men and materials into that area for military purposes.

Accounts of the major engagements of the Civil War do not generally include the Battle of Picacho Pass, because in the words of Edwin Corle, author of The Gila, "[i]t could be called nothing more than a minor skirmish today." [10] It was

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[9] Asa Whitney's original proposal had contemplated an eastern terminus on the south shore of Lake Michigan, and a western terminus in northern California or Oregon. Senator Gwin of California, a Southern sympathizer, urged a route running from Memphis through Ft. Smith and Albuquerque to Los Angeles. Thomas Hart Benton of Missouri, eschewing both the extreme northern and extreme southern routes, advocated "a great central national highway"—beginning in St. Louis. 2 Nevins, *supra* n. 1, at 82–83.

[10] E. Corle, The Gila 232 (1951).

fought 42 miles northwest of Tucson, Ariz., on April 15, 1862, between a small contingent of Confederate cavalry commanded by Captain Sherod Hunter and Union troops under Colonel James H. Carleton consisting of infantry, cavalry, and artillery components known as the "California Volunteers." The battle was a draw, with the Union forces losing three men and the badly outnumbered Confederates apparently suffering two men killed and two captured. Following the battle, the Confederate forces abandoned Tucson, which they had previously occupied, and Carleton's Union forces entered that city on May 20, 1862.

The Battle of Glorieta Pass has similarly endured anonymity. Also described as La Glorieta Pass or Apache Canyon, Glorieta Pass lies in the upper valley of the Pecos River, in the southern foothills of the Sangre de Cristo range of the Rocky Mountains near Santa Fe, N. M. Here in the early spring of 1862 a regiment of Colorado volunteers, having moved by forced marches from Denver to Ft. Union, turned back Confederate forces led by Brigadier General Henry Sibley which, until this encounter, had marched triumphantly northward up the Rio Grande Valley from Ft. Bliss. As a result of the Battle of Glorieta Pass, New Mexico was saved for the Union, and Sibley's forces fell back in an easterly direction through Texas before the advance of Carleton's column of Californians.[11]

These engagements gave some immediacy to the comments of Congressman Edwards of New Hampshire during the debate on the Pacific Railroad bill:

> "If this Union is to be preserved, if we are successfully to combat the difficulties around us, if we are to crush out

[11] See generally M. Hall, Sibley's New Mexico Campaign (1960); W. Whitford, The Colorado Volunteers in the Civil War (1971). The Confederate forces in New Mexico have since been lauded for their courage, if not for their optimism. One Southern commander is reported to have responded to a Union demand for surrender: "We will fight first and surrender afterwards!" G. Harris, A Tale of Men Who Knew Not Fear 18 (1935).

> this rebellion against the lawful authority of the Government, and are to have an entire restoration, it becomes us, with statesmanlike prudence and sagacity, to look carefully into the future, and to guard in advance against all possible considerations which may threaten the dismemberment of the country hereafter." Cong. Globe, 37th Cong., 2d Sess., 1703 (1862).

As is often the case, war spurs technological development, and Congress enacted the Union Pacific Act in May 1862. Perhaps not coincidentally, the Homestead Act was passed the same month.

The Union Pacific Act specified a route west from the 100th meridian, between a site in the Platte River Valley near the cities of Kearney and North Platte, Neb., to California. The original plan was for five eastern terminals located at various points on or near the Missouri River; but in fact Omaha was the only terminal built according to the plan.[12]

The land grants made by the Union Pacific Act included all

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[12] The choice of the 100th meridian as the eastern end of the rail line was not without significance. The 100th meridian has been traditionally thought of as the parallel west of which it was impossible to raise most crops without irrigation. Omaha, for example, 300 miles to the east, receives an average of 25 inches of rainfall per year, while Sidney, Neb., west of the meridian and near the Wyoming line, receives an average of only 16 inches of rainfall each year. Thus, in a sense the 100th meridian represented, not only to travelers but also to potential settlers, the eastern boundary of the amorphous "Great American Desert."

"In general, historians have been content to postulate that American institutions, orientations, and habits of thought which developed east of the 100th meridian maintained their form and retained their content after reaching the West, whereas in fact a good many important ones did not. In the second place, historians have generally been ignorant of or incurious about natural conditions that determine life in the West, differentiate it from other sections, and have given it different orientations." Introduction of Bernard DeVoto to W. Stegner, Beyond the Hundredth Meridian xviii–xix (1954).

the odd-numbered lots within 10 miles on either side of the track. When the Union Pacific's original subscription drive for private investment proved a failure, the land grant was doubled by extending the checkerboard grants to 20 miles on either side of the track. Private investment was still sluggish, and construction did not begin until July 1865, three months after the cessation of Civil War hostilities.[13] Thus began a race with the Central Pacific Railroad, which was laying track eastward from Sacramento, for the Government land grants which went with each mile of track laid. The race culminated in the driving of the golden spike at Promontory, Utah, on May 10, 1869.

II

This case is the modern legacy of these early grants. Petitioners, the Leo Sheep Co. and the Palm Livestock Co., are the Union Pacific Railroad's successors in fee to specific odd-

[13] Construction would not have begun then without the Crédit Mobilier, a limited-liability company that was essentially owned by the promoters and investors of the Union Pacific. One of these investors, Oakes Ames, a wealthy New England shovel maker, was a substantial investor in Crédit Mobilier and also a Member of Congress. Crédit Mobilier contracted with the Union Pacific to build portions of the road, and by 1866 several individuals were large investors in both corporations. Allegations of improper use of funds and bribery of Members of the House of Representatives led to the appointment of a special congressional investigatory committee that during 1872 and 1873 looked into the affairs of Crédit Mobilier. These investigations revealed improprieties on the part of more than one Member of Congress, and the committee recommended that Ames be expelled from Congress. The investigation also touched on the career of a future President. See M. Leech & H. Brown, The Garfield Orbit (1978).

In 1872 the House of Representatives enacted a resolution condemning the policy of granting subsidies of public lands to railroads. Cong. Globe, 42d Cong., 2d Sess., 1585 (1872); see *Great Northern R. Co.* v. *United States,* 315 U. S. 262, 273–274 (1942). Of course, the reaction of the public or of Congress a decade after the enactment of the Union Pacific Act to the conduct of those associated with the Union Pacific cannot influence our interpretation of that Act today.

numbered sections of land in Carbon County, Wyo. These sections lie to the east and south of the Seminoe Reservoir, an area that is used by the public for fishing and hunting. Because of the checkerboard configuration, it is physically impossible to enter the Seminoe Reservoir sector from this direction without some minimum physical intrusion upon private land. In the years immediately preceding this litigation, the Government had received complaints that private owners were denying access over their lands to the reservoir area or requiring the payment of access fees. After negotiation with these owners failed, the Government cleared a dirt road extending from a local county road to the reservoir across both public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

Petitioners initiated this action pursuant to 28 U. S. C. § 2409a to quiet title against the United States. The District Court granted petitioners' motion for summary judgment, but was reversed on appeal by the Court of Appeals for the Tenth Circuit. 570 F. 2d 881. The latter court concluded that when Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government. Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari, 439 U. S. 817, and now reverse.

The Government does not claim that there is any express reservation of an easement in the Union Pacific Act that would authorize the construction of a public road on the Leo Sheep Co.'s property. Section 3 of the 1862 Act sets out a few specific reservations to the "checkerboard" grant. The grant was not to include land "sold, reserved, or otherwise disposed of by the United States," such as land to which there were homestead claims. 12 Stat. 492. Mineral lands were also excepted from the operation of the Act. *Ibid.*

Given the existence of such explicit exceptions, this Court has in the past refused to add to this list by divining some "implicit" congressional intent. In *Missouri, K. & T. R. Co.* v. *Kansas Pacific R. Co.,* 97 U. S. 491, 497 (1878), for example, this Court in an opinion by Mr. Justice Field noted that the intent of Congress in making the Union Pacific grants was clear: "It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned . . . ." The Court held that although a railroad right-of-way under the grant may not have been located until years after 1862, by the clear terms of the Act only claims established prior to 1862 overrode the railroad grant; conflicting claims arising after that time could not be given effect. To overcome the lack of support in the Act itself, the Government here argues that the implicit reservation of the asserted easement is established by "settled rules of property law" and by the Unlawful Inclosures of Public Lands Act of 1885.

Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity." [14] There are two problems with the Government's reliance on that notion in this case. First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area.[15] More importantly, the easement is not

[14] See generally 3 R. Powell, Real Property ¶ 410 (1978). For a recent discussion and application of the "easement by necessity" doctrine, see *Hollywyle Assn., Inc.* v. *Hollister,* 164 Conn. 389, 324 A. 2d 247 (1973).

[15] It is very unlikely that Congress in 1862 contemplated this type of intrusion, and it could not reasonably be maintained that failure to provide access to the public at large would render the Seminoe Reservoir land useless. Yet these are precisely the considerations that define the

actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to effect the same result. For example, the State of Wyoming no longer recognizes the common-law easement by necessity in cases involving landlocked estates. It provides instead for a procedure whereby the landlocked owner can have an access route condemned on his behalf upon payment of the necessary compensation to the owner of the servient estate.[16] For similar reasons other state courts have held that the "easement by necessity" doctrine is not available to the sovereign.[17]

The applicability of the doctrine of easement by necessity in this case is, therefore, somewhat strained, and ultimately of

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scope of easements by necessity. As one commentator relied on by the Government notes:

"As the name implies, these easements are the product of situations where the usefulness of land is at stake. The scope of the resultant easement embodies the best judgment of the court as to what is reasonably essential to the land's use. . . . Changes in the dominant parcel's use exert some, but not a great influence, in determining the scope of such easements." 3 Powell, *supra* n. 14, ¶ 416, pp. 34–203 to 34–204 (footnotes omitted). See, *e. g., Higbee Fishing Club* v. *Atlantic City Electric Co.*, 78 N. J. Eq. 434, 79 A. 326 (1911) (footpath, not roadway, proper scope of easement where use of dominant estate as clubhouse could not have been contemplated by parties to original grant).

[16] Wyo. Stat. §§ 24–9–101 to 24–9–104 (1977); see *Snell* v. *Ruppert*, 541 P. 2d 1042, 1046 (Wyo. 1975) (statute "offers complete relief to the shut-in landowner and covers the whole subject matter"; "[i]f a statute covers a whole subject matter, the abrogation of the common law on the same subject will necessarily be implied"). See also, *e. g., Quinn* v. *Holly*, 244 Miss. 808, 146 So. 2d 357 (1962). In light of the history of public land grants related in Part I of this opinion, it is not surprising that "private" eminent domain statutes like that of Wyoming are most prevalent in the Western United States.

[17] *E. g., State* v. *Black Bros.*, 116 Tex. 615, 629–630, 297 S. W. 213, 218–219 (1927); see *Pearne* v. *Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627–628, 18 S. W. 402, 404 (1891).

little significance. The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862. The 1862 Act specifically listed reservations to the grant, and we do not find the tenuous relevance of the common-law doctrine of ways of necessity sufficient to overcome the inference prompted by the omission of any reference to the reserved right asserted by the Government in this case. It is possible that Congress gave the problem of access little thought; but it is at least as likely that the thought which was given focused on negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes.[18] So both as a matter of common-law

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[18] The intimations that can be found in the Congressional Globe are that there was no commonly understood reservation by the Government of the right to enter upon granted lands and construct a public road. Representative Cradlebaugh of Nevada offered an amendment to what became the Union Pacific Act of 1862 that would have reserved the right to the public to enter granted land and prospect for valuable minerals upon the payment of adequate compensation to the owner. The proposed amendment was defeated. The only Representative other than Cradlebaugh who spoke to it, Representative Sargent of California, stated:

"The amendment of the gentleman proposes to allow the public to enter upon the lands of any man, whether they be mineral lands or not, and prospect for gold and silver, and as compensation proposes some loose method of payment for the injuries inflicted. Now, sir, it may turn out that the man who thus commits the injuries may be utterly insolvent, not able to pay a dollar, and how is the owner of the property to be compensated for tearing down his dwellings, rooting up his orchards, and destroying his crops?" Cong. Globe, 37th Cong., 2d Sess., 1910 (1862).

In debates on an earlier Pacific Railroad bill it was explicitly suggested that there be "a reservation in every grant of land that [the Government] shall have a right to go through it, and take it at proper prices to be paid hereafter." The author of this proposal, Senator Simmons of Rhode Island, lamented the lack of such a reservation in the bill under consideration. Cong. Globe, 35th Cong., 2d Sess., 579 (1859). Apparently the intended purpose of this proposed reservation was to permit railroads to obtain rights-of-way through granted property at the Government's behest. Senator Simmons' comments are somewhat confused, but

doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here.

The Government would have us decide this case on the basis of the familiar canon of construction that, when grants to federal lands are at issue, any doubts "are resolved for the Government, not against it." *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 617 (1978). But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts. In 1885 this Court observed:

> "The solution of [ownership] questions [involving the railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. Peter R. Co.* v. *Barney*, 113 U. S. 618, 625 (1885).

The Court harmonized the longstanding rule enunciated most recently in *Andrus, supra,* with the doctrine of *Winona* in *United States* v. *Denver & Rio Grande R. Co.*, 150 U. S. 1, 14 (1893), when it said:

> "It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legisla-

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they certainly do not evince any prevailing assumption that the Government implicitly reserved a right-of-way through granted lands.

ture, or to withhold what is given either expressly or by necessary or fair implication. . . .

". . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

Thus, invocation of the canon reiterated in *Andrus* does little to advance the Government's position in this case.

Nor do we find the Unlawful Inclosures of Public Lands Act of 1885 of any significance in this controversy. That Act was a response to the "range wars," the legendary struggle between cattlemen and farmers during the last half of the 19th century. Cattlemen had entered Kansas, Nebraska, and the Dakota Territory before other settlers, and they grazed their herds freely on public lands with the Federal Government's acquiescence.[19] To maintain their dominion over the ranges, cattlemen used homestead and pre-emption laws to gain control of water sources in the range lands. With monopoly control of such sources, the cattlemen found that ownership over a relatively small area might yield effective control of thousands of acres of grassland. Another exclusionary technique was the illegal fencing of public lands, which was often the product of the checkerboard pattern of railroad grants. By placing fences near the borders of their parts of the

[19] M. Clawson & B. Held, The Federal Lands 57–58, 84–85 (1957).

checkerboard, cattlemen could fence in thousands of acres of public lands. Reports of the Secretary of the Interior indicated that vast areas of public grazing land had been preempted by such fencing patterns.[20] In response Congress passed the Unlawful Inclosures Act of 1885.[21]

Section 1 of the Unlawful Inclosures Act states that "[a]ll inclosures of any public lands . . . constructed by any person . . . to any of which land included within the inclosure the person . . . had no claim or color of title made or acquired in good faith . . . are declared to be unlawful." 23 Stat. 321, 43 U. S. C. § 1061. Section 3 further provides:

> "No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith." 23 Stat. 322, 43 U. S. C. § 1063.

The Government argues that the prohibitions of this Act should somehow be read to include the Leo Sheep Co.'s refusal to acquiesce in a public road over its property, and that such a conclusion is supported by this Court's opinion in

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[20] H. R. Rep. No. 1325, 48th Cong., 1st Sess. (1884). For example, in a letter to the House of Representatives the Secretary related two instances in Colorado where cattle companies fenced in more than one million acres each. Congressional concern was heightened by the fact that these and other cattle corporations were foreign owned. *Id.*, at 2.

[21] 23 Stat. 321, as amended, 43 U. S. C. § 1061 *et seq.*

Camfield v. *United States,* 167 U. S. 518 (1897). We find, however, that *Camfield* does not afford the support that the Government seeks. That case involved a fence that was constructed on odd-numbered lots so as to enclose 20,000 acres of public land, thereby appropriating it to the exclusive use of Camfield and his associates. This Court analyzed the fence from the perspective of nuisance law, and concluded that the Unlawful Inclosures Act was an appropriate exercise of the police power.

There is nothing, however, in the *Camfield* opinion to suggest that the Government has the authority asserted here. In fact, the Court affirmed the grantee's right to fence completely his own land.

> "So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large." *Id.,* at 528.

Obviously, if odd-numbered lots are individually fenced, the access to even-numbered lots is obstructed. Yet the *Camfield* Court found that this was not a violation of the Unlawful Inclosures Act. In that light we cannot see how the Leo Sheep Co.'s unwillingness to entertain a public road without compensation can be a violation of that Act. It is certainly true that the problem we confront today was not a matter of great concern during the time the 1862 railroad grants were made. The order of the day was the open range—barbed wire had not made its presence felt—and the type of incursions on

private property necessary to reach public land was not such an interference that litigation would serve any motive other than spite.[22] Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.[23] The *Camfield* case expresses similar sentiments. After the passage quoted above conceding the authority of a private landowner to fence the entire perimeter of his odd-numbered lot, the Court opined that such authority was of little practical significance "since a separate enclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section." *Ibid.* It is some testament to common sense that the present case is virtually unprecedented,

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[22] There were exceptions, one of which, *Buford* v. *Houtz*, 133 U. S. 320 (1890), reached this Court. See n. 24, *infra*.

[23] This expectation was fostered by the general land-grant scheme. Each block in the checkerboard was a square mile—640 acres. The public lots were open to homesteading, with 160 acres the maximum allowable claim under the Homestead Act. Act of May 20, 1862, 12 Stat. 392. The Union Pacific was required by the 1862 Act to sell or otherwise dispose of the land granted to it within three years after completion of the entire road, with lands not so disposed of within that period subject to homesteading and pre-emption. Thus, in 1862, the process of subdivision was perceived, to a great degree, as inevitable.

During the 1850 debates concerning the Illinois Central Railroad, Senator Cass of Michigan outlined the dynamics that were presumed to underlie the system of checkerboard grants: "In all the new portions of the United States this Government owns a large proportion of the property. They sell it. They offer it for sale. It is surveyed, thrown into market, and emigration is invited. Tract after tract is sold, roads are made, villages and towns are built up, and all the improvements that can be of value to a country go on and increase the value of the lands . . . ." Cong. Globe, 31st Cong., 1st Sess., 846 (1850).

and that in the 117 years since the grants were made, litigation over access questions generally has been rare.

Nonetheless, the present times are litigious ones and the 37th Congress did not anticipate our plight. Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before.[24] When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased.[25] This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public

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[24] This distinguishes the instant case from *Buford* v. *Houtz*, *supra*. The appellants there were a group of cattle ranchers seeking, *inter alia*, an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on even-numbered public lots. This Court denied the requested relief because it was contrary to a century-old grazing custom. The Court also was influenced by the sheep ranchers' lack of any alternative.

"Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under pretence of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege." 133 U. S., at 332.

Here neither custom nor necessity supports the Government.

[25] In 1887 the Secretary of the Interior recommended that Congress enact legislation providing for a public road around each section of public land to provide access to the various public lots in the checkerboard scheme. The Secretary also recommended that to the extent building these roads required the taking of property that had passed to private individuals, "the bill should provide for necessary compensation." 1 Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887, p. 15 (1887); see also 1 Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1888, p. xvii (1888).

thoroughfares without compensation.[26] The judgment of the Court of Appeals for the Tenth Circuit is accordingly

Reversed.

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

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[26] See, *e. g.*, *Louisiana* v. *Garfield*, 211 U. S. 70, 76 (1908); *Iron Silver Mining Co.* v. *Elgin Mining & Smelting Co.*, 118 U. S. 196, 207–208 (1886); *Doolittle's Lessee* v. *Bryan*, 14 How. 563, 567 (1853).

Syllabus

FEDERAL COMMUNICATIONS COMMISSION *v.* MIDWEST VIDEO CORPORATION ET AL.

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

No. 77–1575. Argued January 10, 1979—Decided April 2, 1979*

The Federal Communications Commission (FCC) promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes. Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. During the rulemaking proceedings, the FCC rejected a challenge to the rules on jurisdictional grounds, maintaining that the rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs." On petition for review, the Court of Appeals set aside the FCC's rules as beyond the agency's jurisdiction. The court was of the view that the rules amounted to an attempt to impose common-carrier obligations on cable operators, and thus ran counter to the command of § 3 (h) of the Communications Act of 1934 that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." *Held:* The FCC's rules are not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 178, and hence are not within the FCC's statutory authority. Pp. 696–709.

(a) The FCC's access rules plainly impose common-carrier obligations on cable operators. *United States* v. *Midwest Video Corp.*, 406 U. S. 649, distinguished. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis; operators are prohibited from determining or influencing the content of access

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*Together with 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 Corporation et al.*, also on certiorari to the same court.

programming; and charges for access and use of equipment are delimited. Pp. 699–702.

(b) Consistently with the policy of the Act to preserve editorial control of programming in the licensee, § 3 (h) forecloses any discretion in the FCC to impose access requirements amounting to common-carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. Although § 3 (h) does not explicitly limit the regulation of cable systems, Congress' limitation on the FCC's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Pp. 702–707.

(c) In light of the hesitancy with which Congress has approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, this Court is constrained to hold that the FCC exceeded the limits of its authority in promulgating its access rules. The FCC may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. Authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress. Pp. 708–709.

571 F. 2d 1025, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 709.

Deputy Solicitor General Wallace argued the cause for petitioner in No. 77–1575 and in support of petitioners in Nos. 77–1648 and 77–1662 under this Court's Rule 21 (4). With him on the briefs were *Solicitor General McCree, Richard A. Allen, David J. Saylor, Keith H. Fagan,* and *Julian R. Rush, Jr. Burt Neuborne, Bruce J. Ennis, Michael Botein,* and *David M. Rice* filed a brief for petitioner in No. 77–1648. *Edward J. Kuhlmann, Jeffrey H. Olson,* and *Charles M. Firestone* filed a brief for petitioners in No. 77–1662.

George H. Shapiro argued the cause for respondent Midwest Video Corp. in all cases. With him on the brief was *Harry M. Plotkin.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. *Report and Order in Docket No. 20508,* 59 F. C. C. 2d 294 (*1976 Order*). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States* v. *Southwestern Cable Co.,* 392 U. S. 157, 178 (1968), and hence within the Commission's statutory authority.

I

The regulations now under review had their genesis in rules prescribed by the Commission in 1972 requiring all cable operators in the top 100 television markets to design their systems to include at least 20 channels and to dedicate 4 of those channels for public, governmental, educational, and leased access. The rules were reassessed in the course of further rulemaking proceedings. As a result, the Commission modified a compliance deadline, *Report and Order in Docket No. 20363,* 54 F. C. C. 2d 207 (1975), effected certain substantive changes, and extended the rules to all cable systems having 3,500 or more subscribers, *1976 Order, supra.* In its

†*James Bouras, Fritz E. Attaway, Arthur Scheiner,* and *Stuart F. Feldstein* filed a brief for the Motion Picture Assn. of America as *amicus curiae* urging reversal.

Lee Loevinger and *Jay E. Ricks* filed a brief for Teleprompter Corp. et al. as *amici curiae* urging affirmance.

1976 Order, the Commission reaffirmed its view that there was "a definite societal good" in preserving access channels, though it acknowledged that the "overall impact that use of these channels can have may have been exaggerated in the past." 59 F. C. C. 2d, at 296.

As ultimately adopted, the rules prescribe a series of interrelated obligations ensuring public access to cable systems of a designated size and regulate the manner in which access is to be afforded and the charges that may be levied for providing it. Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication.[1] 47 CFR § 76.252 (1977). Moreover, to the extent of their available activated channel capacity,[2] cable systems must allocate four

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[1] Systems in the top 100 markets and in operation prior to March 31, 1972, and other systems in operation by March 31, 1977, are given until June 21, 1986, to comply with the channel capacity and two-way communication requirements. 47 CFR § 76.252 (b) (1977).

[2] Activated channel capacity consists of the number of usable channels that the system actually provides to the subscriber's home or that it could provide by making certain modifications to its facilities. *1976 Order,* 59 F. C. C. 2d, at 315. The great majority of systems constructed in the major markets from 1962 to 1972 were designed with a 12-channel capacity. Often, additional channels may be activated by installing converters on subscribers' home sets, albeit at substantial cost. See *Notice of Proposed Rule Making,* 53 F. C. C. 2d 782, 785 (1975).

In determining the number of activated channels available for access use, channels already programmed by the cable operator for which a separate charge is made are excluded. Similarly, channels utilized for transmission of television broadcast signals are subtracted. The remaining channels deemed available for access use include channels provided to the subscriber but not programmed and channels carrying other nonbroadcast programming—such as programming originated by the system operator—for which a separate assessment is not made. *1976 Order, supra,* at 315–316. The Commission has indicated that it will "not consider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts." *Id.,* at 316. Additionally, the Commission has stated that pay

separate channels for use by public, educational, local governmental, and leased-access users, with one channel assigned to each. § 76.254 (a). Absent demand for full-time use of each access channel, the combined demand can be accommodated with fewer than four channels but with at least one. §§ 76.254 (b), (c).[3] When demand on a particular access channel exceeds a specified limit, the cable system must provide another access channel for the same purpose, to the extent of the system's activated capacity. § 76.254 (d). The rules also require cable systems to make equipment available for those utilizing public-access channels. § 76.256 (a).

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter.[4] §§ 76.256

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entertainment programming should not be "provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming." *Id.*, at 317.

[3] Cable systems in operation on June 21, 1976, that lack sufficient activated channel capacity to furnish one full channel for access purposes may meet their access obligations by providing whatever portions of channels that are available for such purposes. 47 CFR § 76.254 (c) (1977). Systems initiated after that date, and existing systems desirous of adding a nonmandatory broadcast signal after that date, must supply one full channel for access use even if they must install converters to do so. See *1976 Order, supra,* at 314–315.

[4] Cable systems were also required to promulgate rules prohibiting the transmission of obscene and indecent material on access channels. 47 CFR § 76.256 (d) (1977). The Court of Appeals for the District of Columbia Circuit stayed this aspect of the rules in an order filed in *American Civil Liberties Union* v. *FCC,* No. 76–1695 (Aug. 26, 1977). The court below, moreover, disapproved the requirement in the belief that

(b), (d). The regulations also instruct cable operators to issue rules providing for first-come, nondiscriminatory access on public and leased channels. §§ 76.256 (d)(1), (3).

Finally, the rules circumscribe what operators may charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public-access channel. § 76.256 (c)(2). Operators may not charge for the use of educational and governmental access for the first five years the system services such users. § 76.256 (c)(1). Leased-access-channel users must be charged an "appropriate" fee. § 76.256 (d)(3). Moreover, the rules admonish that charges for equipment, personnel, and production exacted from access users "shall be reasonable and consistent with the goal of affording users a low-cost means of television access." § 76.256 (c)(3). And "[n]o charges shall be made for live public access programs not exceeding five minutes in length." *Ibid.* Lastly, a system may not charge access users for utilization of its playback equipment or the personnel required to operate such equipment when the cable's production equipment is not deployed and when tapes or film can be played without technical alteration to the system's equipment. *Petition for Reconsideration in Docket No. 20508,* 62 F. C. C. 2d 399, 407 (1976).

The Commission's capacity and access rules were challenged on jurisdictional grounds in the course of the rulemaking proceedings. In its *1976 Order,* the Commission rejected such comments on the ground that the regulations furthered objectives that it might properly pursue in its supervision over broadcasting. Specifically, the Commission maintained that its rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for

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it imposed censorship obligations on cable operators. The Commission has instituted a review of the requirement, and it is not now in controversy before this Court.

local self-expression and augmenting the public's choice of programs." 59 F. C. C. 2d, at 298. The Commission did not find persuasive the contention that "the access requirements are in effect common carrier obligations which are beyond our authority to impose." *Id.*, at 299. The explanation was:

> "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives." *Ibid.*

Additionally, the Commission denied that the rules violated the First Amendment, reasoning that when broadcasting or related activity by cable systems is involved First Amendment values are served by measures facilitating an exchange of ideas.

On petition for review, the Eighth Circuit set aside the Commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F. 2d 1025 (1978). The court was of the view that the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions of this Court. The rules amounted to an attempt to impose common-carrier obligations on cable operators, the court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934, § 3 (h), 47 U. S. C. § 153 (h). Furthermore, the court made plain its belief that the regulations presented grave First Amend-

ment problems. We granted certiorari, 439 U. S. 816 (1978), and we now affirm.[5]

II

A

The Commission derives its regulatory authority from the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.* The Act preceded the advent of cable television and understandably does not expressly provide for the regulation of that medium. But it is clear that Congress meant to confer "broad authority" on the Commission, H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1 (1934), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 138 (1940). To that end, Congress subjected to regulation "all interstate and foreign communication by wire or radio." Communications Act of 1934, § 2 (a), 47 U. S. C. § 152 (a). In *United States* v. *Southwestern Cable Co.,* we construed § 2 (a) as conferring on the Commission a circumscribed range of power to regulate cable television, and we reaffirmed that determination in *United States* v. *Midwest Video Corp.,* 406 U. S. 649 (1972). The question now before us is whether the Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.

The *Southwestern* litigation arose out of the Commission's efforts to ameliorate the competitive impact on local broadcasting operations resulting from importation of distant signals by cable systems into the service areas of local stations.

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[5] In the court below, the American Civil Liberties Union (ACLU), petitioner in No. 77–1648, challenged the Commission's modification of its 1972 access rules, which were less favorable to cable operators than are the regulations finally embraced. The ACLU requests that we remand these cases for further consideration of its challenge in the event that we reverse the judgment of the Eighth Circuit. As we affirm the judgment below, we necessarily decline the ACLU's invitation to remand.

Fearing that such importation might "destroy or seriously degrade the service offered by a television broadcaster," *First Report and Order,* 38 F. C. C. 683, 700 (1965), the Commission promulgated rules requiring CATV systems [6] to carry the signals of broadcast stations into whose service area they brought competing signals, to avoid duplication of local station programming on the same day such programming was broadcast, and to refrain from bringing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. See *Second Report and Order,* 2 F. C. C. 2d 725 (1966).[7]

The Commission's assertion of jurisdiction was based on its view that "the successful performance" of its duty to ensure "the orderly development of an appropriate system of local television broadcasting" depended upon regulation of cable operations. 392 U. S., at 177. Against the background of the administrative undertaking at issue, the Court construed § 2 (a) of the Act as granting the Commission jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U. S., at 178.

Soon after our decision in *Southwestern,* the Commission

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[6] CATV, or "community antenna television," refers to systems that receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to subscribers. *United States* v. *Southwestern Cable Co.,* 392 U. S. 157, 161 (1968). "Because of the broader functions to be served by such facilities in the future," the Commission adopted the "more inclusive term cable television systems" in *Cable Television Report and Order in Docket No. 18397,* 36 F. C. C. 2d 143, 144 n. 9 (1972).

[7] The validity of the particular regulations issued by the Commission was not at issue in *Southwestern.* See 392 U. S., at 167. In dicta in *United States* v. *Midwest Video Corp.,* 406 U. S. 649 (1972), the plurality noted that *Southwestern* had properly been applied by the courts of appeals to sustain the validity of the rules. *Id.,* at 659 n. 17.

resolved "to condition the carriage of television broadcast signals . . . upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating." *Notice of Proposed Rulemaking and Notice of Inquiry,* 15 F. C. C. 2d 417, 422 (1968). It stated that its "concern with CATV carriage of broadcast signals [was] not just a matter of avoidance of adverse effects, but extend[ed] also to requiring CATV affirmatively to further statutory policies." *Ibid.* Accordingly, the Commission promulgated a rule providing that CATV systems having 3,500 or more subscribers may not carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by originating its own programs—or cablecasting—and maintains facilities for local production and presentation of programs other than automated services. 47 CFR § 74.1111 (a) (1970). This Court, by a 5-to-4 vote but without an opinion for the Court, sustained the Commission's jurisdiction to issue these regulations in *United States* v. *Midwest Video Corp., supra.*

Four Justices, in an opinion by MR. JUSTICE BRENNAN, reaffirmed the view that the Commission has jurisdiction over cable television and that such authority is delimited by its statutory responsibilities over television broadcasting. They thought that the reasonably-ancillary standard announced in *Southwestern* permitted regulation of CATV "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U. S., at 667. The Commission had reasonably determined, MR. JUSTICE BRENNAN's opinion declared, that the origination requirement would " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . .' " *Id.,* at 667–668, quoting *First Report and Order,* 20 F. C. C. 2d 201, 202 (1969).

The conclusion was that the "program-origination rule [was] within the Commission's authority recognized in *Southwestern.*" 406 U. S., at 670.

THE CHIEF JUSTICE, in a separate opinion concurring in the result, admonished that the Commission's origination rule "strain[ed] the outer limits" of its jurisdiction. *Id.*, at 676. Though not "fully persuaded that the Commission ha[d] made the correct decision in [the] case," he was inclined to defer to its judgment. *Ibid.*[8]

B

Because its access and capacity rules promote the long-established regulatory goals of maximization of outlets for local expression and diversification of programming—the objectives promoted by the rule sustained in *Midwest Video*—the Commission maintains that it plainly had jurisdiction to promulgate them. Respondents, in opposition, view the access regulations as an intrusion on cable system operations that is qualitatively different from the impact of the rule upheld in *Midwest Video.* Specifically, it is urged that by requiring the allocation of access channels to categories of users specified by

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[8] The Commission repealed its mandatory origination rule in December 1974. It explained:

"Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop, regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be." *Report and Order in Docket No. 19988,* 49 F. C. C. 2d 1090, 1105–1106.

the regulations and by depriving the cable operator of the power to select individual users or to control the programming on such channels, the regulations wrest a considerable degree of editorial control from the cable operator and in effect compel the cable system to provide a kind of common-carrier service. Respondents contend, therefore, that the regulations are not only qualitatively different from those heretofore approved by the courts but also contravene statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3 (h) of the Act that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U. S. C. § 153 (h).

We agree with respondents that recognition of agency jurisdiction to promulgate the access rules would require an extension of this Court's prior decisions. Our holding in *Midwest Video* sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting; and the plurality's analysis of the origination requirement stressed the requirement's nexus to such goals. But the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters. Cable operators had become enmeshed in the field of television broadcasting, and, by requiring them to engage in the functional equivalent of broadcasting, the Commission had sought "only to ensure that [they] satisfactorily [met] community needs within the context of their undertaking." 406 U. S., at 670 (opinion of BRENNAN, J.).

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto,* to common-carrier

status.[9] A common-carrier service in the communications context[10] is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . ." *Report and Order, Industrial Radiolocation Service, Docket No. 16106,* 5 F. C. C. 2d 197, 202 (1966); see *National Association of Regulatory Utility Comm'rs* v. *FCC,* 173 U. S. App. D. C. 413, 424, 525 F. 2d 630, 641, cert. denied, 425 U. S. 992 (1976); *Multipoint Distribution Service,* 45 F. C. C. 2d 616, 618 (1974). A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *National Association of Regulatory Utility Comm'rs* v. *FCC, supra,* at 424, 525 F. 2d, at 641.

The access rules plainly impose common-carrier obligations on cable operators.[11] Under the rules, cable systems are required to hold out dedicated channels on a first-come,

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[9] A cable system may operate as a common carrier with respect to a portion of its service only. See *National Association of Regulatory Utility Comm'rs* v. *FCC,* 174 U. S. App. D. C. 374, 381, 533 F. 2d 601, 608 (1976) (opinion of Wilkey, J.) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *First Report and Order in Docket No. 18397,* 20 F. C. C. 2d 201, 207 (1969).

[10] Section 3 (h) defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . ." Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning. See *National Association of Regulatory Utility Comm'rs* v. *FCC,* 173 U. S. App. D. C. 413, 423, 525 F. 2d 630, 640, cert. denied, 425 U. S. 992 (1976); *Frontier Broadcasting Co.* v. *Collier,* 24 F. C. C. 251, 254 (1958); H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 46 (1934).

[11] As we have noted, and as the Commission has held, cable systems otherwise "are not common carriers within the meaning of the Act." *United States* v. *Southwestern Cable Co.,* 392 U. S., at 169 n. 29; see *Frontier Broadcasting Co.* v. *Collier, supra.*

nondiscriminatory basis. 47 CFR §§ 76.254 (a), 76.256 (d) (1977).[12] Operators are prohibited from determining or influencing the content of access programming. § 76.256 (b). And the rules delimit what operators may charge for access and use of equipment. § 76.256 (c). Indeed, in its early consideration of access obligations—whereby "CATV operators [would] furnish studio facilities and technical assistance [but] have no control over program content except as may be required by the Commission's rules and applicable law"—the Commission acknowledged that the result would be the operation of cable systems "as common carriers on some channels." *First Report and Order in Docket No. 18397,* 20 F. C. C. 2d, at 207; see *id.,* at 202; *Cable Television Report and Order,* 36 F. C. C. 2d 143, 197 (1972). In its *1976 Order,* the Commission did not directly deny that its access requirements compelled common carriage, and it has conceded before this Court that the rules "can be viewed as a limited form of common carriage-type obligation." Brief for Petitioner in No. 77–1575, p. 39. But the Commission continues to insist that this characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured, in the Commission's view, so long as the rules promote statutory objectives.

Congress, however, did not regard the character of regulatory obligations as irrelevant to the determination of whether they might permissibly be imposed in the context of broadcasting itself. The Commission is directed explicitly by § 3 (h) of the Act not to treat persons engaged in broadcasting as common carriers. We considered the genealogy and the meaning of this provision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94 (1973).

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[12] See also *1976 Order,* 59 F. C. C. 2d, at 316 ("We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis").

The issue in that case was whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the First Amendment. Our examination of the legislative history of the Radio Act of 1927—the precursor to the Communications Act of 1934—prompted us to conclude that "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee." 412 U. S., at 105. We determined, in fact, that "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *Ibid.* The Court took note of a bill reported to the Senate by the Committee on Interstate Commerce providing in part that any licensee who permits " 'a broadcasting station to be used . . . for the discussion of any question affecting the public . . . shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast.' " *Id.,* at 106, quoting 67 Cong. Rec. 12503 (1926). That bill was amended to eliminate the common-carrier obligation because of the perceived lack of wisdom in " 'put[ting] the broadcaster under the hampering control of being a common carrier' " and because of problems in administering a nondiscriminatory right of access. 412 U. S., at 106; see 67 Cong. Rec. 12502, 12504 (1926).

The Court further observed that, in enacting the 1934 Act, Congress rejected still another proposal "that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues." 412 U. S., at 107–108.[13] "Instead," the Court noted,

[13] The proposal adopted by the Senate provided:

"[I]f any licensee shall permit any person to use a broadcasting station

"Congress after prolonged consideration adopted § 3 (h), which specifically provides that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' " *Id.*, at 108–109.

"Congress' flat refusal to impose a 'common carrier' right of access for all persons wishing to speak out on public issues," *id.*, at 110, was perceived as consistent with other provisions of the 1934 Act evincing "a legislative desire to preserve values of private journalism." *Id.*, at 109. Notable among them was § 326 of the Act, which enjoins the Commission from exercising " 'the power of censorship over the radio communications or signals transmitted by any radio station,' " and commands that " 'no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.' " 412 U. S., at 110, quoting 47 U. S. C. § 326.

The holding of the Court in *Columbia Broadcasting* was in accord with the view of the Commission that the Act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the Act, though not mandating the claimed access, would nevertheless permit the Commission to require broadcasters to extend a range of public access by regulations similar to those at issue here. The Court speculated that the Commission might have flexibility to regulate access, 412 U. S., at 122, and that

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in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public questions."

See Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 19 (1934). The portion regarding discussion of public issues was excised by the House-Senate Conference. See H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 49 (1934).

"[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable," *id.*, at 131. But this is insufficient support for the Commission's position in the present case. The language of § 3 (h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, § 3 (h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems.[14] The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a "nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3 (h) of the Act." 412 U. S., at 140 n. 9 (STEWART, J., concurring); see *id.*, at 152, and n. 2 (Douglas, J., concurring in judgment).[15]

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[14] Whether less intrusive access regulation might fall within the Commission's jurisdiction, or survive constitutional challenge even if within the Commission's power, is not presently before this Court. Certainly, our construction of § 3 (h) does not put into question the statutory authority for the fairness-doctrine obligations sustained in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). The fairness doctrine does not require that a broadcaster provide common carriage; it contemplates a wide range of licensee discretion. See *Report on Editorializing by Broadcast Licensees*, 13 F. C. C. 1246, 1251 (1949) (in meeting fairness-doctrine obligations the "licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view").

[15] The dissent maintains that § 3 (h) does not place "limits on the Commission's exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a 'common car-

Of course, § 3 (h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2 (a) would be unbounded. See *United States* v. *Midwest Video Corp.*, 406 U. S., at 661 (opinion of BRENNAN, J.). Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities.[16] Specifically, regulation was imperative to prevent

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rier obligation.' " *Post,* at 710–711. Rather, § 3 (h) means only that "every broadcast station is not to be *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it is engaged in radio broadcasting." *Post,* at 710. But Congress was plainly anxious to avoid regulation of broadcasters as common carriers under Title II, which commands, *inter alia,* that regulated entities shall "furnish . . . communication service upon reasonable request therefor." 47 U. S. C. § 201 (a). Our review of the Act in *Columbia Broadcasting* led us to conclude that § 3 (h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access:

"Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. [The] provisio[n] clearly manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee." 412 U. S., at 116.

We now reaffirm that view of § 3 (h): The purpose of the provision and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services. As we demonstrate in the following text, that same constraint applies to the regulation of cable television systems.

[16] The Commission contends that the signal carriage rules involved in *Southwestern* are, in part, analogous to the Commission's access rules in question here. The signal carriage rules required, *inter alia,* that cable

interference with the Commission's work in the broadcasting area. And in *Midwest Video* the Commission had endeavored to promote long-established goals of broadcasting regulation. Petitioners do not deny that statutory objectives pertinent to broadcasting bear on what the Commission might require cable systems to do. Indeed, they argue that the Commission's authority to promulgate the access rules derives from the relationship of those rules to the objectives discussed in *Midwest Video*. But they overlook the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." *Report and Order in Docket No. 20829,* 69 F. C. C. 2d 1324, 1333 (1978).[17]

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operators transmit, upon request, the broadcast signals of broadcast licensees into whose service area the cable operator imported competing signals. See *First Report and Order in Docket No. 14895,* 38 F. C. C. 683, 716–719 (1965). But that requirement did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers. See *supra,* at 701. Rather, the rule was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by § 3 (h).

[17] We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters. Moreover, we reject the contention that the Commission's access rules will not significantly compromise the editorial discretion actually exercised by cable operators. At least in certain instances the access obligations will restrict expansion of other cable services. See

In determining, then, whether the Commission's assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *United States* v. *Southwestern Cable Co.*, 392 U. S., at 178, we are unable to ignore Congress' stern disapproval—evidenced in § 3 (h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

The exercise of jurisdiction in *Midwest Video,* it has been said, "strain[ed] the outer limits" of Commission authority. 406 U. S., at 676 (BURGER, C. J., concurring in result). In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating its access rules.[18] The

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nn. 2, 3, *supra*. And even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers.

[18] The Commission has argued that the capacity, access, and facilities regulations should not be reviewed as a unit, but as discrete rules entailing unique considerations. But the Commission concedes that the facilities and access rules are integrally related, see Brief for Petitioner in No. 77–1575, p. 36 n. 32, and acknowledges that the capacity rules were adopted in part to complement the access requirement, see *id.*, at 35; *1976 Order,* 59 F. C. C. 2d, at 313, 322. At the very least it is unclear whether any particular rule or portion thereof would have been promulgated in isolation. Accordingly, we affirm the lower court's determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context.

Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.[19]

Affirmed.

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

In 1969, the Commission adopted a rule requiring cable television systems to originate a significant number of local programs. In *United States* v. *Midwest Video Corp.*, 406 U. S. 649, the Court upheld the Commission's authority to promulgate this "mandatory origination" rule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." [1] Accordingly, it adopted the access rules that the Court invalidates today.[2]

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[19] The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forgo comment on these issues as well.

[1] The quotation is from the report accompanying the promulgation of the 1969 rules. See *First Report and Order*, 20 F. C. C. 2d 201, 202 (1969) (*1969 Order*). The report accompanying the 1976 rules identifies precisely the same purpose. See *Report and Order in Docket 20508*, 59 F. C. C. 2d 294, 298 (1976) (App. 103).

[2] By the time of this Court's decision in *Midwest Video*, the Commission had adopted limited-access and channel-capacity rules. See *Cable*

In my opinion the Court's holding in *Midwest Video* that the mandatory origination rules were within the Commission's statutory authority requires a like holding with respect to the less burdensome access rules at issue here. The Court's contrary conclusion is based on its reading of § 3 (h) of the Act as denying the Commission the power to impose common-carrier obligations on broadcasters. I am persuaded that the Court has misread the statute.

Section 3 (h) provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U. S. C. § 153 (h).

Section 3 is the definitional section of the Act. It does not purport to grant or deny the Commission any substantive authority. Section 3 (h) makes it clear that every broadcast station is not to be *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it is engaged in radio broadcasting. But nothing in the words of the statute or its legislative history suggests that § 3 (h) places limits on the Commission's exercise of powers otherwise within its statutory authority because

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Television Report and Order in Docket No. 18397, 36 F. C. C. 2d 143 (1972); *American Civil Liberties Union* v. *FCC,* 523 F. 2d 1344 (CA9 1975). In 1974, the Commission largely repealed the mandatory origination rule at issue in *Midwest Video* on the grounds that access was found to be a less burdensome and equally effective means of furthering the same statutory objectives. See *Report and Order in Docket No. 19988,* 49 F. C. C. 2d 1090, 1099–1100, 1104–1106 (1974). The 1972 access rules were reviewed and amended in 1976, see *Report and Order in Docket No. 20508, supra,* and it is these rules that are at issue here.

a lawfully imposed requirement might be termed a "common carrier obligation." [3]

The Commission's understanding supports this reading of § 3 (h). In past decisions interpreting FCC authority under the Communications Act, "we [have been] guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 121, quoting *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381. The Commission's construction of § 3 (h) is clear: it has never interpreted that provision, or any other in the Communications Act, as a limitation on its authority to impose common-carrier obligations on cable systems.

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[3] The Senate Report on the Communications Act of 1934, for example, simply stated:

"Section 3: Contains the definitions. Most of these are taken from the Radio Act, the Interstate Commerce Act, and international conventions." S. Rep. No. 781, 73d Cong., 2d Sess., 3 (1934).

The House Report was only slightly more detailed; as to § 3 (h), it explained:

"Since a person must be a common carrier for hire to come within this definition, it does not include press associations or other organizations engaged in the business of collecting and distributing news services, which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor." H. R. Rep. No. 1850, 73d Cong., 2d Sess., 4 (1934).

Finally, the Conference Report "noted that the definition does not include any person if not a common carrier in the ordinary sense of the term." H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 46 (1934).

Section 3 (h), it seems clear to me, cannot be read to be directly applicable to cable systems in any regard. Such systems are not, in the full range of their activities, "common carrier[s] in the ordinary sense of the term." And, as relevant here, they are technically not broadcasters at all; what they are engaged in is the distinct process of "cablecasting." See *1969 Order, supra,* at 223.

The Commission's 1966 rules, which gave rise to this Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, imposed just such an obligation. Under those rules, local systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals.[4] And its 1969 rules, according to the FCC Report and Order, reflected the Commission's view "that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services, might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created." [5] Finally, in adopting the rules at issue here, the Commission explicitly rejected the rationale the Court accepts today:

> "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper ques-

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[4] See *Second Report and Order in Docket 14895*, 2 F. C. C. 2d 725 (1966). The *Southwestern Cable* Court did not pass upon the validity of these rules. MR. JUSTICE BRENNAN's opinion for the plurality in *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 659 n. 17, noted that "[t]heir validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, *e. g.*, *Black Hills Video Corp.* v. *FCC*, 399 F. 2d 65 (CA8 1968)."

[5] *1969 Order*, 20 F. C. C. 2d, at 202. See also *United States* v. *Midwest Video Corp.*, *supra*, at 654 n. 8 (plurality opinion):

"Although the Commission did not impose common carrier obligations on CATV systems in its 1969 report, it did note that 'the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels.' First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common-carrier service. See [Report and Order on Cable Television Service] 3277."

tion, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives." 59 F. C. C. 2d 294, 299 (1976).

In my judgment, this is the correct approach. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* relied upon almost exclusively by the majority, is not to the contrary. In that case, we reviewed the provisions of the Communications Act, including § 3 (h), which had some bearing on the access question presented. We emphasized, as does the majority here, that "Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access." 412 U. S., at 122. But we went on to conclude: "That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. *Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require.*" *Ibid.* (emphasis added).[6]

The Commission here has exercised its "flexibility to experiment" in choosing to replace the mandatory origination rule upheld in *Midwest Video* with what it views as the less onerous local access rules at issue here. I have no reason to doubt its conclusion that these rules, like the mandatory origination rule they replace, do promote the statutory objectives of "increasing the number of outlets for community self-expres-

[6] While the Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* went on to reject the claim that the Commission's refusal to require broadcasters to accept paid political advertisements was unconstitutional, it also recognized that "[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable" and noted the rules at issue here as an example. 412 U. S., at 131.

sion and augmenting the public's choice of programs and types of services." And under this Court's holding in *Midwest Video,* this is all that is required to uphold the jurisdiction of the Commission to promulgate these rules. Since Congress has not seen fit to modify the scope of the statute as construed in *Midwest Video,* I would therefore reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case with instructions to decide the constitutional issue.

Syllabus

UNITED STATES *v.* KIMBELL FOODS, INC., ET AL.

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

No. 77–1359. Argued January 8, 1979—Decided April 2, 1979*

These cases present the question whether contractual liens arising from certain federal loan programs take precedence over private liens, absent a federal statute that sets priorities. Resolution of this question requires determination of whether federal or state law governs the conflicting claims and, if federal law applies, whether a uniform priority rule should be fashioned or state commercial law should be incorporated as the federal rule of decision. In No. 77–1359, the United States' contractual lien secures a loan guaranteed by the Small Business Administration (SBA) under the Small Business Act, which generally does not specify priority rules to govern SBA security interests. The private lien of respondent Kimbell Foods, Inc. (Kimbell), arose from security agreements that were executed before the federal guarantee and secured advances that Kimbell made after the federal guarantee. Both the federal and private security interests, which covered the same collateral, were perfected pursuant to Texas' Uniform Commercial Code. The District Court found that the Government's lien was superior to Kimbell's. In so ruling, it applied the first-in-time and choateness doctrines, rules originally developed to afford federal statutory tax liens special priority over state and private liens where the governing statute does not specify priorities. The Court of Appeals reversed the District Court's judgment. While agreeing that federal law governed the controversy and that the "first in time, first in right" priority principle controlled the competing claims, the court refused to extend the choateness rule to situations in which the Government was a voluntary lender. Instead, the Court of Appeals fashioned a federal common-law rule whereby the first lien to meet Uniform Commercial Code perfection requirements achieved priority, and held that under this rule Kimbell's lien was superior. Although the Court of Appeals did not adopt Texas law, it did determine that Texas law would also afford priority to Kimbell's security interests. In No. 77–1644, a borrower obtained several loans from the Farmers Home Administration (FHA) under the Consolidated Farmers Home Administration Act of 1961 (now

*Together with No. 77–1644, *United States* v. *Crittenden, dba Crittenden Tractor Co.*, also on certiorari to the same court.

redesignated the Consolidated Farm and Rural Development Act), which does not establish rules of priority. To secure the loans, the FHA obtained a security interest in the borrower's crops and farm equipment, and perfected its interest by filing a standard financing statement with Georgia officials. Subsequently, respondent repaired the borrower's tractor on numerous occasions. When the borrower failed to pay the repair bills, respondent retained the tractor and acquired a lien therein under Georgia law. After the borrower had filed for bankruptcy and had been discharged from his debts, the United States instituted this action to obtain possession of the tractor. The District Court granted summary judgment for respondent, holding that the FHA had not properly perfected its security interest because the financing statement inadequately described the collateral; and that even if the description were sufficient, both federal and state law accorded priority to respondent's lien. Affirming in part and reversing in part, the Court of Appeals fashioned a federal rule, based on the Model Uniform Commercial Code, to determine the validity of the financing statement. It found the description of the collateral adequate to perfect the FHA's security interest. As to the priority question, the Court of Appeals rejected state law as well as the first-in-time and choateness doctrines. In their place the court devised a special "federal commercial law rule" giving priority to repairman's liens when the repairman continuously possesses the property from the time his lien arises. The court concluded that under this rule respondent's lien for only the final repair bill took precedence over the FHA's security interest. *Held:*

1. The priority of liens stemming from federal lending programs must be determined with reference to federal law. Since both the SBA and the FHA derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a "constitutional function or power," *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366, their rights, as well, should derive from a federal source. That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. Pp. 726–727.

2. Because a national rule is unnecessary to protect the federal interests underlying the SBA and FHA loan programs, the relative priority of private liens and consensual liens arising from the programs is to be determined under nondiscriminatory state laws, absent a congressional directive to the contrary. Pp. 727–740.

(a) Incorporating state law to determine the rights of the United States as against private creditors will in no way hinder administration of the SBA and FHA loan programs. The agencies' own operating

practices, which recognize that the Government's security interests are controlled by the commercial law of each State, belie the assertion that a uniform rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules. Pp. 729–733.

(b) Deference to customary commercial practices will not conflict with the objectives of the lending programs. The SBA and FHA loan programs are a form of social welfare legislation, primarily designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms. If Congress had intended the private commercial sector, rather than taxpayers in general, to bear the risks of default entailed by these public welfare programs, it would have established a priority scheme displacing state law. Since the Government is in substantially the same position as private lenders when it extends funds under the programs, the special status it seeks is unnecessary to safeguard the public fisc. Pp. 733–738.

(c) Rejecting well-established commercial rules which have proven workable over time could undermine the stability on which the commercial community depends in making reliable evaluations of risk. Absent concrete reasons for altering settled commercial practices, the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation. Pp. 739–740.

3. The judgment in No. 77–1359 is affirmed since the Court of Appeals found that Texas law gave preference to Kimbell's lien. The judgment in No. 77–1644 is vacated, and the case is remanded for determination of whether the FHA's financing statement is sufficient under Georgia law, and whether Georgia treats repairman's liens as superior to previously perfected consensual liens. P. 740.

No. 77–1359, 557 F. 2d 491, affirmed; No. 77–1644, 563 F. 2d 678, vacated and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Barnett argued the cause for the United States in both cases. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook, Marion L. Jetton,* and *Thomas G. Wilson.*

Vernon O. Teofan argued the cause for respondents in No. 77–1359. With him on the brief was *A. L. Vickers.*

Howell Hollis III argued the cause and filed a brief for respondent in No. 77–1644.†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari in these cases to determine whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities.[1] To resolve this question, we must decide first whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a uniform priority rule or incorporate state commercial law. We conclude that the source of law is federal, but that a national rule is unnecessary to protect the federal interests underlying the loan programs. Accordingly, we adopt state law as the appropriate federal rule for establishing the relative priority of these competing federal and private liens.

I

A

No. 77–1359 involves two contractual security interests in the personal property of O. K. Super Markets, Inc. Both interests were perfected pursuant to Texas' Uniform Commercial Code (UCC).[2] The United States' lien secures a loan guaranteed by the Small Business Administration (SBA). The private lien, which arises from security agreements that preceded the federal guarantee, secures advances respondent made after the federal guarantee.

In 1968, O. K. Super Markets borrowed $27,000 from

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†*Robert D. McLean* filed a brief for the National Commercial Finance Conference, Inc., as *amicus curiae* in No. 77–1359.

James D. Keast and *William J. Travis* filed a brief for the National Farm & Power Equipment Dealer's Assn. as *amicus curiae* urging affirmance in No. 77–1644.

[1] 436 U. S. 903 (1978); 439 U. S. 817 (1978).

[2] Tex. Bus. & Com. Code Ann. § 9.101 *et seq.* (1968).

Kimbell Foods, Inc. (Kimbell), a grocery wholesaler. Two security agreements identified the supermarket's equipment and merchandise as collateral. The agreements also contained a standard "dragnet" clause providing that this collateral would secure future advances from Kimbell to O. K. Super Markets. Kimbell properly perfected its security interests by filing financing statements with the Texas Secretary of State according to Texas law.

In February 1969, O. K. Super Markets obtained a $300,000 loan from Republic National Bank of Dallas (Republic). The bank accepted as security the same property specified in Kimbell's 1968 agreements, and filed a financing statement with the Texas Secretary of State to perfect its security interest. The SBA guaranteed 90% of this loan under the Small Business Act, which authorizes such assistance [3] but, with one exception, does not specify priority rules to govern the SBA's security interests.[4]

O. K. Super Markets used the Republic loan proceeds to satisfy the remainder of the 1968 obligation and to discharge an indebtedness for inventory purchased from Kimbell on open account. Kimbell continued credit sales to O. K. Super Markets until the balance due reached $18,258.57 on January 15, 1971. Thereupon, Kimbell initiated state proceedings against O. K. Super Markets to recover this inventory debt.

Shortly before Kimbell filed suit, O. K. Super Markets had defaulted on the SBA-guaranteed loan. Republic assigned its security interest to the SBA in late December 1970, and recorded the assignment with Texas authorities on January 21, 1971. The United States then honored its guarantee and paid

[3] Section 7 (a) of the Small Business Act, 72 Stat. 387, as amended, 15 U. S. C. § 636 (a)(1), permits extension of financial assistance to small businesses when funds are "not otherwise available on reasonable terms from non-Federal sources." The SBA prefers to guarantee private loans rather than to disburse funds directly. § 636 (a)(2); 13 CFR §§ 120.2 (b)(1), 122.15 (c) (1978).

[4] See n. 36, *infra*.

Republic $252,331.93 (90% of the outstanding indebtedness) on February 3, 1971. That same day, O. K. Super Markets, with the approval of its creditors, sold its equipment and inventory and placed the proceeds in escrow pending resolution of the competing claims to the funds. Approximately one year later, the state court entered judgment against O. K. Super Markets, and awarded Kimbell $24,445.37, representing the inventory debt, plus interest and attorney's fees.

Kimbell thereafter brought the instant action to foreclose on its lien, claiming that its security interest in the escrow fund was superior to the SBA's.[5] The District Court held for the Government. On determining that federal law controlled the controversy, the court applied principles developed by this Court to afford federal statutory tax liens special priority over state and private liens where the governing statute does not specify priorities. *Kimbell Foods, Inc.* v. *Republic Nat. Bank of Dallas,* 401 F. Supp. 316, 321–322 (ND Tex. 1975). See, *e. g., United States* v. *Security Trust & Sav. Bank,* 340 U. S. 47 (1950); *United States* v. *Pioneer American Ins. Co.,* 374 U. S. 84 (1963).[6] Under these rules, the lien "first in time" is "first in right."[7] However, to be

[5] Jurisdiction was premised on 28 U. S. C. § 2410.

[6] The tax liens were authorized by 26 U. S. C. § 3670 (1952 ed.), currently codified at 26 U. S. C. § 6321. This statute established the time when the tax lien arose, 26 U. S. C. § 3671 (1952 ed.), currently codified at 26 U. S. C. § 6322, and required the filing of notice for the lien to be valid against specified creditors. 26 U. S. C. § 3672 (1952 ed.), currently codified, as amended, at 26 U. S. C. § 6323 (a). But until 1966, the statute did not specify priority rules to resolve conflicts between federal tax liens and rival liens. The Federal Tax Lien Act of 1966, 80 Stat. 1125, as amended, 26 U. S. C. §§ 6323 (b), (c), (d), (e), set specific priorities to displace the doctrines that this Court had created. See *infra,* at 738.

[7] This well-accepted common-law principle for resolving lien priority disputes, see *Rankin* v. *Scott,* 12 Wheat. 177, 179 (1827); *United States* v. *New Britain,* 347 U. S. 81, 85–86 (1954), also underlies the Uniform Commercial Code's priority structure. See Uniform Commercial Code § 9–312 (5), 3 U. L. A. 85 (1979 pamphlet) (hereinafter Model UCC); J. White & R. Summers, Uniform Commercial Code 905 (1972).

considered first in time, the nonfederal lien must be "choate," that is, sufficiently specific, when the federal lien arises.[8] A state-created lien is not choate until the "identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *New Britain,* 347 U. S. 81, 84 (1954); see *United States* v. *Vermont,* 377 U. S. 351, 358 (1964). Failure to meet any one of these conditions forecloses priority over the federal lien, even if under state law the nonfederal lien was enforceable for all purposes when the federal lien arose.

Because Kimbell did not reduce its lien to judgment until February 1972, and the federal lien had been created either in 1969, when Republic filed its financing statement, or in 1971, when Republic recorded its assignment, the District

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[8] See, *e. g., United States* v. *Security Trust & Sav. Bank,* 340 U. S. 47 (1950); *United States* v. *New Britain, supra,* at 86; *United States* v. *Acri,* 348 U. S. 211, 213 (1955); *United States* v. *R. F. Ball Construction Co.,* 355 U. S. 587 (1958) (*per curiam*); *United States* v. *Pioneer American Ins. Co.,* 374 U. S. 84 (1963); *United States* v. *Vermont,* 377 U. S. 351, 355 (1964); *United States* v. *Equitable Life Assurance Soc.,* 384 U. S. 323, 327–328 (1966).

This Court originally formulated the choate lien test to govern conflicts arising under the federal insolvency statute, Rev. Stat. § 3466, 31 U. S. C. § 191, which awards the United States priority over other creditors in collecting debts from insolvents. In theory, the statute does not defeat liens that are choate at the time of insolvency. But in practice, it has proved difficult for nonfederal lienors to satisfy the strictures of the choateness test. See *New York* v. *Maclay,* 288 U. S. 290 (1933); *United States* v. *Texas,* 314 U. S. 480 (1941); *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U. S. 353 (1945); *United States* v. *Gilbert Associates, Inc.,* 345 U. S. 361 (1953).

The Court later applied the choateness doctrine outside the insolvency context together with the first-in-time requirement to give federal tax liens special priority. See *United States* v. *Security Trust & Sav. Bank, supra,* at 51. For a discussion of the history of the choate lien test, see Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. J. 905 (1954) (hereinafter Kennedy, Relative Priority).

Court concluded that respondent's lien was inchoate when the federal lien arose. 401 F. Supp., at 324–325. Alternatively, the court held that even under state law, the SBA lien was superior to Kimbell's claim because the future advance clauses in the 1968 agreements were not intended to secure the debts arising from O. K. Super Market's subsequent inventory purchases. *Id.*, at 325–326.

The Court of Appeals reversed. *Kimbell Foods, Inc.* v. *Republic Nat. Bank of Dallas*, 557 F. 2d 491 (CA5 1977). It agreed that federal law governs the rights of the United States under its SBA loan program, *id.*, at 498 n. 9, 503 n. 16, and that the "first in time, first in right" priority principle should control the competing claims. *Id.*, at 502–503. However, the court refused to extend the choateness rule to situations in which the Federal Government was not an involuntary creditor of tax delinquents, but rather a voluntary commercial lender. *Id.*, at 498, 500–502. Instead, it fashioned a new federal rule for determining which lien was first in time, and concluded that "in the context of competing state security interests arising under the U. C. C.," the first to meet UCC perfection requirements achieved priority. *Id.*, at 503.[9]

The Court of Appeals then considered which lien qualified as first perfected. Disagreeing with the District Court, the court determined that, under Texas law, the 1968 security agreements covered Kimbell's future advances, and that the liens securing those advances dated from the filing of the security agreements before the federal lien arose. *Id.*, at 494–498, 503. But the Court of Appeals did not adopt Texas law. Rather, it proceeded to decide whether the future advances should receive the same treatment under federal com-

[9] In so holding, the Court of Appeals refused to formulate a federal doctrine of general applicability, "leav[ing] for another day" questions involving the priority of other nonfederal liens, such as state tax and mechanic's liens. 557 F. 2d, at 503 n. 15.

mon law. After surveying three possible approaches,[10] the court held that Kimbell's future advances dated back to the 1968 agreements, and therefore took precedence over Republic's 1969 loan. *Id.*, at 503–505.

B

At issue in No. 77–1644 is whether a federal contractual security interest in a tractor is superior to a subsequent repairman's lien in the same property. From 1970 to 1972, Ralph Bridges obtained several loans from the Farmers Home Administration (FHA), under the Consolidated Farmers Home Administration Act of 1961.[11] Like the Small Business Act, this statute does not establish rules of priority. To secure the FHA loans, the agency obtained a security interest in Bridges' crops and farm equipment, which it perfected by filing a standard FHA financing statement with Georgia officials on February 2, 1972. Bridges subsequently took his tractor to respondent Crittenden for repairs on numerous occasions, accumulating unpaid repair bills of over $1,600. On December 21, 1973, Bridges again had respondent repair the tractor, at a cost of $543.81. When Bridges could not pay the balance of $2,151.28, respondent retained the tractor and acquired a lien therein under Georgia law. Ga. Code § 67–2003 (1978).

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[10] One approach afforded priority to liens intervening between execution of a security agreement covering future advances and extension of those advances. Another gave priority only to future advances made before the advancing creditor received actual notice of an intervening lien, while a third rule afforded priority regardless of actual notice. The court rejected the first option and found that Kimbell would prevail under either of the other two since it did not have notice of the SBA guarantee. *Id.*, at 503–504.

[11] The statute, now redesignated the Consolidated Farm and Rural Development Act, see 86 Stat. 657, authorizes federal financial assistance for farmers who are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms." 75 Stat. 307, as amended, 7 U. S. C. § 1922 (1976 ed., Supp. III).

On May 1, 1975, after Bridges had filed for bankruptcy and had been discharged from his debts,[12] the United States instituted this action against Crittenden to obtain possession of the tractor.[13] The District Court rejected the Government's claim that the FHA's security interest was superior to respondent's, and granted summary judgment for respondent on alternative grounds. First, it held that the agency had not properly perfected its security interest because the financing statement inadequately described the collateral. Civ. Action No. 75–37–COL (MD Ga. Sept. 25, 1975). Second, it found that even if the description were sufficient, both federal and state law accorded priority to respondent's lien. *Ibid.*

The Court of Appeals affirmed in part and reversed in part. It first ruled that "the rights and liabilities of the parties to a suit arising from FHA loan transactions must, under the rationale of the *Clearfield Trust* doctrine, be determined with reference to federal law." 563 F. 2d 678, 680–681 (CA5 1977) (footnotes omitted). See *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943). In fashioning a federal rule for assessing the sufficiency of the FHA's financing statement, the court elected to follow the Model UCC rather than to incorporate Georgia law. 563 F. 2d, at 681–682. And, it determined that the description of the collateral was adequate under the Model UCC to perfect the FHA's security interest. *Id.,* at 682–683.

The Court of Appeals then addressed the priority question and concluded that neither state law nor the first-in-time, first-in-right and choateness doctrines were appropriate to resolve the conflicting claims. *Id.,* at 683–689. In their place, the court devised a special "federal commercial law rule," using

[12] Bridges' bankruptcy did not affect the relative priority of the Government and respondent. The priority rights afforded the United States under § 64a of the Bankruptcy Act do not defeat valid pre-existing liens. See 11 U. S. C. § 104 (a); 3A W. Collier, Bankruptcy § 64.02 [2] (14th ed. 1975).

[13] Jurisdiction was invoked under 28 U. S. C. § 1345.

the Model UCC and the Tax Lien Act of 1966 as guides. *Id.*, at 679, 688–690.[14] This rule would give priority to repairman's liens over the Government's previously perfected consensual security interests when the repairman continuously possesses the property from the time his lien arises. *Id.*, at 690–691.[15] Applying its rule, the Court of Appeals concluded that Crittenden's lien for only the final $543.81 repair bill took precedence over the FHA's security interest. *Id.*, at 692.[16]

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[14] Section 9–310 of the Model UCC provides:

"When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise." Model UCC § 9–310 (1979 pamphlet).

The Tax Lien Act of 1966 extends similar protection to repairmen:

"Even though notice of a [federal tax lien] has been filed, such lien shall not be valid

. . . . .

"With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose." 26 U. S. C. § 6323 (b)(5).

[15] The court found it unnecessary to determine whether the same result would obtain under Georgia's Commercial Code. 563 F. 2d, at 688 n. 17, 689.

[16] Other Courts of Appeals have adopted divergent approaches regarding the priority of federal security interests arising from loan programs. Compare, *e. g., Chicago Title Ins. Co.* v. *Sherred Village Associates,* 568 F. 2d 217 (CA1 1978), cert. pending, No. 77–1611; *United States* v. *General Douglas MacArthur Senior Village, Inc.,* 470 F. 2d 675 (CA2 1972), cert. denied *sub nom. County of Nassau* v. *United States,* 412 U. S. 922 (1973); *United States* v. *Oswald & Hess Co.,* 345 F. 2d 886 (CA3 1965); *Willow Creek Lumber Co.* v. *Porter County Plumbing & Heating, Inc.,* 572 F. 2d 588 (CA7 1978); *United States* v. *Latrobe Construction Co.,* 246 F. 2d 357 (CA8), cert. denied, 355 U. S. 890 (1957); *T. H. Rogers Lumber Co.* v. *Apel,* 468 F. 2d 14 (CA10 1972), with, *e. g., United States* v. *Gregory-Beaumont Equipment Co.,* 243 F. 2d 591 (CA8 1957); *United States* v.

II

This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs. As the Court explained in *Clearfield Trust Co.* v. *United States, supra,* at 366–367:

> "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." (Citations and footnote omitted.)

Guided by these principles, we think it clear that the priority of liens stemming from federal lending programs must be determined with reference to federal law. The SBA and FHA unquestionably perform federal functions within the meaning of *Clearfield.* Since the agencies derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a "constitutional function or power," *Clearfield Trust Co.* v. *United States, supra,* at 366, their rights, as well, should derive from a federal source.[17] When

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California-Oregon Plywood, Inc., 527 F. 2d 687 (CA9 1975). See also *United States* v. *Union Livestock Sales Co.,* 298 F. 2d 755 (CA4 1962); *United States* v. *Kramel,* 234 F. 2d 577 (CA8 1956); *United States* v. *Chappell Livestock Auction, Inc.,* 523 F. 2d 840 (CA8 1975); *Bumb* v. *United States,* 276 F. 2d 729 (CA9 1960).

[17] See *United States* v. *Standard Oil Co.,* 332 U. S. 301, 305–306 (1947); *United States* v. *Seckinger,* 397 U. S. 203, 209–210 (1970); Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 410 (1964); see also *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176 (1942); *Board of County Comm'rs* v. *United States,* 308 U. S. 343, 349–350 (1939).

Government activities "aris[e] from and bea[r] heavily upon a federal . . . program," the Constitution and Acts of Congress " 'require' otherwise than that state law govern of its own force." *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 592, 593 (1973).[18] In such contexts, federal interests are sufficiently implicated to warrant the protection of federal law.[19]

That the statutes authorizing these federal lending programs do not specify the appropriate rule of decision in no way limits the reach of federal law. It is precisely when Congress has not spoken " 'in an area comprising issues substantially related to an established program of government operation,' " *id.*, at 593, quoting Mishkin 800, that *Clearfield* directs federal courts to fill the interstices of federal legislation "according to their own standards." *Clearfield Trust Co.* v. *United States*, 318 U. S., at 367.[20]

Federal law therefore controls the Government's priority rights. The more difficult task, to which we turn, is giving content to this federal rule.

III

Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably

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[18] See *United States* v. *Security Trust & Sav. Bank*, 340 U. S., at 49; cf. *United States* v. *Yazell*, 382 U. S. 341, 356 (1966).

[19] See *United States* v. *Standard Oil Co., supra*, at 305–307; Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 800, and n. 15 (1957) (hereinafter Mishkin); Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U. Chi. L. Rev. 823, 825 (1976); see also *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U. S. 29, 33–34 (1956); *Miree* v. *DeKalb County*, 433 U. S. 25, 29, 31–32 (1977).

[20] See *Board of County Comm'rs* v. *United States, supra*, at 349–350; *National Metropolitan Bank* v. *United States*, 323 U. S. 454, 456 (1945); *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946); *Moor* v. *County of Alameda*, 411 U. S. 693, 701–702, and n. 12 (1973).

require resort to uniform federal rules. See *Clearfield Trust Co.* v. *United States, supra,* at 367; *United States* v. *Little Lake Misere Land Co., supra,* at 594–595. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *United States* v. *Standard Oil Co.,* 332 U. S. 301, 310 (1947).[21]

Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. *United States* v. *Yazell,* 382 U. S. 341, 354 (1966); see *Clearfield Trust Co.* v. *United States, supra,* at 367; *United States* v. *Standard Oil Co., supra,* at 311; *Illinois* v. *Milwaukee,* 406 U. S. 91, 105 n. 6 (1972). Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.[22] Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests.[23] Finally, our choice-of-

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[21] As explained by one commentator:

"Whether state law is to be incorporated as a matter of federal common law . . . involves the . . . problem of the relationship of a particular issue to a going federal program. The question of judicial incorporation can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance." Mishkin 805.

[22] *Miree* v. *DeKalb County, supra,* at 28–29; see *RFC* v. *Beaver County,* 328 U. S. 204, 209–210 (1946); *United States* v. *Brosnan,* 363 U. S. 237, 241–242 (1960); *United States* v. *Yazell, supra,* at 356–357; *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 701–703 (1966).

[23] See *United States* v. *Allegheny County,* 322 U. S. 174, 183 (1944); *RFC* v. *Beaver County, supra,* at 209–210; *Auto Workers* v. *Hoosier Cardinal Corp , supra,* at 706–707; *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63, 68 (1966); *United States* v. *Little Lake Misere Land Co.,* 412

law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.[24]

The Government argues that effective administration of its lending programs requires uniform federal rules of priority. It contends further that resort to any rules other than first in time, first in right and choateness would conflict with protectionist fiscal policies underlying the programs. We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s]," *United States* v. *Standard Oil Co., supra,* at 309, we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.

A

Incorporating state law to determine the rights of the United States as against private creditors would in no way hinder administration of the SBA and FHA loan programs. In *United States* v. *Yazell, supra,* this Court rejected the argument, similar to the Government's here, that a need for uniformity precluded application of state coverture rules to an SBA loan contract. Because SBA operations were "specifically and in great detail adapted to state law," 382 U. S., at 357, the federal interest in supplanting "important

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U. S. 580, 595–597 (1973); *Johnson* v. *Railway Express Agency, Inc.,* 421 U. S. 454, 465–466 (1975); *Miree* v. *DeKalb County, supra,* at 31–32; *Robertson* v. *Wegmann,* 436 U. S. 584, 590–593 (1978); see also *De Sylva* v. *Ballentine,* 351 U. S. 570, 581 (1956).

[24] See *United States* v. *Brosnan, supra,* at 241–242; *United States* v. *Yazell, supra,* at 352–353; *Wallis* v. *Pan American Petroleum Corp., supra,* at 68; *United States* v. *Little Lake Misere Land Co., supra,* at 599–603.

and carefully evolved state arrangements designed to serve multiple purposes" was minimal. *Id.*, at 353. Our conclusion that compliance with state law would produce no hardship on the agency was also based on the SBA's practice of "individually negotiat[ing] in painfully particularized detail" each loan transaction. *Id.*, at 345–346. These observations apply with equal force here and compel us again to reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs.

Although the SBA Financial Assistance Manual on which this Court relied in *Yazell* is no longer "replete with admonitions to follow state law carefully," *id.*, at 357 n. 35, SBA employees are still instructed to, and indeed do, follow state law.[25] In fact, a fair reading of the SBA Financial Assistance Manual, SOP 50–10 (SBA Manual), indicates that the agency assumes its security interests are controlled to a large extent by the commercial law of each State.[26] Similarly, FHA reg-

[25] The applicable regulations recognize that "[i]n order to implement and facilitate th[e] Federal loan programs," SBA offices should comply with state law, in particular, with state procedural requirements for obtaining enforceable security interests. 13 CFR § 101.1 (d)(3) (1978). And the SBA routinely follows such rules, Tr. of Oral Arg. in No. 77–1359, p. 43, as it did here by requiring Republic to file a financing statement and a notice of assignment. That the SBA conforms its transactions to state law is also reflected in the security agreement between Republic and O. K. Super Markets, approved by the SBA, which provided that the contract would be construed according to Texas law and bound the parties' assigns to this provision. App. in No. 77–1359, p. 68.

[26] For example, the Manual stresses that the borrower's inventory should be used as collateral only after careful consideration of the protection afforded under state law:

"*Uniform Commercial Code—Factor's Lien Laws.* Most states have adopted the Uniform Commercial Code or Factor's Lien Laws. Under such laws it is possible to obtain a general lien covering all existing and to-be-acquired inventory. Generally, these statutes also provide that the lien may follow the accounts receivable or proceeds resulting from the sale of the inventory. . . . The loan specialist should inquire as to any

ulations expressly incorporate state law. They mandate compliance with state procedures for perfecting and maintaining valid security interests, and highlight those rules that differ from State to State. *E. g.,* 7 CFR §§ 1921.104 (c)(1), 1921.105, 1921.106, 1921.107, 1921.108, 1921.111, 1930.5, 1930.8, 1930.9, 1930.14, 1930.17, 1930.27 (1978).[27] To ensure that employees are aware of new developments, the FHA also issues "State supplements" to "reflect any State statutory changes in its version of the UCC." § 1921.111 (c); see, *e. g.,* §§ 1802.80, 1904.108 (d), 1930.46 (d)(3). Contrary to the Government's claim that the FHA complies only with state procedural rules, Reply Brief for United States in No. 77–1644, p. 7, the agency's reliance on state law extends to substantive requirements as well. Indeed, applicable regula-

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prior liens against either inventories or receivables. The lien obtained under the Code (or Factor's Lien Laws) covering accounts receivable or other proceeds resulting from the sale of the inventory is not generally invalidated by the fact that the borrower thereafter deals with the accounts receivable or proceeds as his own. . . . However, a careful study should be made of borrower's credit circumstances to determine the measures of control and supervision to be imposed. . . . Although the collateral may not require close supervision from inception, the security agreement should contain provisions that borrower shall . . . comply with such other servicing practices as are deemed necessary by counsel to safeguard the collateral.

"Accounts receivable resulting from the sale of inventories assigned to SBA prior to adoption of the Code in code states shall be serviced in accordance with applicable local law existing prior to the date of adoption of the Code. This is not necessary however, if in the opinion of counsel, servicing can be performed in a manner permitted under the Code without adversely affecting SBA's interest." SBA Manual ¶ 29 (a)(4)(b) (1977). See also n. 25, *supra.*

[27] After publication of the 1978 Code of Federal Regulations, the FHA began reorganizing its regulations to provide separate rules for each loan program. Most provisions of 7 CFR cited throughout this opinion have been recodified with modifications not relevant here. See, *e. g.,* 43 Fed. Reg. 5504, 7978, 23986, 55882–55895, 56643–56647, 59078 (1978); 44 Fed. Reg. 1701, 4431–4458, 6354, 10979–10980 (1979). For convenience, we refer to the 1978 version of the FHA regulations contained in 7 CFR.

tions suggest that state rules determine the priority of FHA liens when federal statutes or agency regulations are not controlling. 7 CFR §§ 1872.2 (c), 1921.111 (b), 1930.43, 1930.44, 1930.46 (d)(1), (3) (1978); see also § 1955.15 (d).

Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules.[28] The programs already conform to each State's commercial standards. By using local lending offices and employees who are familiar with the law of their respective localities,[29] the agencies function effectively without uniform procedures and legal rules.

Nevertheless, the Government maintains that requiring the agencies to assess security arrangements under local law would dictate close scrutiny of each transaction and thereby impede expeditious processing of loans. We disagree. Choosing responsible debtors necessarily requires individualized selection procedures, which the agencies have already implemented in considerable detail. Each applicant's financial condition is evaluated under rigorous standards in a lengthy process.[30] Agency employees negotiate personally with borrowers, investigate property offered as collateral for encumbrances, and

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[28] The differences between the rules, moreover, are insignificant in comparison with the similarities. All States except Louisiana have enacted Art. 9 of the UCC with minor variations. See Model UCC 1–2 (1979 pamphlet). As Judge Friendly observed in *United States* v. *Wagematic Corp.*, 360 F. 2d 674, 676 (CA2 1966):

"When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States."

[29] See 13 CFR §§ 101.3, 101.7 (a) (1978); 7 CFR §§ 1800.1–1800.4 (1978).

[30] See 13 CFR §§ 120.2 (c), (d), as amended, 43 Fed. Reg. 3702 (1978); 13 CFR §§ 122.15, 122.16 (1978); SBA Manual ¶¶ 10, 11, 16–40; 7 CFR §§ 1801.2–1801.4, 1904.108, 1904.127, 1904.175, 1980.175 (1978).

obtain local legal advice on the adequacy of proposed security arrangements.[31] In addition, they adapt the terms of every loan to the parties' needs and capabilities.[32] Because each application currently receives individual scrutiny, the agencies can readily adjust loan transactions to reflect state priority rules, just as they consider other factual and legal matters before disbursing Government funds. As we noted in *United States* v. *Yazell,* 382 U. S., at 348, these lending programs are distinguishable from "nationwide act[s] of the Federal Government, emanating in a single form from a single source." (Footnote omitted.) Since there is no indication that variant state priority schemes would burden current methods of loan processing, we conclude that considerations of administrative convenience do not warrant adoption of a uniform federal law.

B

The Government argues that applying state law to these lending programs would undermine its ability to recover funds disbursed and therefore would conflict with program objectives. In the Government's view, it is difficult "to identify a material distinction between a dollar received from the collection of taxes and a dollar returned to the Treasury on

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[31] See *United States* v. *Yazell,* 382 U. S., at 344–346; 13 CFR §§ 101.2–1, 101.7 (a), 122.16 (1978); SBA Manual ¶¶ 16–17, 21 (c), 23 (a)–(f), 29 (a) (8), 30 (*l*), 31 (b)(6); 7 CFR §§ 1801.1–1801.4, 1801.11, 1921.107, 1930.5 (1978).

[32] The Court of Appeals in No. 77–1644 believed that a uniform federal law was necessary to determine the sufficiency of the FHA's financing statement in part because the agency uses standard forms with preprinted descriptions of collateral commonly taken as security. 563 F. 2d, at 682. However, the form also has a blank space for listing specific property. See App. in No. 77–1644, p. 12 (Form FHA 440–25). And the FHA regulations advise that individual descriptions be made, specifically when "major items of equipment" are involved. 7 CFR §§ 1921.105 (e)(1), (2) (1978). Since the standard FHA forms leave spaces for recording the details of each loan, the agency can take account of local law without altering these materials. See, *e. g.,* App. in No. 77–1644, p. 8 (Form FHA 440–4).

repayment of a federal loan." Brief for United States in No. 77–1359, p. 22. Therefore, the agencies conclude, just as "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes" [33] justified our imposition of the first-in-time and choateness doctrines in the tax lien context, the federal interest in recovering on loans compels similar legal protection of the agencies' consensual liens. However, we believe significant differences between federal tax liens and consensual liens counsel against unreflective extension of rules that immunize the United States from the commercial law governing all other voluntary secured creditors. These differences persuade us that deference to customary commercial practices would not frustrate the objectives of the lending programs.

That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied. *McCulloch* v. *Maryland,* 4 Wheat. 316, 425, 428, 431 (1819); *Springer* v. *United States,* 102 U. S. 586, 594 (1881). Congress recognized as much over 100 years ago when it authorized creation of federal tax liens. Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107, recodified as amended in 26 U. S. C. §§ 6321–6323. The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. By contrast, when the United States operates as a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to invoke protective measures against defaulting debtors in a manner disruptive of existing credit markets.

To equate tax liens with these consensual liens also misperceives the principal congressional concerns underlying the respective statutes. The overriding purpose of the tax lien

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[33] *United States* v. *Security Trust & Sav. Bank,* 340 U. S., at 51.

statute obviously is to ensure prompt revenue collection. The same cannot be said of the SBA and FHA lending programs.[34] They are a form of social welfare legislation, primarily designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms.[35] We believe that had Congress intended the private commercial sector, rather than taxpayers in general, to bear the risks of default entailed by these public welfare programs, it would have established a priority scheme displacing state law. Far from doing so, both Congress and the agencies have expressly recognized the priority of certain private liens over the agencies' security interests,[36] thereby indicating that the extraordinary safeguards applied in the tax lien area are unnecessary to maintain the lending programs.

The Government's ability to safeguard its interests in commercial dealings further reveals that the rules developed in the tax lien area are unnecessary here, and that state priority rules would not conflict with federal lending objec-

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[34] Congress did not delineate specific priority rules in either the tax lien statute prior to 1966, the insolvency statute, or the statutes authorizing these lending programs. See nn. 6 and 8, *supra*. Accordingly, the Government urges that we establish identical priority rules for all three situations. This argument overlooks the evident distinction between lending programs for needy farmers and businesses and statutes created to guarantee receipt of debts due the United States. We, of course, express no view on the proper priority rules to govern federal consensual liens in the context of statutes other than those at issue here.

[35] See nn. 3 and 11, *supra;* 15 U. S. C. § 631 (1976 ed. and Supp. III) (declaration of policy); 7 U. S. C. § 1921 (congressional findings); 43 Fed. Reg. 55883 (1978) (to be codified in 7 CFR § 1941.2); S. Rep. No. 566, 87th Cong., 1st Sess., 1, 64 (1961); Hearings on H. R. 4384 before the House Committee on Agriculture, 78th Cong., 2d Sess., 43–45 (1944).

[36] A 1958 amendment to the Small Business Act subordinates SBA liens to state and local property tax liens when the tax liens would be superior to nonfederal security interests under state law. 72 Stat. 396, 15 U. S. C. § 646. The FHA has established by regulation that purchase-money security interests take priority over previously arising FHA liens. 7 CFR

tives.[37] The United States is an involuntary creditor of delinquent taxpayers, unable to control the factors that make tax collection likely. In contrast, when the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status. The agencies evaluate the risks associated with each loan, examine the interests of other creditors, choose the security believed necessary to assure repayment, and set the terms of every agreement.[38] By carefully selecting loan recipients and tailoring each transaction with state law in mind, the agencies are fully capable of establishing terms that will secure repayment.[39]

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§ 1921.106 (1978); see § 1930.44. In appropriate circumstances, the FHA also subordinates its liens to interests that are junior under state law. 7 U. S. C. § 1981 (d) (1976 ed. and Supp. III); see, *e. g.*, 7 CFR § 1930.30 (1978).

[37] We reject the Government's suggestion that the choateness and first-in-time doctrines are needed to prevent States from "undercutting" the agencies' liens by creating "arbitrary" rules. Brief for United States in No. 77–1359, pp. 24–25. Adopting state law as an appropriate federal rule does not preclude federal courts from excepting local laws that prejudice federal interests. See, *e. g.*, *RFC* v. *Beaver County*, 328 U. S., at 210; *De Sylva* v. *Ballentine*, 351 U. S., at 581; *United States* v. *Little Lake Misere Land Co.*, 412 U. S., at 596. The issue here, however, involves commercial rules of general applicability, based on codes that are remarkably uniform throughout the Nation. See n. 28, *supra*.

[38] See nn. 30, 31, *supra*.

[39] The facts presented here demonstrate the ease with which the agencies could have protected themselves. O. K. Super Markets informed the SBA of Kimbell's security interests in the inventory. Had the agency followed its guidelines and checked local records, it would have discovered the 1968 security agreements Kimbell filed with its financing statements. See SBA Manual ¶¶ 29 (a)(3), (4), (8), 31 (b)(6). Thus, the agency should have known that the agreements secured future advances. The SBA was also informed in the loan guarantee application that O. K. Super Markets intended to discharge the debts it owed Kimbell from the Republic loan proceeds. See App. in No. 77–1359, p. 72. Additionally, as a result of negotiations with O. K. Super Markets' creditors, the SBA was aware that Kimbell would not guarantee any portion of the Republic loan because it wanted its account paid in full before advancing further credit. *Id.*, at

The Government nonetheless argues that its opportunity to evaluate the credit worthiness of loan applicants provides minimal safety. Because the SBA and FHA make loans only when private lenders will not, the United States believes that its security interests demand greater protection than ordinary commercial arrangements. We find this argument unconvincing. The lending agencies do not indiscriminately distribute public funds and hope that reimbursement will follow. SBA loans must be "of such sound value or so secured as reasonably to assure repayment." 15 U. S. C. § 636 (a)(7); see 13 CFR § 120.2 (c)(1) (1978). The FHA operates under a similar restriction. 7 CFR § 1833.35 (1978). Both agencies have promulgated exhaustive instructions to ensure that loan recipients are financially reliable and to prevent improvident loans.[40] The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judiciously supports the view that it did not intend to confer special privileges on agencies that enter the commercial field. Accordingly, we agree with the Court of Appeals in No. 77–1359 that "[a]s a quasi-commercial lender, [the Government] does not require . . .

62–63. In these circumstances, the SBA easily could have persuaded Kimbell either to subordinate its liens covering future advances or to terminate the 1968 security arrangements once the obligations were satisfied. This procedure, moreover, would have comported with agency practices. The SBA Manual allows employees to impose conditions on third parties when "advisable," and to note such agreements on the appropriate forms. *Id.*, ¶ 30 (e).

With respect to the FHA loan, the agency could have followed the practices of private lenders in protecting themselves from subsequent liens that take priority under state law. For example, the FHA might have secured its loan with property not subject to repairman's liens or demanded more substantial collateral.

[40] *E. g.*, 13 CFR § 120.2, as amended, 43 Fed. Reg. 3702 (1978); 13 CFR §§ 122.2, 122.3 (1978); SBA Manual ¶¶ 5–7; nn. 30, 31, *supra*.

the special priority which it compels as sovereign" in its tax-collecting capacity. 557 F. 2d, at 500.

The Federal Tax Lien Act of 1966, 80 Stat. 1125, as amended, 26 U. S. C. § 6323, provides further evidence that treating the United States like any other lender would not undermine federal interests. These amendments modified the Federal Government's preferred position under the choateness and first-in-time doctrines, and recognized the priority of many state claims over federal tax liens.[41] In enacting this legislation, Congress sought to "improv[e] the status of private secured creditors" and prevent impairment of commercial financing transactions by "moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors." S. Rep. No. 1708, 89th Cong., 2d Sess., 1–2 (1966); see also H. R. Rep. No. 1884, 89th Cong., 2d Sess., 35 (1966). This rationale has even greater force when the Government acts as a moneylender. We do not suggest that Congress' actions in the tax lien area control our choice of law in the commercial lien context. But in fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy. *E. g., RFC* v. *Beaver County,* 328 U. S. 204, 209–210 (1946). To ignore Congress' disapproval of unrestricted federal priority in an area as important to the Nation's stability as taxation would be inconsistent with this function. Thus, without a showing that application of state laws would impair federal operations, we decline to extend to new contexts extraordinary safeguards largely rejected by Congress.

[41] See nn. 6 and 8, *supra.* Of particular relevance here, the Act added mechanic's liens to the list of private interests already protected against unrecorded tax liens. 26 U. S. C. § 6323 (a). Holders of consensual security interests also receive priority over unrecorded tax liens. *Ibid.* Moreover, the Act gives priority to many types of nonfederal liens even when the Government has filed notice of the tax lien. § 6323 (b). Included in this group are repairman's liens in personal property, § 6323 (b)(5), see n. 14, *supra,* and in limited situations, liens securing future advances. § 6323 (c).

C

In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. Cf. *National Bank* v. *Whitney,* 103 U. S. 99, 102 (1881). However, subjecting federal contractual liens to the doctrines developed in the tax lien area could undermine that stability. Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.[42]

Because the ultimate consequences of altering settled commercial practices are so difficult to foresee,[43] we hesitate to

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[42] The cases under consideration illustrate the substantial new risks that creditors would encounter. Neither the financing statement filed by Republic nor its security agreement mentioned the SBA. App. in No. 77–1359, pp. 67–69. To give the federal lien priority in this situation would undercut the reliability of the notice filing system, which plays a crucial role in commercial dealings. Subsequent creditors such as Crittenden and prior creditors such as Kimbell would have no trustworthy means of discovering the undisclosed security interest. Even those creditors aware of a federal agency's lien would have to adjust their lending arrangements to protect against the stringent choateness requirements. In recognition of these burdens, commentators have criticized the doctrine for frustrating private creditors' expectations as well as generating inconsistencies in application. See, *e. g.,* 2 G. Gilmore, Security Interests in Personal Property 1052–1073 (1965); Plumb, Federal Liens and Priorities—Agenda for the Next Decade, 77 Yale L. J. 228 (1967); Kennedy, From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien, 50 Iowa L. Rev. 724 (1965); Kennedy, Relative Priority; Comment, The Relative Priority of Small Business Administration Liens: An Unreasonable Extension of Federal Preference?, 64 Mich. L. Rev. 1107 (1966).

Considerable uncertainty would also result from the approach used in the opinions below. Developing priority rules on a case-by-case basis, depending on the types of competing private liens involved, leaves creditors without the definite body of law they require in structuring sound business transactions.

[43] For example, the decision below in No. 77–1359 noted that priority rules favoring the Government could inhibit private lenders' extension of

create new uncertainties, in the absence of careful legislative deliberation. Of course, formulating special rules to govern the priority of the federal consensual liens in issue here would be justified if necessary to vindicate important national interests. But neither the Government nor the Court of Appeals advanced any concrete reasons for rejecting well-established commercial rules which have proven workable over time. Thus, the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.[44]

IV

Accordingly, we hold that, absent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws. In No. 77–1359, the Court of Appeals found that Texas law gave preference to Kimbell's lien. We therefore affirm the judgment in that case. Although the issue was contested, the Court of Appeals in No. 77–1644 did not decide whether and to what extent Georgia treats repairman's liens as superior to previously perfected consensual liens. Nor did the court assess the sufficiency of the FHA's financing statement under Georgia law. Because "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of [such] issues," *Butner* v. *United States, ante,* at 58 (footnote omitted), we vacate the judgment in No. 77–1644 and remand for resolution of these issues.

So ordered.

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credit to the very people for whom Congress created these programs. 557 F. 2d, at 500. See MacLachlan, Improving the Law of Federal Liens and Priorities, 1 B. C. Ind. and Com. L. Rev. 73, 74–76 (1959).

[44] See *RFC* v. *Beaver County,* 328 U. S., at 209–210; *United States* v. *Brosnan,* 363 U. S., at 242; *United States* v. *Yazell,* 382 U. S., at 352, and nn. 26–27; *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S., at 68.

Syllabus

UNITED STATES *v.* CACERES

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

No. 76–1309. Argued January 8, 9, 1979—Decided April 2, 1979

Regulations in the Internal Revenue Service Manual prohibit "consensual electronic surveillance" between taxpayers and IRS agents unless certain specified prior authorization is obtained. With respect to the monitoring of face-to-face (nontelephone) conversations, the Director of the Internal Security Division or the Assistant Commissioner (Inspection) of the IRS may authorize the recording of such conversations in emergency situations, but if there is at least 48 hours in which to obtain approval, a signed request must also be submitted to the Attorney General or a designated Assistant Attorney General. In connection with the audit of the income tax returns of respondent and his wife, an IRS agent met with respondent on, among other dates, January 31 and February 6, 1975. Emergency approval for the use of electronic equipment at both meetings was obtained, pending a request to the Justice Department for authority to monitor conversations with respondent for a 30-day period, but such authority was never obtained for the January 31 and February 6 meetings. At these meetings, respondent, unaware of the surveillance, paid or offered money to the agent for a favorable resolution of the audit. The agent at both meetings wore a concealed radio transmitter which allowed other agents to monitor and record the conversations. Subsequently, respondent was prosecuted for bribing the IRS agent. At his trial he moved to suppress tape recordings of the conversations on the ground that the authorizations required by the IRS regulations had not been secured. The District Court granted the motion, and the Court of Appeals affirmed. Both courts held that the meetings had not been monitored in accordance with the IRS regulations, concluding that neither meeting fell within the emergency provision of the regulations because the exigencies were the product of "government-created scheduling problems." *Held:* The tape recordings, and the testimony of the agents who monitored the meetings in question, were not required to be excluded from evidence because of the conceded violation of the IRS regulations. Pp. 749–757.

(a) While a court has a duty to enforce an agency regulation when compliance with the regulation is mandated by the Constitution or federal law, here the agency was not required either by the Constitution, *Lopez* v. *United States,* 373 U. S. 427; *United States* v. *White,* 401 U. S.

745, or by statute, *Bridges* v. *Wixon,* 326 U. S. 135, distinguished, to adopt any particular procedures or rules before engaging in consensual monitoring and recording. Pp. 749–751.

(b) None of respondent's constitutional rights was violated either by the actual recording or by the agency's violation of its own regulations. That respondent's conversations were monitored without Justice Department approval, whereas conversations of others similarly situated would, assuming the IRS generally follows its own regulations, be recorded only with such approval, does not amount to a denial of equal protection. Nor does the IRS officials' construction of the situation as an emergency, even if erroneous, raise any constitutional questions. And this is not a case in which the Due Process Clause is implicated, since respondent cannot reasonably contend that he relied on the regulations or that their breach had any effect on his conduct. Finally, the Administrative Procedure Act provides no grounds for judicial enforcement of the violated regulations, since the remedy sought is not invalidation of the agency action but rather judicial enforcement of the regulations by means of the exclusionary rule. Pp. 751–755.

(c) This Court declines to adopt any rigid exclusionary rule, such as is urged by respondent, whereby all evidence obtained in violation of regulations concerning electronic eavesdropping would be excluded. Nor can this Court accept respondent's further argument that even without a rigid rule of exclusion, his is a case in which evidence secured in violation of agency regulations should be excluded under a more limited, individualized approach, since, to the contrary, this case exemplifies those situations in which evidence would *not* be excluded under a case-by-case approach, it appearing that the agency action, though later found to violate the regulations, nonetheless reflected a reasonable, good-faith attempt to comply in a situation in which monitoring was appropriate and would have received Justice Department approval if the request had been received more promptly. Pp. 755–757.

545 F. 2d 1182, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 757.

Kenneth S. Geller argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Jerome M. Feit.*

James J. Brosnahan argued the cause for respondent. With him on the brief was *H. Preston Moore, Jr.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question we granted certiorari to decide is whether evidence obtained in violation of Internal Revenue Service (IRS) regulations may be admitted at the criminal trial of a taxpayer accused of bribing an IRS agent. 436 U. S. 943 (1978).

Unbeknown to respondent, three of his face-to-face conversations with IRS Agent Yee were monitored by means of a radio transmitter concealed on Yee's person. Respondent moved to suppress tape recordings of the three conversations on the ground that the authorizations required by IRS regulations had not been secured. The District Court granted the motion. The Court of Appeals for the Ninth Circuit reversed as to the third tape; it concluded that adequate authorization had been obtained.[1] As to the first two tapes, however, the Court of Appeals agreed with the District Court both that the IRS regulations had not been followed and that exclusion of the recordings was therefore required. It is the latter conclusion that is at issue here.

The Government argues that exclusion of probative evidence in a criminal trial is an inappropriate sanction for violation of an executive department's regulations. In this case, moreover, it argues that suppression is especially inappropriate because the violation of the regulation was neither deliberate nor prejudicial, and did not affect any constitu-

[1] 545 F. 2d 1182 (1976). The District Court suppressed evidence relating to the third conversation as well on the ground that the approval of a *Deputy* Assistant Attorney General was not sufficient to comply with the regulations. The Court of Appeals disagreed, concluding that the Attorney General's authority to approve such monitoring could be delegated not only to Assistant Attorneys General, as provided specifically in the regulation, but also to their deputies. That conclusion is not at issue here.

tional or statutory rights. We agree that suppression should not have been ordered in this case, and therefore reverse the judgment of the Court of Appeals.

I

Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants.[2] Such "consensual electronic surveillance" between taxpayers and IRS agents is, however, prohibited by IRS regulations unless appropriate prior authorization is obtained.[3]

The IRS Manual sets forth in detail the procedures to be followed in obtaining such approvals.[4] For all types of re-

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[2] See *United States* v. *White,* 401 U. S. 745, 752 (plurality opinion); *Lopez* v. *United States,* 373 U. S. 427; 18 U. S. C. § 2511 (2)(c); *infra,* at 749–751.

[3] The IRS regulations were drafted to conform to the requirements of the Attorney General's October 16, 1972, Memorandum to the Heads of Executive Departments and Agencies. The memorandum mandates Justice Department approval for all consensual monitoring of nontelephone conversations by federal departments and agencies. The only exceptions are if less than 48 hours is available to secure approval or if exigent circumstances preclude requests for advance authorization from the Justice Department; in such cases, monitoring may be instituted under the authorization of the head of the department or agency, or other officials designated by him.

[4] Paragraph 652.22 of the IRS Manual (in effect Sept. 1975) provides in pertinent part:

"(1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division,

quests the regulations require an explanation of the reasons for the proposal, the type of equipment to be used, the names of the persons involved, and the duration of the proposed monitoring.

Approval by as many as three different levels of authority may be required, depending on the kind of surveillance that is contemplated and the circumstances of the request. Telephone conversations may be monitored with the approval of an Assistant Regional Inspector of the Internal Security Division. Such advance approval may be requested and given verbally, although the authorization must subsequently be

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cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.

"(2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical, electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. . . . Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use. . . .

"(3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of persons involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] . . . .

. . . . . .

"(6) When emergency situations occur, the Director or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelegated. . . . Emergency authorization pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.

"(7) If, at the time the emergency approval request is submitted, it is desired that approval for use of electronic equipment be given for an extended period, this should be indicated on the [appropriate form]. The Director, in addition to reporting his authorization for emergency use to the Attorney General, will also request approval for the Use of Electronic Equipment for the duration of that period specified by the requestor."

confirmed in writing. The monitoring of nontelephone conversations requires approval at the national as well as the regional level. In emergency situations, the Director, or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) may authorize the recording. If there is at least 48 hours in which to obtain approval, a signed request must also be submitted to the Attorney General of the United States, or a designated Assistant Attorney General, by the Director or Acting Director of the Internal Security Division.

II

On March 14, 1974, Agent Yee met with respondent and his wife in connection with an audit of their 1971 income tax returns. After Mrs. Caceres left the meeting, respondent offered Yee a "personal settlement" of $500 in exchange for a favorable resolution of the audit. When he returned to the IRS office, Yee reported the offer to his superiors and prepared an affidavit describing it.[5]

The record reflects no further discussion of the offer until January 1975. It does indicate, however, that one telephone conversation between Yee and respondent, on March 21, 1974, was recorded with authorization,[6] and that authority was also obtained to monitor face-to-face conversations with respondent from time to time during the period between March and September 1974.[7] Yee continued to work on the

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[5] App. 20, 23–24, 46.

[6] *Id.*, at 25–27, 46.

[7] Requests for authorization to use electronic equipment to monitor nontelephone conversations are made on a form (No. 5177) that requires disclosure of the dates of previous authorizations. The form dated January 31, 1975, App. 63, is termed an extension, and reports prior authorizations dated March 25, April 24, May 24, June 27, July 23, and August 29, 1974. Under the regulations, a single authorization may cover a period of up to 30 days; the intervals between the dates of prior authorizations in this case are consistent with successive 30-day authorizations, although this has not been established by any evidence called to our attention.

audit of respondent's records throughout this period, but his meetings, until January 1975, were with Mrs. Caceres and the Cacereses' accountant.[8]

On January 27, 1975, Yee had a meeting with respondent that was not recorded. According to Yee's affidavit,[9] the meeting proceeded in two stages. First, he discussed his calculations with respondent, Mrs. Caceres, and their accountant. When respondent and his wife asked for an additional week to check their records, Yee told them it would be necessary to sign an extension because the statute of limitations would otherwise expire soon. Respondent stated that he would have to consult his attorney before signing any extension, and would call Yee with his decision later that day.

Yee then left the office to return to his car. He was followed by respondent, who revived the subject of a "personal settlement." This time, respondent indicated that he had $500 that he would give Yee immediately, with an additional $500 to be paid when the matter was finally settled. Yee refused the offer, but at respondent's insistence, eventually stated that he might consider it.

In subsequent conversations initiated by Agent Yee, all of which were monitored,[10] respondent indicated that he was not prepared for another meeting with Yee. Finally, in a conversation on January 30 at 5:15 p. m., respondent agreed to a meeting the following day at 2 p. m. At 8:15 a. m. on the

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[8] Yee had one follow-up conversation with respondent later in March, which was not monitored. From that point until January 1975, he had no further contact with respondent. App. to Pet. for Cert. 16a (opinion and order of the District Court); App. 21–22.

[9] *Id.*, at 65–67.

[10] In the District Court, respondent moved to suppress evidence relating to these telephone conversations on the grounds that the monitoring had not been properly authorized. The District Court rejected that challenge, concluding that the applicable IRS regulations had been followed with respect to these conversations. App. to Pet. for Cert. 16a–17a. That ruling is not at issue here.

31st, the Regional Inspector in San Francisco telephoned the Director of Internal Security in Washington and obtained emergency approval for the use of electronic equipment to monitor the meeting that afternoon. On the same day, a written request for authority to monitor face-to-face conversations for a period of 30 days was initiated and, in due course, forwarded to Washington for submission to the Department of Justice.

At the meeting on the 31st, respondent gave Yee $500 and promised to give him an additional $500 when he received a notice from IRS showing his deficiency at an amount upon which he and Yee had agreed. As in all his future meetings with respondent, Yee wore a concealed radio transmitter which allowed other agents to monitor and record their conversation.

Yee next called respondent on February 5 and arranged a meeting for the next day to review the audit agreement. Because the Department of Justice had not yet acted on, or perhaps even received, the request for a 30-day authorization, the Regional Inspector again requested and obtained emergency approval to monitor the meeting with respondent. At the February 6 meeting, respondent renewed his promise to pay an additional $500 in connection with the 1971 return, and also offered Yee another $2,000 for help in settling his 1973 and 1974 returns.

On February 11, a Deputy Assistant Attorney General approved the request for authority to monitor Yee's conversations with respondent for 30 days. The approval was received in time to cover a meeting held that day at which Yee was paid the additional $500. Because the 30-day period did not commence until February 11, however, no approval from the Department of Justice was ever obtained for the earlier monitorings of January 31 and February 6.

The District Court and the Court of Appeals both held that the two earlier meetings had not been monitored in accordance with IRS regulations, since Justice Department approval had

not been secured. The courts recognized that such approval is not required, by the terms of the regulations, in "emergency situations" when less than 48 hours is available to secure authorization. They recognized, too, that in each instance, less than 48 hours did exist between the time the IRS initiated its request for monitoring approval and the time of the scheduled meeting with Yee. But the courts concluded that neither meeting fell within the emergency provision of the regulations because the exigencies were the product of "government-created scheduling problems." [11]

The Government does not challenge that conclusion. We are therefore presented with the question whether the tape recordings, and the testimony of the agents who monitored the January 31 and February 6 conversations, should be excluded because of the violation of the IRS regulations.

III

A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law. In *Bridges* v. *Wixon,* 326 U. S. 135, 152–153, for example, this Court held invalid a deportation ordered on the basis of statements which did not comply with the Immigration Service's rules requiring signatures and oaths, finding that the rules were designed "to afford [the alien] due process of law" by providing "safeguards against essentially unfair procedures." [12]

In this case, however, unlike *Bridges* v. *Wixon,* the agency was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in con-

[11] 545 F. 2d, at 1187. See also App. to Pet. for Cert. 20a (opinion of District Court) ("the only 'emergency' was created wholly by the I. R. S.").

[12] See also *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 155 (Court assumed that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law").

sensual monitoring and recording. While Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*, regulates electronic surveillance conducted without the consent of either party to a conversation, federal statutes impose no restrictions on recording a conversation with the consent of one of the conversants.

Nor does the Constitution protect the privacy of individuals in respondent's position. In *Lopez* v. *United States,* 373 U. S. 427, 439, we held that the Fourth Amendment provided no protection to an individual against the recording of his statements by the IRS agent to whom he was speaking. In doing so, we repudiated any suggestion that the defendant had a "constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment," concluding instead that "the risk that petitioner took in offering a bribe to [the IRS agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." The same analysis was applied in *United States* v. *White,* 401 U. S. 745, to consensual monitoring and recording by means of a transmitter concealed on an informant's person, even though the defendant did not know that he was speaking with a Government agent:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa* v. *United States,* 385 U. S., at 300–303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person,

> *Lopez* v. *United States, supra;* (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee* v. *United States,* [343 U. S. 747]. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." *United States* v. *White, supra,* at 751 (opinion of WHITE, J.).[13]

Our decisions in *Lopez* and *White* demonstrate that the IRS was not required by the Constitution to adopt these regulations.[14] It is equally clear that the violations of agency regu-

[13] MR. JUSTICE WHITE further stated:

"Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question." 401 U. S., at 753.

[14] It does not necessarily follow, however, as a matter of either logic or law, that the agency had no duty to obey them. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton* v. *Ruiz,* 415 U. S. 199, 235. See, *e. g., United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (holding habeas corpus relief proper where Government regulations "with the force and effect of law" governing the procedure to be followed in processing and passing upon an alien's application for suspen-

lations disclosed by this record do not raise any constitutional questions.

It is true, of course, that respondent's conversations were monitored without the approval of the Department of Justice, whereas the conversations of others in a similar position would, assuming the IRS generally follows its regulations, be recorded only with Justice Department approval. But this difference does not even arguably amount to a denial of equal protection. No claim is, or reasonably could be, made that if the IRS had more promptly addressed this request to the Department of Justice, it would have been denied. As a result, any inconsistency of which respondent might complain is purely one of form, with no discernible effect in this case on the action taken by the agency and its treatment of respondent.

Moreover, the failure to secure Justice Department authorization, while conceded here to be a violation of the IRS regulations, was attributable to the fact that the IRS officials responsible for administration of the relevant regulations, both in San Francisco and Washington, construed the situation as an emergency within the meaning of those regulations. Their construction of their own regulations, even if erroneous, was not obviously so. That kind of error by an executive agency in interpreting its own regulations surely does not raise any constitutional questions.

Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency

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sion of deportation were not followed); *Service* v. *Dulles,* 354 U. S. 363 (invalidating Secretary of State's dismissal of an employee where regulations requiring approval of the Deputy Undersecretary and consultation of full record were not satisfied); *Vitarelli* v. *Seaton,* 359 U. S. 535 (invalidating dismissal of Interior Department employee where regulations governing hearing procedures for national security dismissals were not followed). See also *Yellin* v. *United States,* 374 U. S. 109 (reversing contempt conviction where congressional committee had not complied with its rules requiring it to consider a witness' request to be heard in executive session).

regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.[15] Respondent cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct. He did not know that his conversations with Yee were being recorded without proper authority. He was, of course, prejudiced in the sense that he would be better off if all monitoring had been postponed until after the Deputy Assistant Attorney General's approval was obtained on February 11, 1975, but precisely the same prejudice would have ensued if the approval had been issued more promptly. For the record makes it perfectly clear that a delay in processing the request, rather than any doubt about its propriety or sufficiency, was the sole reason why advance authorization was not obtained before February 11.

Finally, the Administrative Procedure Act[16] provides no grounds for judicial enforcement of the regulation violated in this case. The APA authorizes judicial review and invalidation of agency action that is arbitrary, capricious, an abuse of discretion, or not in accordance with law, as well as action

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[15] In *Raley* v. *Ohio,* 360 U. S. 423, 437–438, we held that due process precluded the conviction of individuals for refusing to answer questions asked by a state investigating commission which itself had erroneously provided assurances, express or implied, that the defendants had a privilege under state law to refuse to answer. And in *Cox* v. *Louisiana,* 379 U. S. 559, the Court held that an individual could not be punished for demonstrating "near" a courthouse where the highest police officials of the city had advised the demonstrators that they could meet where they did without violating the statutory proscription against demonstrations "near" the courthouse. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370 (holding invalid Interstate Commerce Commission's retroactive application of new rate); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407, 422 (agency regulations on which individuals are "entitled to rely" bind agency and are therefore ripe for judicial review). The underlying rationale of the foregoing cases is plainly inapplicable here.

[16] The Act was originally passed in 1946, 60 Stat. 237, and is codified at 5 U. S. C. § 551 *et seq.* and § 701 *et seq.*

taken "without observance of procedure required by law." [17] Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the courts to enforce.[18] Indeed, some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA.[19]

But this is not an APA case, and the remedy sought is not invalidation of the agency action. Rather, we are dealing with a criminal prosecution in which respondent seeks judicial enforcement of the agency regulations by means of the exclusionary rule. That rule has primarily rested on the judgment that the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community outweighs the importance of securing the conviction of the specific defendant on trial.[20] In view of our

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[17] 5 U. S. C. § 706.

[18] Cf. *Board of Curators, Univ. of Mo.* v. *Horowitz,* 435 U. S. 78, 92 n. 8; *Vitarelli* v. *Seaton, supra,* at 547 (Frankfurter, J., concurring in part and dissenting in part) ("This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword").

Even as a matter of administrative law, however, it seems clear that agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as "internal." In *American Farm Lines* v. *Black Ball Freight Service,* 397 U. S. 532, 538, for example, ICC rules requiring certain information to be included in applications had not been followed. This Court rejected the argument that the agency action was therefore invalid, concluding that the Commission was "entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems."

[19] See App. in *Service* v. *Dulles,* O. T. 1956, No. 407, p. 40; App. in *Vitarelli* v. *Seaton,* O. T. 1958, No. 101, p. 7. The complaints in both of these cases invoked 5 U. S. C. § 1009 (1964 ed.), the then-applicable APA judicial-review provision.

[20] See *Linkletter* v. *Walker,* 381 U. S. 618, 633, 636–637; *Mapp* v. *Ohio,* 367 U. S. 643, 656; *Elkins* v. *United States,* 364 U. S. 206, 217.

conclusion that none of respondent's constitutional rights has been violated here, either by the actual recording or by the agency violation of its own regulations, our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case.[21]

IV

Respondent argues that the regulations concerning electronic eavesdropping, even though not required by the Constitution or by statute, are of such importance in safeguarding the privacy of the citizenry that a rigid exclusionary rule should be applied to all evidence obtained in violation of any of their provisions. We do not doubt the importance of these rules. Nevertheless, without pausing to evaluate the Government's challenge to our power to do so,[22] we decline to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of these rules.

Regulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence in criminal trials.[23] Although we do not suggest that a suppression order in this case would cause the IRS to abandon or modify its electronic surveillance regulations, we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious

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[21] Since no statute was violated by the recording of respondent's conversations, this Court's decision in *Miller* v. *United States,* 357 U. S. 301, is likewise inapplicable.

[22] The Government argues that Fed. Rule Evid. 402 and 18 U. S. C. § 3501 prohibited the Court of Appeals from exercising whatever supervisory power it might otherwise have to suppress evidence of respondent's statements to Yee. Brief for United States 42.

[23] See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416–428 (1974); McGowan, Rule-Making and the Police, 70 Mich. L. Rev. 659 (1972).

deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.[24] Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic-surveillance regulations.[25] To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations. But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations. In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.

Nor can we accept respondent's further argument that even without a rigid rule of exclusion, his is a case in which evidence secured in violation of the agency regulation should be excluded on the basis of a more limited, individualized approach. Quite the contrary, this case exemplifies those situations in which evidence would *not* be excluded if a case-by-case approach were applied. The two conversations at issue here were recorded with the approval of the IRS officials in San Francisco and Washington. In an emergency situa-

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[24] See F. Cooper, Administrative Agencies and the Courts 289–290 (1951) ("[T]oo rigid an application of the doctrine prohibiting disregard of procedural rules would encourage the tendency of some agencies to proceed almost without rules. The doctrine should not be pressed so far as to induce agencies to adopt the protective device of promulgating procedural rules so vague in nature as to make it impossible to show a violation of the rules").

[25] See IRS Manual ¶ 652.1 (3) (in effect Sept. 1975) ("Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service").

tion, which the agents thought was present, this approval would have been sufficient. The agency action, while later found to be in violation of the regulations, nonetheless reflected a reasonable, good-faith attempt to comply in a situation in which no one questions that monitoring was appropriate and would have certainly received Justice Department authorization, had the request been received more promptly. In these circumstances, there is simply no reason why a court should exercise whatever discretion it may have to exclude evidence obtained in violation of the regulations.

The judgment of the Court of Appeals is

Reversed.

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

The Court today holds that evidence obtained in patent violation of agency procedures is admissible in a criminal prosecution. In so ruling, the majority determines both that the Internal Revenue Service's failure to comply with its own mandatory regulations implicates no due process interest, and that the exclusionary rule is an inappropriate sanction for such noncompliance. Because I can subscribe to neither proposition, and because the Court's decision must inevitably erode respect for law among those charged with its administration, I respectfully dissent.

I

In a long line of cases beginning with *Bridges* v. *Wixon,* 326 U. S. 135, 152–153 (1945), this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules" promulgated by an executive or legislative body for his protection. See *United States* v. *Nixon,* 418 U. S. 683, 695–696 (1974); *Morton* v. *Ruiz,* 415 U. S. 199, 235 (1974); *Yellin* v. *United States,* 374 U. S. 109 (1963); *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959); *Service* v. *Dulles,* 354 U. S. 363 (1957); *United States ex rel. Accardi* v.

Shaughnessy, 347 U. S. 260 (1954). Underlying these decisions is a judgment, central to our concept of due process, that government officials no less than private citizens are bound by rules of law.[1] Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged. See *Vitarelli* v. *Seaton, supra,* at 547 (Frankfurter, J., concurring in part and dissenting in part).

Despite these well-established precedents and the IRS's conceded failure to abide by mandatory investigative regulations, the Court finds no due process violation on the facts of this case. In reaching its conclusion, the majority relies on the absence of constitutional or statutory underpinnings for

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[1] Although not always expressly predicated on the Due Process Clause, these decisions are explicable in no other terms. The complaints in only two of the cases, *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959), and *Service* v. *Dulles,* 354 U. S. 363 (1957), invoked the Administrative Procedure Act, see *ante,* at 754 n. 19. In neither of these cases was the Act even mentioned in the Court's opinions. Rather, *Vitarelli* followed *Service,* see 359 U. S., at 539–540, which in turn had relied on *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954). See 354 U. S., at 373, 386–387. Both *Accardi* and its predecessor, *Bridges* v. *Wixon,* 326 U. S. 135 (1945), were habeas corpus cases. And *Yellin* v. *United States,* 374 U. S. 109 (1963), which involved criminal contempt sanctions, followed *Accardi.* Thus, it is clear that this line of precedent cannot be dismissed as federal administrative law. Cf. *Board of Curators, Univ. of Mo.* v. *Horowitz,* 435 U. S. 78, 92 n. 8 (1978) (dictum). To the contrary, these decisions have been uniformly, and I believe properly, interpreted as resting on due process foundations. See *United States* v. *Sourapas,* 515 F. 2d 295, 298 (CA9 1975); *Konn* v. *Laird,* 460 F. 2d 1318 (CA7 1972); *Antonuk* v. *United States,* 445 F. 2d 592, 595 (CA6 1971); *Hollingsworth* v. *Balcom,* 441 F. 2d 419, 421 (CA6 1971); *United States* v. *Leahey,* 434 F. 2d 7, 9 (CA1 1970); *United States* v. *Lloyd,* 431 F. 2d 160, 171 (CA9 1970); *Government of Canal Zone* v. *Brooks,* 427 F. 2d 346, 347 (CA5 1970); *United States* v. *Heffner,* 420 F. 2d 809, 811–812 (CA4 1969); cf. *Schatten* v. *United States,* 419 F. 2d 187, 191 (CA6 1969). See generally Berger, Do Regulations Really Bind Regulators, 62 Nw. U. L. Rev. 137 (1967).

the regulations and on respondent's inability to establish prejudice from their circumvention. This approach draws support neither from our prior holdings nor from the principles on which the Due Process Clause is founded.

This Court has consistently demanded governmental compliance with regulations designed to safeguard individual interests even when the rules were not mandated by the Constitution or federal statute. In *United States ex rel. Accardi* v. *Shaughnessy, supra,* the Court granted a writ of habeas corpus where the Attorney General had disregarded applicable procedures for the Board of Immigration Appeals' suspension of deportation orders. Although the Attorney General had final power to deport the petitioner and had no statutory or constitutional obligation to provide for intermediate action by the Board, this Court held that while suspension procedures were in effect, "the Attorney General denies himself the right to sidestep the Board or dictate its decision." 347 U. S., at 267. On similar reasoning, the Court in *Service* v. *Dulles* vacated a Foreign Service officer's national security discharge. While acknowledging that the Secretary of State was not obligated to adopt "rigorous substantive and procedural safeguards," the Court nonetheless held that "having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." 354 U. S., at 388. Similarly, in *Vitarelli* v. *Seaton* we demanded adherence to Department of the Interior employee-discharge procedures that were "generous beyond the requirements that bind [the] agency." 359 U. S., at 547 (Frankfurter, J., concurring in part and dissenting in part). And most recently, in *Morton* v. *Ruiz,* we declined to permit the Bureau of Indian Affairs to depart from internal rules for establishing assistance-eligibility requirements although the procedures were "more rigorous than otherwise would be required." 415 U. S., at 235. See also *United States* v. *Nixon, supra; Yellin* v. *United States, supra; Bridges* v.

Wixon, 326 U. S. 135 (1945).[2] Thus, where internal regulations do not merely facilitate internal agency housekeeping, cf. *American Farm Lines* v. *Black Ball Freight Service,* 397 U. S. 532, 538 (1970),[3] but rather afford significant procedural protections, we have insisted on compliance.

That the IRS regulations at issue here extend such protections is beyond dispute. As this Court recognized in *Berger* v. *New York,* 388 U. S. 41, 63 (1967), "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." An agency's self-imposed constraints on the use of these devices, no less than limitations mandated by statute or by the Fourth Amendment, operate to preserve a "measure of privacy and a sense of personal security" for individuals potentially subject to surveillance. See *United States* v. *White,* 401 U. S. 745, 790 (1971) (Harlan, J., dissenting).

Moreover, the history of the IRS authorization requirements clearly establishes that they were intended to protect privacy interests. The regulations were an outgrowth of investigations in 1965 and 1966 by a Subcommittee of the Senate Judiciary Committee concerning surveillance techniques of federal agencies. Testimony at Subcommittee hearings revealed that IRS agents had made extensive unauthorized use of a wide variety of eavesdropping techniques.

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[2] At issue in *Bridges* were regulations requiring that witness statements be made under oath and signed in order to be admissible in deportation hearings. As the Court correctly points out, *ante,* at 749, those rules were designed as "safeguards against essentially unfair procedures." 326 U. S., at 153. However, there is no basis in precedent or in the language of *Bridges* itself for the majority's further intimation that the Due Process Clause "mandated" such protective regulations. *Ante,* at 749.

[3] *American Farm Lines* v. *Black Ball Freight Service* involved rules promulgated to assist an agency in compiling information for internal decisionmaking. As the *American Farm* Court noted in distinguishing *Vitarelli* v. *Seaton, supra,* these rules were not "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion . . . ." 397 U. S., at 538–539.

Hearings on S. Res. 39 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st and 2d Sess., 1206–1208, 1762–1763, 1774–1777, 1828–1830, 1923–1935, 1999–2003 (1965–1966) (hereinafter S. Res. 39 Hearings).[4] Among the agency practices that the Subcommittee found offensive was the monitoring of certain conversations between taxpayers and IRS agents wired for sound. See, *e. g.*, *id.*, at 2017, 2078. Of more general concern was the agency's total failure to detect or disapprove violations of its own internal rules. Evidence before the Subcommittee indicated that supervisory personnel had condoned the use of illegal wiretaps, see *id.*, 1517, 1546–1548, while upper level officials had remained ignorant of widespread departures from prescribed policies. See *id.*, 1118, 1124–1128, 2005.

In response to that congressional investigation, the IRS convened a special Board of Inquiry to review agency surveillance practices and to recommend new procedures. Both the scope of the new regulations and the IRS Commissioner's representations to the Senate Subcommittee demonstrate that the agency was concerned not only with preventing "violation[s] of a person's constitutional or statutory rights," but also with "carefully control[ling]" certain investigatory techniques which, "although legal, nevertheless tend to be offensive to the public conscience." *Id.*, at 1122 (testimony of Commissioner Cohen). The Commissioner further assured the Subcommittee that detailed regulations adopted by the agency in 1967 would guarantee such control. *Id.*, at 1122–1126; CCH [1967] Stand. Fed. Tax Rep. ¶ 6711, p. 71,756. Those regulations, recodified without substantial modification, are

[4] As summarized by Senator Morse: "The record reveals that illegal wiretapping by the Internal Revenue Service is not an occasional action of an overzealous agent, but is the logical and reasonable consequence of a well-defined program . . . ." Hearings on S. Res. 928 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 29 (1967).

the basis of the instant proceedings. Compare Internal Revenue Service Manual ¶ 652.22 (Sept. 1975) with Internal Revenue Service Manual Supplement, Wiretapping and Electronic Eavesdropping, No. 93G–70 (July 10, 1967).

Against this historical backdrop, it is inarguable that these IRS regulations affect substantial individual interests. Indeed the Court does not suggest otherwise. Rather, it places weight on respondent's failure to establish prejudice from agency illegality. Because Caceres cannot demonstrate that he "reasonably relied" on the regulations, *ante,* at 752, or that the failure to obtain proper authorization had any "discernible effect" on the IRS's decision to monitor his conversations with Agent Yee, *ibid.,* the Court concludes that the agency's action implicates no due process interest. Such an approach is fundamentally misconceived. By assessing respondent's claim in terms of prejudice, the Court disregards not only its prior holdings, but also the principles of governmental regularity on which they rest.

To make subjective reliance controlling in due process analysis deflects inquiry from the relevant constitutional issue, the legitimacy of government conduct. If an individual is entitled only to the process that he subjectively believes is due, an agency could disregard its investigative rules with impunity provided it did so with consistency. For no person could "reasonably rely," *ibid.,* on rules that were generally ignored. And to the extent that the majority views reliance as critical in an investigative context, it effectively reduces mandatory regulations to hortatory policies. Presumably the only persons with occasion to discover breaches of investigative rules will be those facing criminal prosecution. Such individuals will rarely, if ever, be able to establish that they planned their conduct with internal agency regulations in view.[5]

[5] Just as we do not expect defendants in Fourth Amendment cases to demonstrate that but for the warrant requirement they would have acted

Moreover, the Court's focus on subjective reliance is inconsistent with our prior decisions enforcing due process guarantees. In *Bridges* v. *Wixon,* 326 U. S. 135 (1945), we vacated a deportation order because the Immigration and Naturalization Service had failed to observe regulations requiring that witness statements be made under oath, even though the petitioner's statements were not involved and he had not invoked the regulations at his deportation hearing. So too, in *Yellin* v. *United States,* 374 U. S. 109 (1963), this Court overturned the defendant's contempt conviction for refusal to testify before Congress where the House Committee on Un-American Activities had ignored rules requiring it to consider formally the injuries to a witness' reputation that might attend public hearings. Yet as the dissent in *Yellin* pointed out, the defendant had predicated his refusal to testify on First Amendment grounds, not on the public nature of the proceedings, and had in "no way indicated that an executive session would have made any difference in his willingness to answer questions." *Id.,* at 141 (WHITE, J., dissenting).

Nor has this Court required, as it does today, that procedural irregularity affect the outcome of the governmental action at issue. For example, there was no suggestion in *Yellin* that, had the Committee formally considered the injury to the defendant's reputation, it would have convened an executive session. Indeed, the Committee Chairman had testified that this was precisely the kind of case where a public hearing was appropriate. *Id.,* at 117–118, n. 6. Nonetheless, the Court, even as it expressed doubt that procedural com-

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otherwise, we should not demand that those in respondent's position establish that they predicated their action on the existence of internal regulations. In both contexts, the rationale for mandating government compliance with procedural safeguards is the same: to prevent law enforcement officials from exercising unchecked discretion where substantial privacy interests are involved. And in neither case is a requirement of subjective reliance consistent with that objective.

pliance would have made a difference, insisted that the defendant was entitled to no less. *Id.*, at 121.[6]

Similarly, the petitioner in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959), was in no meaningful sense prejudiced by the Department of the Interior's departure from regulations governing employee discharges for national security reasons. After the petitioner filed suit, he received a revised notice of dismissal which complied with all applicable regulations. Despite the petitioner's inability to demonstrate that adherence to agency regulations would have affected the decision to discharge him, this Court ordered reinstatement.

Implicit in these decisions,[7] and in the Due Process Clause itself, is the premise that regulations bind with equal force whether or not they are outcome determinative. As its very terms make manifest, the Due Process Clause is first and foremost a guarantor of *process*. It embodies a commitment to procedural regularity independent of result. To focus on the conduct of individual defendants rather than on that of the government necessarily qualifies this commitment. If prejudice becomes critical in measuring due process obligations, individual officials may simply dispense with whatever procedures are unlikely to prove dispositive in a given case. Thus, the majority's analysis invites the very kind of capricious and unfettered decisionmaking that the Due Process Clause in general and these regulations in particular were designed to prevent.

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[6] The *Yellin* Court, 374 U. S., at 121, was equally dubious that agency adherence to its regulations would have affected the Attorney General's ultimate decision to deport in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S., at 267.

[7] In part, these decisions also reflect a prudent reluctance to speculate how another branch of government would have acted under different circumstances. Because the Court has so little apparent difficulty in hypothesizing that compliance would not have mattered in this case, see *ante*, at 752–753, 757, it has adopted an approach that may well prove problematic in the next. Not all circumstances affecting agency decisions will so readily lend themselves to counterfactual analysis.

Any fair application of our prior holdings mandates a different result. When the Government engages to protect individual interests, it may not constitutionally abrogate that commitment at its own convenience. I would hold the IRS to its surveillance-authorization procedures regardless of whether a litigant can establish prejudice from their circumvention.

II

Having found a due process violation, I would require that the fruits of that illegality be suppressed in respondent's criminal prosecution. *Mapp* v. *Ohio,* 367 U. S. 643 (1961). Accordingly, under my analysis, it would be unnecessary to consider the scope of our supervisory powers, discussed in Part IV of the Court's opinion. Because, however, the Court addresses that issue, I must register my profound disagreement with both its reasoning and ultimate conclusion.

In determining that the exclusionary rule is an unwarranted sanction for the agency misconduct here, the Court attaches great significance to the agents' ostensible "good faith" in construing their own regulations to permit "emergency" surveillance of respondent in January and February 1975. *Ante,* at 757, 756. The record does not admit of such a charitable characterization. IRS Agent Yee alleged that respondent first attempted to bribe him in March 1974. The IRS recorded a conversation between Caceres and Yee that same month. No further contact with Caceres concerning the bribe occurred until January 1975, and no reasons have been offered for Agent Yee's failure to initiate surveillance during that 10-month hiatus. Nor does the record reflect any justification for the agency's failure to obtain approval for monitoring between the January 27 and January 31 meetings, to schedule meetings so as to permit timely authorization requests, or to process the January 31 authorization request expeditiously. In positing that the agents had a colorable basis for believing that the January 31 and February 6 meetings

constituted "emergency situation[s]," see *ante,* at 756–757, the Court simply ignores the findings below that Agent Yee had absolute control over the scheduling of those conversations, and that any exigency was solely of the Government's own making.[8] This is plainly not an instance in which law enforcement officers have failed to grasp the nuances of constitutional doctrine in an area where the Court itself is sharply divided. Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 417 (1971) (BURGER, C. J., dissenting); *Stone* v. *Powell,* 428 U. S. 465, 538–540 (1976) (WHITE, J., dissenting). Rather, the record demonstrates a breach of unambiguous and unquestionably applicable procedures.

Moreover, even assuming the good faith which the agency has failed to demonstrate, that consideration should not figure in our present analysis. Restricting application of the exclusionary rule to instances of bad faith would invite law enforcement officials to gamble that courts would grant absolution for all but the most egregious conduct. Since judges do not lightly cast aspersions on the motives of government officials, the suppression doctrine would be relegated to those rare circumstances where a litigant can prove insolent or calculated indifference to agency regulations. As we have noted in the context of Fourth Amendment violations, "[i]f subjective good faith alone were the test, . . . the people would be 'secure . . .' only in the discretion of the police." *Beck* v. *Ohio,* 379 U. S. 89, 97 (1964). Just as intent has not been determinative in Fourth Amendment cases, see, *e. g., Mincey* v. *Arizona,* 437 U. S. 385 (1978); *United States* v. *Brignoni-Ponce,* 422 U. S. 873 (1975); *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), it should not be material here.

The Court next suggests that suppression is unnecessary in this case because "the Executive itself has provided for

[8] See 545 F. 2d 1182, 1187 (CA9 1976). For example, when Agent Yee proposed a meeting for the following day, Caceres responded: "I'll arrange my schedule to your convenience." App. 15.

internal sanctions in cases of knowing violations of the electronic-surveillance regulations." *Ante,* at 756 (footnote omitted). Significantly, however, the Court does not assert that the sanctions which exist in theory are effectively employed in practice. While "[s]elf-scrutiny is a lofty ideal," *Wolf* v. *Colorado,* 338 U. S. 25, 42 (1949) (Murphy, J., dissenting), nothing in the record before us indicates why IRS disciplinary procedures should enjoy the Court's special confidence. Quite the contrary, the circumstances surrounding the conception and continued operation of IRS authorization requirements illustrate a persistent indifference toward enforcement.[9] And abdication by the courts is unlikely to increase the agency's vigilance in disciplining or even discov-

[9] With respect to IRS officials' enthusiasm for self-discipline before and during the Senate investigation, Senator Long stated that "generally speaking, they have found wrongdoing only when the subcommittee has pointed directly and explicitly to it." S. Res. 39 Hearings 1118.

Since that investigation, the agency's performance has remained less than exemplary. In 1974, an internal audit of electronic surveillance within the IRS Intelligence Division revealed that 18 agents had engaged in 35 to 40 "instances" of improper monitoring within the previous year, with an "instance" defined to include as many as 15 different phone calls. Oversight Hearings into the Operations of the IRS before a Subcommittee of the House Committee on Government Operations, 94th Cong., 1st Sess., 426–431, 450 (1975) (hereinafter Oversight Hearings). None of these employees were dismissed or demoted. In only one case did violations even actuate suspension. There, an employee who monitored his home telephone for "personal reasons completely unrelated to his official duties" was suspended for five days. *Id.,* at 451; Reply Brief for United States 17, and n. 9. Four other employees received written reprimands. Eight received oral admonitions, three of which were confirmed in writing and none of which became part of the agents' personnel folders. Oversight Hearings 451, 453. The Service took no action in five cases. *Id.,* at 451.

Such nominal sanctions hardly justify the Court's faith in agency self-restraint, particularly given the Government's failure to identify a single instance of internal disciplinary action by the IRS since 1974. See Reply Brief for United States 16–17.

ering violations. To remove a defendant's incentive for exposing evasions or disingenuous constructions of applicable rules will inevitably diminish the agency's interest in self-monitoring.[10]

Finally, the Court declines to order suppression because "a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures." *Ante,* at 755–756. No support is offered for that speculation. In fact, all available evidence is to the contrary. Since 1967, the IRS has retained regulations requiring agents to give *Miranda* warnings in noncustodial settings despite Court of Appeals decisions suppressing statements taken in violation of those rules. *United States* v. *Sourapas,* 515 F. 2d 295, 298 (CA9 1975); *United States* v. *Leahey,* 434 F. 2d 7 (CA1 1970); *United States* v. *Heffner,* 420 F. 2d 809 (CA4 1969). Significantly, the Court points to no instance in which an agency has withdrawn the procedural protections made meaningful by decisions such as *Bridges* v. *Wixon,* 326 U. S. 135 (1945), *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954), *Service* v. *Dulles,* 354 U. S. 363 (1957), and *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959).

Even if the majority's concern about inhibiting agency self-regulation were more solidly grounded, it could not justify the result in this case. Under today's decision, regulations

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[10] Professor Amsterdam, whom the majority cites for the proposition that regulations governing investigatory conduct "may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence," *ante,* at 755, and n. 23, submits in the same article that federal review of compliance with such regulations through the exclusionary rule "remains essential." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 429 (1974). As he maintains, the suppression doctrine provides the "necessary occasions" for review of administrative problems and circumventions, and affords the "only available incentive" for law enforcement officials to make internal rules clear and incorporate them in personnel training. *Ibid.*

largely unenforced by the IRS will be unenforceable by the courts.[11] I cannot share the Court's apparent conviction that much would be lost if the agency were to withdraw such rules in protest against judicial enforcement. Presumably Congress, which has been repeatedly dissuaded by the IRS from legislating in the area,[12] would then step into the breach. In the event of congressional action, this Court could not so cavalierly tolerate unauthorized electronic surveillance. See *Miller* v. *United States,* 357 U. S. 301 (1958).[13] Particularly where, as here, agency regulations were designed to stand in the place of legislative action, we should not hesitate to give them similar force and effect.

In my judgment, the Court has utterly failed to demonstrate why the exclusionary rule is inappropriate under the circumstances presented here. Equally disturbing is the majority's refusal even to acknowledge countervailing considerations. Quite apart from specific deterrence, there are significant values served by a rule that excludes evidence secured by lawless enforcement of the law. Denying an agency the fruits of noncompliance gives credibility to the due

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[11] See n. 9, *supra.* Significantly, the Court does not suggest APA litigation as a plausible alternative means of enforcing investigative regulations. Unless a criminal prosecution is initiated, an individual is unlikely to discover that he was subject to unauthorized surveillance. And it strains credulity to suppose that an individual under criminal indictment would assume the expense, not to mention the risks of antagonizing government officials, that would attend APA proceedings. Cf. Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N. Y. U. L. Rev. 785, 787 (1970).

[12] See S. Res. 39 Hearings 1122–1124, 1144 (testimony of Commissioner Cohen); Oversight Hearings 401 (testimony of Commissioner Alexander); *id.,* at 448 (testimony of Assistant Commissioner for Compliance Wolfe).

[13] In *Miller,* the Court suppressed evidence obtained after District of Columbia police forcibly entered an apartment without announcing their authority and purpose as required by a federal statute made applicable in the District by a ruling.

process and privacy interests implicated by its conduct.[14] Also, and perhaps more significantly, exclusion reaffirms the Judiciary's commitment to those values. Preservation of judicial integrity demands that unlawful intrusions on privacy should "find no sanction in the judgments of the courts." *Weeks* v. *United States,* 232 U. S. 383, 392 (1914). See *Elkins* v. *United States,* 364 U. S. 206, 222–223 (1960). Today's holding necessarily confers upon the Judiciary a "taint of partnership in official lawlessness." *United States* v. *Calandra,* 414 U. S. 338, 357 (1974) (BRENNAN, J., dissenting). I decline to participate in that venture.

I would affirm the judgment of the court below.

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[14] See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970) (by demonstrating that society attaches serious consequences to unlawful infringement of privacy interests, "the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies").

Reporter's Note

The next page is purposely numbered 901. The numbers between 770 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 21 THROUGH APRIL 13, 1979

FEBRUARY 21, 1979

Appeals Dismissed

No. 78–669. ELLSWORTH FREIGHT LINES, INC., ET AL. *v.* MISSOURI HIGHWAY RECIPROCITY COMMISSION ET AL. Appeal from Sup. Ct. 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: 568 S. W. 2d 521.

No. 78–809. WALTON *v.* SMALL BUSINESS ADMINISTRATION. 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: 578 F. 2d 1372.

No. 78–1024. STRONGIN *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 N. Y. 2d 943, 380 N. E. 2d 150.

No. 78–1048. MURPHY *v.* PENNSYLVANIA STATE BOARD OF BAR EXAMINERS ET AL. 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. Reported below: 482 Pa. 43, 393 A. 2d 369.

No. 78–883. NEWMAN SIGNS, INC. *v.* HJELLE, STATE HIGHWAY COMMISSIONER OF NORTH DAKOTA, ET AL. Appeal from Sup. Ct. N. D. dismissed for want of substantial federal question. Reported below: 268 N. W. 2d 741.

No. 78–955. CONDOSTA *v.* CONDOSTA. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. Reported below: 136 Vt. 360, 395 A. 2d 345.

No. 78–1010. CITY OF MOUNTAIN VIEW, GEORGIA, ET AL. *v.* CLAYTON COUNTY, GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 242 Ga. 163, 249 S. E. 2d 541.

No. 78–1077. VALLEY INTERNATIONAL PROPERTIES, INC. *v.* LOS CAMPEONES, INC. Appeal from Ct. Civ. App. Tex., 13th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 568 S. W. 2d 680.

No. 78–1056. LOGAN ET AL. *v.* STRICKLAND, REVENUE COMMISSIONER OF GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed as moot. Reported below: 242 Ga. 163, 249 S. E. 2d 541.

Miscellaneous Orders

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Motion for leave to file bill of complaint granted and defendants allowed 60 days in which to answer.

No. A–631 (78–1086). ETCHIESON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–643. KLINE ET AL. *v.* PYMS SUCHMAN REAL ESTATE CO. ET AL. Sup. Ct. Fla. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–682 (78–1189). FADDEN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–710. SNYDER *v.* UNITED STATES. C. A. 6th Cir. Application for stay, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. D–138. In re Disbarment of Mueller. Disbarment entered. [For earlier order herein, see 439 U. S. 906.]

No. D–159. In re Disbarment of Ratcliff. It is ordered that Elijah W. Ratcliff, of Livingston, 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. 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.; 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 American Friends Service Committee et al., Nez Perce Tribe of Idaho, and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 77–6673. Brown v. Texas. County Ct. at Law No. 2, El Paso County. [Probable jurisdiction noted, 439 U. S. 909.] Motion of California for divided argument denied.

No. 78–91. Jones et al. *v.* Wolf et al. Sup. Ct. Ga. [Certiorari granted, 439 U. S. 891.] Motion of respondents for leave to file supplemental brief after argument granted.

No. 78–233. Personnel Administrator of Massachusetts et al. *v.* Feeney. D. C. Mass. [Probable jurisdiction noted, 439 U. S. 891.] Motion of Office of Personnel Management et al. for leave to file a brief as *amici curiae* granted.

No. 78–275. Oscar Mayer & Co., et al. *v.* Evans. C. A. 8th Cir. [Certiorari granted, 439 U. S. 925.] Motion of the Solicitor General 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, 439 U. S. 925.] Motion of Planned Parenthood Federation of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Petition for rehearing of order denying appointment of Alan Ernest as counsel or guardian *ad litem* for unborn children, 439 U. S. 1065, 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, 439 U. S. 1045.] Motion of Thomas P. O'Neill, Jr., et al. for leave to file a brief as *amicus curiae* granted.

No. 78–625. Andrus, Secretary of the Interior, et al. *v.* Sierra Club et al. C. A. D. C. Cir. [Certiorari granted, 439 U. S. 1065.] Motion of respondents to dispense with printing appendix granted.

No. 78–808. Califano, Secretary of Health, Education, and Welfare *v.* Boles et al. D. C. W. D. Tex. [Probable jurisdiction noted, 439 U. S. 1126.] Motion to dispense with printing appendix granted.

No. 78–986. Arkansas Louisiana Gas Co. *v.* Hall et al. Ct. App. La., 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–6034. Szijarto *v.* California; and

No. 78–6125. Gibson et al *v.* Wainwright, Director, Department of Offender Rehabilitation of Florida. Motions for leave to file petitions for writs of habeas corpus denied.

No. 78–1105. Nassar & Co., Inc., et al. *v.* United States Court of Appeals for the District of Columbia Circuit et al. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 78–1038. KUBERT *v.* SUPREME COURT OF PENNSYLVANIA;

No. 78–5858. SHAW *v.* FISHER, U. S. DISTRICT JUDGE, ET AL.; and

No. 78–5938. KIBERT *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 78–5886. ABU-BAKR *v.* SPRECHER, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 78–5864. MORROW *v.* KESSLER, JUDGE. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 78–740. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALLARD ET AL. Appeal from D. C. Colo. Probable jurisdiction noted.

No. 78–630. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL.; and WASHINGTON *v.* UNITED STATES ET AL. Appeals from D. C. E. D. Wash. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 446 F. Supp. 1339.

No. 78–952. RUSH ET AL. *v.* SAVCHUK. Appeal from Sup. Ct. Minn. Probable jurisdiction noted and case set for oral argument with No. 78–1078, *World-Wide Volkswagen Corp.* v. *Woodson* [certiorari granted, *infra,* p. 907]. Reported below: 272 N. W. 2d 888.

Certiorari Granted

No. 78–873. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 584 F. 2d 576.

No. 78–1014. UNITED STATES *v.* KUBRICK. C. A. 3d Cir. Certiorari granted. Reported below: 581 F. 2d 1092.

No. 77–1819. VAUGHN ET AL. *v.* VERMILION CORP. Ct. App. La., 3d Cir. Certiorari granted and case set for oral argument with No. 78–738, *Kaiser Aetna* v. *United States*, immediately *infra*. Reported below: 356 So. 2d 551.

No. 78–738. KAISER AETNA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted and case set for oral argument with No. 77–1819, *Vaughn* v. *Vermilion Corp.*, immediately *supra*. Reported below: 584 F. 2d 378.

No. 78–857. NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY; and

No. 78–997. YESHIVA UNIVERSITY FACULTY ASSN. *v.* YESHIVA UNIVERSITY. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 582 F. 2d 686.

No. 78–911. INDUSTRIAL UNION DEPARTMENT, AFL–CIO *v.* AMERICAN PETROLEUM INSTITUTE ET AL.; and

No. 78–1036. MARSHALL, SECRETARY OF LABOR *v.* AMERICAN PETROLEUM INSTITUTE ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 581 F. 2d 493.

No. 78–253. ESTES ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.;

No. 78–282. CURRY ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.; and

No. 78–283. BRINEGAR ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL. C. A. 5th Cir. Motion of respondents Tasby et al. for leave to proceed *in forma pauperis* in No. 78–253 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and these petitions. Reported below: 572 F. 2d 1010.

No. 78–1078. World-Wide Volkswagen Corp. et al. *v.* Woodson, Judge, et al. Sup. Ct. Okla. Certiorari granted and case set for oral argument with No. 78–952, *Rush* v. *Savchuk* [probable jurisdiction noted, *supra,* p. 905]. Reported below: 585 P. 2d 351.

No. 78–777. United States *v.* Crews. Ct. App. D. C. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 389 A. 2d 277.

No. 78–5981. Ferri *v.* Ackerman. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 483 Pa. 90, 394 A. 2d 553.

Certiorari Denied. (See also Nos. 78–669, 78–809, 78–1024, and 78–1048, *supra.*)

No. 77–1866. Boswell et al. *v.* Georgia Power Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 563 F. 2d 1178.

No. 78–524. Azhocar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 735.

N. 78–591. Harelson *v.* United States;

No. 78–638. Lipper et al. *v.* United States; and

No. 78–769. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 1347.

No. 78–612. Schulman, Director of Law, City of Cleveland *v.* Tegreene, Director of Finance, City of Cleveland. Sup. Ct. Ohio. Certiorari denied. Reported below: 55 Ohio St. 2d 22, 377 N. E. 2d 1003.

No. 78–622. Clement et ux. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 217 Ct. Cl. 495, 580 F. 2d 422.

No. 78–624. Powell *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 72 Ill. 2d 50, 377 N. E. 2d 803.

No. 78–640. ABELES *v.* ELROD, SHERIFF. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 832.

No. 78–692. PRO ARTS, INC., ET AL. *v.* FACTORS ETC., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 215.

No. 78–728. DIPAOLA *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 581 F. 2d 1111.

No. 78–733. POE *v.* MITCHELL. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1280.

No. 78–736. DICK MEYERS TOWING SERVICE, INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1023.

No. 78–737. HONGISTO, SHERIFF, ET AL. *v.* GLEN ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–742. GRIGSBY *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 585 F. 2d 1069.

No. 78–743. RIZZO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 907.

No. 78–779. EDELSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 1290.

No. 78–780. SHOVEA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 580 F. 2d 1382.

No. 78–783. REECE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 578 F. 2d 1386.

No. 78–784. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 371.

No. 78–788. ESQUIRE, INC. *v.* RINGER, REGISTER OF COPYRIGHTS. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 591 F. 2d 796.

No. 78–791. GREENBLATT *v.* UNITED STATES; and
No. 78–896. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 583 F. 2d 659.

No. 78–800. KESTENBAUM *v.* FALSTAFF BREWING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 564.

No. 78–802. BULLOCK *v.* UNITED STATES; and
No. 78–803. KEHOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 335 and 579 F. 2d 971.

No. 78–806. HANKINS *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 1344 and 581 F. 2d 431.

No. 78–812. HOFER *v.* CAMPBELL, CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 197, 581 F. 2d 975.

No. 78–818. TENNESSEE-CAROLINA TRANSPORTATION, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 378.

No. 78–819. FROMMHAGEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 216 Ct. Cl. 1, 573 F. 2d 52.

No. 78–820. REPUBLIC STEEL CORP. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 2d 1228.

No. 78–823. DRAKE ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–825. GRANBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1054.

No. 78–826. MOSHER *v.* MARKEY, CHIEF JUDGE, U. S. COURT OF CUSTOMS AND PATENT APPEALS, ET AL. C. C. P. A. Certiorari denied.

No. 78–831. RINGQUIST *v.* CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1138.

No. 78–832. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1287.

No. 78–833. BROWN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 2d 252.

No. 78–835. SAETTELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 2d 307.

No. 78–837. FATICO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1332.

No. 78–838. HOSPITAL & INSTITUTIONAL WORKERS LOCAL 250, SEIU, AFL–CIO *v.* MERCY HOSPITALS OF SACRAMENTO, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 968.

No. 78–842. TOM'S FORD, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1276.

No. 78–843. SANTONI *v.* UNITED STATES; and
No. 78–944. JAKUBIK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 2d 667.

No. 78–847. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 31.

No. 78–849. ZIZZO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 835.

No. 78–852. LIBRACH *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 372.

No. 78–854. HUTUL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1155.

No. 78–856. AERO TRUCKING, INC. *v.* C & H TRANSPORTATION CO., INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 42, 589 F. 2d 565.

No. 78–858. MATHES ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 70.

No. 78–863. TRIPLE A MACHINE SHOP ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 580 F. 2d 1331.

No. 78–871. SHANNON *v.* WATERHOUSE ET AL., EXECUTORS. Sup. Ct. Hawaii. Certiorari denied. Reported below: 58 Haw. 4, 563 P. 2d 391.

No. 78–875. BLAKE CONSTRUCTION CO., INC. *v.* ALLIANCE PLUMBING & HEATING CO., INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 388 A. 2d 1217.

No. 78–884. PUMPHREY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 33 Ore. App. 1, 575 P. 2d 178.

No. 78–886. WESLEY-JESSEN, INC., ET AL. *v.* ARIAS. C. A. 7th Cir. Certiorari denied.

No. 78–889. CITY OF IMPACT ET AL. *v.* WHITWORTH, DBA DINKIE'S FOOD MART. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 696.

No. 78–890. LEVITT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 1290.

No. 78–892. GARDNER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 263 Ark. 739, 569 S. W. 2d 74.

No. 78–894. IRVIN ET AL. *v.* GREENSBORO-HIGH POINT AIRPORT AUTHORITY. Ct. App. N. C. Certiorari denied. Reported below: 36 N. C. App. 662, 245 S. E. 2d 390.

No. 78–899. MCCOLLUM ET AL. *v.* STAHL, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 579 F. 2d 869.

No. 78–900. PAYNE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–903. EATON, DBA EATON CONSTRUCTION *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (NATIONAL STEEL PRODUCTS CO., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 78–909. CITY OF CINCINNATI, OHIO *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 55 Ohio St. 2d 168, 378 N. E. 2d 729.

No. 78–912. OSKOUI *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1275.

No. 78–914. BARRETT *v.* STATE MUTUAL LIFE ASSURANCE CO. Ct. App. N. Y. Certiorari denied. Reported below: 44 N. Y. 2d 872, 378 N. E. 2d 1047.

No. 78–916. OCEAN DRILLING & EXPLORATION CO. *v.* QUALITY EQUIPMENT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 273.

No. 78–920. GENERAL CRUDE OIL CO. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 585 F. 2d 508.

No. 78–923. INSURANCE COMPANY OF NORTH AMERICA *v.* INDEX FUND, INC. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 1158.

No. 78–924. Associated Students of the University of Arizona et al. *v.* Arizona Board of Regents. Ct. App. Ariz. Certiorari denied. Reported below: 120 Ariz. 100, 584 P. 2d 564.

No. 78–926. Jackson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 832.

No. 78–929. Village of Maywood et al. *v.* Sterling et al. C. A. 7th Cir. Certiorari denied. Reported below: 579 F. 2d 1350.

No. 78–932. Zimmerman *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 190 U. S. App. D. C. 252, 587 F. 2d 1149.

No. 78–935. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 40.

No. 78–936. Atlas Tack Corp. *v.* Mahoney et al. C. A. 1st Cir. Certiorari denied. Reported below: 581 F. 2d 1.

No. 78–939. Palmieri *v.* LeFevre Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 973.

No. 78–941. Jaggard et ux. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 582 F. 2d 1189.

No. 78–942. United States Fidelity & Guaranty Co. *v.* Lord, U. S. District Judge, et al. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 2d 860.

No. 78–949. Lowitt *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 78–951. Morton *v.* Morton. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–957. Bache Halsey Stuart, Inc., et al. *v.* Commercial Iron & Metal Co. C. A. 10th Cir. Certiorari denied. Reported below: 581 F. 2d 246.

No. 78–958. City of Fairfax, Virginia *v.* Washington Metropolitan Area Transit Authority et al. C. A. 4th Cir. Certiorari denied. Reported below: 582 F. 2d 1321.

No. 78–962. Purvis et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 853.

No. 78–965. Farrell et al. *v.* Carey, Governor of New York, et al. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 832, 381 N. E. 2d 610.

No. 78–967. DiPiro *v.* Taft, Mayor of Cranston, et al. C. A. 1st Cir. Certiorari denied. Reported below: 584 F. 2d 1.

No. 78–975. Posey *v.* South Carolina. Sup. Ct. S. C. Certiorari denied.

No. 78–989. Jones *v.* City of Memphis et al. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 622.

No. 78–991. Bel Marin Enterprises, Inc., et al. *v.* Bel Marin Keys Community Services District et al. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 477.

No. 78–992. Anaheim Operating, Inc., dba Sheraton Anaheim Hotel, et al. *v.* Hotel & Restaurant Employees & Bartenders Union, Local 681, AFL–CIO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 82 Cal. App. 3d 737, 147 Cal. Rptr. 510.

No. 78–993. Thompson *v.* People's Liberty Bank & Trust Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–994. ALTBAUM *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–995. ALTBAUM *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–1000. BLAKENEY ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 59 Ill. App. 3d 119, 375 N. E. 2d 1309.

No. 78–1003. YOFFE *v.* KELLER INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 126 and 582 F. 2d 982.

No. 78–1009. ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC. *v.* BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 361 So. 2d 234.

No. 78–1011. BOYCE *v.* BONDED ADJUSTMENT ASSOCIATES, INC. Ct. Sp. App. Md. Certiorari denied.

No. 78–1012. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 F. 2d 1273.

No. 78–1016. GREENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1332.

No. 78–1020. ROESCH *v.* ROESCH. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 83 Cal. App. 3d 96, 147 Cal. Rptr. 586.

No. 78–1021. ALFANO *v.* ILLINOIS JUDICIAL INQUIRY BOARD ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 72 Ill. 2d 225, 380 N. E. 2d 801.

No. 78–1023. MCMILLON *v.* RONEY. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 835.

No. 78–1027. Illinois Hospital & Health Services, Inc. *v.* Aurand, Treasurer and County Collector of Winnebago County. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 79, 373 N. E. 2d 1021.

No. 78–1028. Friedland *v.* Indiana Bell Telephone Co., Inc. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 373 N. E. 2d 344.

No. 78–1029. Mitchell et al. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 60 Ill. App. 3d 598, 376 N. E. 2d 1036.

No. 78–1031. Au *v.* Kelly et al., Trustees, dba Financial Plaza of the Pacific. Sup. Ct. Hawaii. Certiorari denied.

No. 78–1032. Hudkins, State Farm Superintendent, et al. *v.* Buise. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 2d 223.

No. 78–1034. Evans *v.* Andrejko et al. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 834.

No. 78–1037. Star Chopper Co., Inc. *v.* Roy et al. C. A. 1st Cir. Certiorari denied. Reported below: 584 F. 2d 1124.

No. 78–1040. Hopedale Medical Foundation *v.* Tazewell County Collector. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 59 Ill. App. 3d 816, 375 N. E 2d 1376.

No. 78–1042. Spinka, dba North Grand Dental Laboratory, et al. *v.* Watson, Director, Department of Registration and Education of Illinois, et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 729, 374 N. E. 2d 787.

No. 78–1045. CANNES ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 61 Ill. App. 3d 865, 378 N. E. 2d 552.

No. 78–1046. GIRARD ET AL. *v.* SCHWEITZER, SHERIFF. C. A. 8th Cir. Certiorari denied.

No. 78–1050. GIANARIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 212, 589 F. 2d 1116.

No. 78–1053. SOCIALIST LABOR PARTY *v.* CITY OF GLENDALE. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–1057. WILLIAMS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 147 Ga. App. 395, 249 S. E. 2d 110.

No. 78–1059. BEAGLEY *v.* ANDEL ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 588, 374 N. E. 2d 929.

No. 78–1065. WRIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 588 F. 2d 31.

No. 78–1074. KARGE ET AL. *v.* MILNES. C. A. 7th Cir. Certiorari denied.

No. 78–1096. SORBARA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–1097. WEISKOPF ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–1106. THERIAULT *v.* SILBER, DIRECTOR, U. S. CHAPLAIN SERVICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 197.

No. 78–1120. OLSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied Reported below: 589 F. 2d 351.

No. 78–1135. STRAHL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 590 F. 2d 10.

No. 78–5057. THOMAS *v.* O'GRADY. C. A. 2d Cir. Certiorari denied.

No. 78–5553. CARTERA *v.* GILLIAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 733.

No. 78–5576. KIRK *v.* HOWARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 735.

No. 78–5590. KUSH *v.* UNITED STATES; and
No. 78–5793. TARNOWSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 583 F. 2d 903.

No. 78–5593. KING *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 435.

No. 78–5598. GAERTNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 308.

No. 78–5601. RUTHERFORD *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–5615. GRANDISON *v.* WARDEN, MARYLAND HOUSE OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1231.

No. 78–5623. BERRIOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–5639. MONGER *v.* UNITED STATES;
No. 78–5640. STEWART *v.* UNITED STATES;
No. 78–5641. JOHNSON *v.* UNITED STATES;
No. 78–5664. STEWART *v.* UNITED STATES;
No. 78–5765. JACKSON *v.* UNITED STATES; and
No. 78–5854. MORROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 148.

No. 78–5635. O'QUINN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 574 F. 2d 1208.

No. 78–5643. CHORIER *v.* UNITED STATES; and
No. 78–5715. UMBERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 833.

No. 78–5645. GAUTAM *v.* FIRST NATIONAL CITY BANK. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1290.

No. 78–5648. FINNEGAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 78–5651. HUDSON ET AL. *v.* RHODES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 2d 46.

No. 78–5661. SANCHEZ-MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5674. WILCHER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5675. MALDONADO-PEREZ *v.* UNITED STATES; and
No. 78–5764. ALGAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 78–5675, 577 F. 2d 753; No. 78–5764, 577 F. 2d 752.

No. 78–5688. MOORE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 577 F. 2d 411.

No. 78–5692. SCHWALBE ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 836.

No. 78–5709. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–5724. SCUDIERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 833.

No. 78–5725. Rees *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5727. Boyd *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 578 F. 2d 1376.

No. 78–5733. Bowman *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 585 P. 2d 1373.

No. 78–5744. Levy *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 1332.

No. 78–5745. Porter *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 78–5753. Patterson *v.* Riddle, Penitentiary Superintendent, et al. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 838.

No. 78–5755. Swanson *v.* Califano, Secretary of Health, Education, and Welfare. C. A. 5th Cir. Certiorari denied.

No. 78–5758. Marsili *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 78–5762. Luck *v.* Jackson, Corrections Director, et al. C. A. D. C. Cir. Certiorari denied.

No. 78–5774. Beechum *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 898.

No. 78–5775. Silman et ux. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 838.

No. 78–5776. Cabral-Avila et al. *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 957.

No. 78–5778. Battle *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5783. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5784. GIBSON *v.* MISSOURI PACIFIC RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 890.

No. 78–5785. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5789. BROWNING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–5791. BELCHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 823.

No. 78–5792. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied Reported below: 585 F. 2d 374.

No. 78–5801. DREITZLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 577 F. 2d 539.

No. 78–5803. BRACKETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 1027.

No. 78–5820. JONES *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–5826. JENKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 635.

No. 78–5829. MIKKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 152.

No. 78–5834. SEARP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 1117.

No. 78–5836. ZILKA *v.* BAKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 1051.

No. 78–5837. HANDABAKA *v.* CITY OF PATERSON ET AL. Super. Ct. N. J. Certiorari denied.

No. 78–5838. DORTCH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–5841. WALKER ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 1354.

No. 78–5842. PEOPLES *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 34 Ore. App. 1, 578 P. 2d 508.

No. 78–5843. SPATES *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 176 Conn. 227, 405 A. 2d 656.

No. 78–5845. IN RE GREEN. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 1247.

No. 78–5846. ROBALLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 874, 407 N. Y. S. 2d 770.

No. 78–5847. COELHO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 78–5848. GREEN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 78–5851. HAAS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 729, 247 S. E. 2d 507.

No. 78–5856. BELK *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–5859. BOWLES *v.* ANDERSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 842.

No. 78–5868. CHANEY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 78–5869. SMITH *v.* PUTNAM, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 842.

No. 78–5870. HARRIS *v.* WINSTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1348.

No. 78–5871. YAMINE *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 846.

No. 78–5872. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 978.

No. 78–5878. RICHMOND *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari Denied.

No. 78–5880. PROPHET *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 580 F. 2d 926.

No. 78–5881. NATIELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–5882. PAGLUCCI *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 78–5884. BERNOTAS ET UX. *v.* CHESTER COUNTY WATER RESOURCES AUTHORITY. Commw. Ct. Pa. Certiorari denied. Reported below: 35 Pa. Commw. 1, 384 A. 2d 1014.

No. 78–5888. WIDEMAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 380 N. E. 2d 687.

No. 78–5890. MCFERRAN *v.* ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 45 N. Y. 2d 729, 380 N. E. 2d 301.

No. 78–5897. BRAUDRICK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 572 S. W. 2d 709.

No. 78–5899. SPRINGER *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 329.

No. 78–5902. FLORES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 80.

No. 78–5903. HAMPTON *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 632.

No. 78–5906. WARDEN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 78–5908. SMITH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–5909. EVERS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 579 F. 2d 71.

No. 78–5910. CARTERA *v.* MUNCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 837.

No. 78–5912. REUSCHEL *v.* HOGAN, CORRECTIONS COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–5915. LUDWIN, TRUSTEE *v.* CAMBRIDGE MUTUAL FIRE INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 817.

No. 78–5925. WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 362 So. 2d 377.

No. 78–5926. WATSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 120 Ariz. 441, 586 P. 2d 1253.

No. 78–5929. LORENTZEN *v.* BOSTON COLLEGE. C. A. 1st Cir. Certiorari denied. Reported below: 577 F. 2d 720.

No. 78–5931. HAGANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 518.

No. 78–5933. MATHEWS *v.* PENLEY ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 192, 249 S. E. 2d 552.

No. 78–5939. RODRIGUEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5940. CRISTINA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 481 Pa. 44, 391 A. 2d 1307.

No. 78–5941. DUNLAP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5945. DEAN *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 830.

No. 78–5946. DUMBACH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 78–5949. SPECK *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5951. BREEZE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 78–5952. KURPIEWSKI *v.* KURPIEWSKI. Sup. Ct. Pa. Certiorari denied.

No. 78–5953. CASTELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 87.

No. 78–5958. PERRY *v.* CUYLER, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 584 F. 2d 644.

No. 78–5959. JOHNSON *v.* COUSINS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–5960. KLEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5961. HITE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–5962. DAVIS ET AL. *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–5963. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 395.

No. 78–5964. WATSON *v.* BELL, ATTORNEY GENERAL, ET AL. Ct. App. D. C. Certiorari denied.

No. 78–5966. STRICKLAND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 389 A. 2d 1325.

No. 78–5970. WHELAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 481 Pa. 418, 392 A. 2d 1362.

No. 78–5971. KOZARSKI *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 78–5973. CHATMAN *v.* ROWE, ACTING CORRECTIONS DIRECTOR. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 835.

No. 78–5975. CELAYA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 210.

No. 78–5980. MATTEO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 253 Pa. Super. 603, 384 A. 2d 989.

No. 78–5982. BAILEY *v.* SHEPARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 584 F. 2d 858.

No. 78–5984. ISAACS ET UX. *v.* BOARD OF TRUSTEES OF TEMPLE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1274.

No. 78–5987. ANDERSON ET UX. *v.* NEW YORK PROPERTY INSURANCE UNDERWRITING ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1329.

No. 78–5988. FILLER *v.* APO ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–5990. Loe *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 1015.

No. 78–5994. Thomas *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 393 A. 2d 123.

No. 78–5997. Grenagle *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 87.

No. 78–6002. Dupart *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 641.

No. 78–6004. Bierey *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 620.

No. 78–6015. Perez-Cruz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 1002.

No. 78–6016. Adorno *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 2d 1123, 405 N. Y. S. 2d 1011.

No. 78–6018. Tukes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 507.

No. 78–6021. Kapl *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–6027. Wiley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 1190.

No. 78–6033. Ferraro *v.* United States. C. A. 6th Cir. Certiorari denied Reported below: 590 F. 2d 335

No. 78–6037. Morrow *v.* United States;
No. 78–6064. Cole *v.* United States; and
No. 78–6083. Chandler *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 593.

No. 78–6039. Reid *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 393.

No. 78–6044. BEST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–6052. LAMARTINA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 764.

No. 78–6055. WOODY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 1212.

No. 78–6056. GORDON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 818.

No. 78–6070. TASTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 1068.

No. 78–6072. HOLST *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–6080. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 573.

No. 78–6099. WHALEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 595 F. 2d 1206.

No. 78–6100. HEAD *v.* UNITED STATES. C. A 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No 78–517. CHAMBERS *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 78–5901. DRAKE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 78–517, 568 S. W. 2d 313; No. 78–5901, 241 Ga. 583, 247 S. E. 2d 57.

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. 78–544. GIANGROSSO ET AL. *v.* LOUISIANA. Ct. App. La., 1st Cir. Motion of Public Defender of California for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 361 So. 2d 259.

No. 78–623. ROGERS *v.* LOUGH, MAGISTRATE FOR WETZEL COUNTY. Sup. Ct. App. W. Va. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari.

No. 78–735. PENNINGTON *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 224 Kan. 573, 581 P. 2d 812.

No. 78–828. RESSLER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 576 F. 2d 650.

No. 78–968. AKERS MOTOR LINES, INC., ET AL. *v.* DRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, TEAMSTERS LOCAL UNION NO. 71. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 582 F. 2d 1336.

No. 78–872. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., 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: 190 U. S. App. D. C. 118, 585 F. 2d 522.

No. 78–881. UNITED STATES *v.* SCOTT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 579 F. 2d 1013.

No. 78–1043. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* SINGLETON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 583 F. 2d 618.

No. 78–901. Woods *v.* Safeway Stores, Inc. C. A. 4th Cir. Motion of National Medical Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 579 F. 2d 43.

No. 78–946. Equal Employment Opportunity Commission et al. *v.* Burlington Northern, Inc., et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Brennan would grant certiorari. Reported below: 582 F. 2d 1097.

No. 78–1054. Sealy, Inc., et al. *v.* Ohio-Sealy Mattress Manufacturing Co. et al. C. A. 7th Cir. Motion of Certain Sealy Licensees for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 585 F. 2d 821.

No. 78–5746. Kasto *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Powell would grant certiorari. Reported below: 584 F. 2d 268.

No. 78–5750. Evans *v.* Alabama. Sup. Ct. Ala. Motion of petitioner to withdraw petition and certiorari denied. Reported below: 361 So. 2d 666.

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. 78–5850. Burke *v.* Miller. C. A. 4th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice White would grant certiorari. Reported below: 580 F. 2d 108.

No. 78–5978. Cox *v.* North Carolina. Ct. App. N. C. Certiorari denied. Mr. Justice Marshall would grant certiorari. Reported below: 37 N. C. App. 356, 246 S. E. 2d 152.

No. 78–5914. SCHREIBMAN *v.* WALTER E. HELLER & COMPANY OF PUERTO RICO ET AL. C. A. 1st Cir. Petition for rehearing on order denying Las Colinas Development Corp. leave to proceed *in forma pauperis*, 439 U. S. 1063, denied. Certiorari denied. Reported below: 585 F. 2d 7.

Rehearing Denied

No. 78–589. POE *v.* UNITED STATES, 439 U. S. 1047;

No. 78–606. PACIFIC TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., 439 U. S. 1052;

No. 78–607. GENERAL TELEPHONE COMPANY OF CALIFORNIA *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., 439 U. S. 1052;

No. 78–801. KIRK *v.* UNITED STATES, 439 U. S. 1048;

No. 78–5321. ADAMS *v.* FLORIDA, 439 U. S. 947;

No. 78–5457. GLOVER *v.* DOLAN, SHERIFF, 439 U. S. 1075;

No. 78–5520. JONES *v.* UNITED STATES, 439 U. S. 1075;

No. 78–5683. OLVERA *v.* UNITED STATES, 439 U. S. 1078;

No. 78–5700. PATTERSON *v.* THOMPSON, WARDEN, ET AL., 439 U. S. 1078;

No. 78–5721. MORROW *v.* IGLEBURGER ET AL., 439 U. S. 1118;

No. 78–5788. PORTER *v.* CONTINENTAL BANK ET AL., 439 U. S. 1119; and

No. 78–5794. GREENE *v.* UNITED STATES, 439 U. S. 1081. Petitions for rehearing denied.

No. 76–1694. MOBIL OIL CORP. *v.* LIGHTCAP ET AL., 434 U S. 876. Motion of Continental Oil Co. for leave to file a brief as *amicus curiae* granted. Petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition.

No. 78–5375. GALLAGHER *v.* FLORIDA, 439 U. S. 1005; and

No. 78–5512. NICHOLAS *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL., 439 U. S. 988. Motions for leave to file petitions for rehearing denied.

FEBRUARY 23, 1979

Miscellaneous Order

No. A–748. EXECUTIVE JET AVIATION, INC. *v.* ESTATE OF GREEN ET AL. Application for stay of orders of the United States District Court for the Eastern District of Michigan, dated February 9, 1979, and to enjoin Michigan state court proceedings, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

FEBRUARY 26, 1979

Certiorari Granted—Reversed and Remanded. (See No. 78–443, *ante,* p. 194, and No. 78–551, *ante,* p. 202.

Miscellaneous Orders

No. D–136. IN RE DISBARMENT OF BREMERS. Disbarment entered. [For earlier order herein, see 439 U. S. 905.]

No. D–144. IN RE DISBARMENT OF HIRSCH. Disbarment entered. [For earlier order herein, see 439 U. S. 975.]

No. D–145. IN RE DISBARMENT OF SHAKER. Disbarment entered. [For earlier order herein, see 439 U. S. 975.]

No. D–148. IN RE DISBARMENT OF CLEM. Disbarment entered. [For earlier order herein, see 439 U. S. 975.]

No. D–150. IN RE DISBARMENT OF GILLARD. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. D–155. IN RE DISBARMENT OF REAVES. It is ordered that John Laverne Reaves, of Loris, 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–160. IN RE DISBARMENT OF FODIMAN. It is ordered that Aaron R. Fodiman, of Arlington, 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–157. In re Disbarment of Mitchell. It is ordered that Robert B. Mitchell, Jr., of Bethlehem, Pa., 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–158. In re Disbarment of Herman. It is ordered that Harold C. Herman, of Woodmere, 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–161. In re Disbarment of Bong Hyun Kim. It is ordered that Bong Hyun Kim, 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. 77–1844. City of Mobile, Alabama, et al. *v.* Bolden et al. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 815.] Motion of Lawyers Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 78–425. P. C. Pfeiffer Co., Inc., et al. *v.* Ford et al. C. A. 5th Cir. [Certiorari granted, 439 U. S. 978.] Motions of National Association of Stevedores, Alliance of American Insurers et al., and International Longshoremen's Assn., AFL–CIO, for leave to file briefs as *amici curiae* granted.

No. 78–482. Smith, Judge, et al. *v.* Daily Mail Publishing Co. et al. Sup. Ct. App. W. Va. [Certiorari granted, 439 U. S. 963.] Motions of American Society of Newspaper Editors et al., American Newspaper Publishers Assn., Chicago Tribune Co., and American Civil Liberties Union for leave to file briefs as *amici curiae* granted.

No. 78–910. Occidental of Umm Al Qaywayn, Inc. *v.* Cities Service Oil Co. et al. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–1281. Iowa Beef Processors, Inc. *v.* Smith. C. A. 8th Cir. Motion of petitioner for preliminary injunction denied.

No. 78–5420. Payton *v.* New York; and

No. 78–5421. Riddick *v.* New York. Ct. App. N. Y. [Probable jurisdiction noted, 439 U. S. 1044.] Motion of appellee for additional time for oral argument denied.

No. 78–6106. Ryan et al. *v.* United States Court of Appeals for the Seventh Circuit. Motion for leave to file petition for writ of mandamus denied. Mr. Justice Stevens took no part in the consideration or decision of this motion.

Certiorari Granted

No. 78–1076. Rhode Island *v.* Innis. Sup. Ct. R. I. Certiorari granted. Reported below: —— R. I. ——, 391 A. 2d 1158.

No. 78–5705. Trammel *v.* United States. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 583 F. 2d 1166.

Certiorari Denied

No. 78–739. General Motors Corp. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 936, and 584 F. 2d 1366.

No. 78–865. Peoples Savings & Loan Association of Chillicothe *v.* Christison, Trustee in Bankruptcy. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 832.

No. 78–829. BLUE *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 268 N. W. 2d 654.

No. 78–868. HUMMEL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 217 Va. 548, 247 S. E. 2d 385.

No. 78–877. CONNOLLY ET AL. *v.* PENSION BENEFIT GUARANTY CORP. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 729.

No. 78–882. FORSTER *v.* UNITED STATES; and
No. 78–885. ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 F. 2d 391.

No. 78–908. DEANGELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 46.

No. 78–915. BROUSSARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 10.

No. 78–921. RUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 833.

No. 78–925. OREGON STATE PENITENTIARY ET AL. *v.* HAMMER. Sup. Ct. Ore. Certiorari denied. Reported below: 283 Ore. 369, 583 P. 2d 1136.

No. 78–943. THOMPSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 189 U. S. App. D. C. 400, 584 F. 2d 558.

No. 78–970. ROWLETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–978. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 13 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 1321.

No. 78–984. CARR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 612.

No. 78–1002. GOUGH, TRUSTEE IN BANKRUPTCY *v.* ROSSMOOR CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 F. 2d 381.

No. 78–1058. DENIS J. O'CONNELL HIGH SCHOOL *v.* VIRGINIA HIGH SCHOOL LEAGUE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 581 F. 2d 81.

No. 78–1064. KAERCHER ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 362 So. 2d 754.

No. 78–1066. AMERICAN INDUSTRIES CORP. *v.* SHARON STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 819.

No. 78–1067. PADOR *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied.

No. 78–1070. KOHLBERG *v.* WALKER. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 839.

No. 78–1075. STAR FISH & OYSTER CO., INC., ET AL. *v.* CLABORN. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 983.

No. 78–1079. POPE *v.* CITY OF ATLANTA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 331, 249 S. E. 2d 16.

No. 78–1083. KORNIT *v.* BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT, PLAINVIEW, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1330.

No. 78–1086. ETCHIESON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 574 S. W. 2d 753.

No. 78–1094. GUST CONSTRUCTION CO., INC., ET AL. *v.* HUB ELECTRIC CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 2d 183.

No. 78–1110. BEER, JUDGE *v.* SECRETARY OF STATE OF MICHIGAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 403 Mich. 825.

No. 78–5629. LEBEDUN *v.* DAY ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–5718. COTTON, AKA HAILEY *v.* DORSEY, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 112.

No. 78–5723. CROSS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5757. MILLER *v.* UNITED STATES; and
No. 78–5979. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–5798. RIDDLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 83 Cal. App. 3d 563, 148 Cal. Rptr. 170.

No. 78–5818. MCKEE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5825. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 874, 407 N. Y. S. 2d 770.

No. 78–5876. GEARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–5954. TEPLITSKY *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–5957. SUMPTER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 217 Ct. Cl. 725, 578 F. 2d 1391.

No. 78–5993. ARNOLD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 78–5998. HOLDMAN ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 73 Ill. 2d 213, 383 N. E. 2d 155.

No. 78–6001. ECHOLS *v.* DEKALB COUNTY, GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 560, 247 S. E. 2d 114.

No. 78–6003. KRUG *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6006. LOPEZ *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 78–6008. SHAW *v.* CARYL. Ct. App. Ariz. Certiorari denied.

No. 78–6009. BASAMAN *v.* MCMAHON. C. A. 3d Cir. Certiorari denied.

No. 78–6013. SCARBORO *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 38 N. C. App. 105, 247 S. E. 2d 273.

No. 78–6014. SMART *v.* ZIEGLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6017. POOLE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6045. BRADLEY ET VIR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 481 Pa. 223, 392 A. 2d 688.

No. 78–6103. MILLER *v.* HUNT ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 78–6104. BRIDGES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 392 A. 2d 1053.

No. 78–6108. SEIDEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6117. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 737.

No. 78–6124. LYNCH ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 213, 598 F. 2d 132.

No. 78–6136. SHEPHERD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 943.

No. 78–6146. FAIRORTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 823.

No. 78–718. CROATAN BOOKS, INC. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 78–757. ECHOLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 577 F. 2d 308.

No. 78–775. NEW YORK *v.* TOMPKINS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 45 N. Y. 2d 748, 380 N. E. 2d 311.

No. 78–960. COLLINS *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner to supplement petition granted. Certiorari denied.

No. 78–982. SPECTROFUGE CORP. *v.* BECKMAN INSTRUMENTS, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 575 F. 2d 256.

No. 78–1030. EPSTEIN ET AL. *v.* GOODMAN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 582 F. 2d 388.

No. 78–998. ANDERSON, WARDEN *v.* STROBLE. C. A. 6th Cir. Motion of Wayne County Prosecuting Attorney for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 587 F. 2d 830.

No. 78–1095. KUMAR *v.* INGRAM, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 585 F. 2d 566.

Rehearing Denied

No. 77–388. WASHINGTON ET AL. *v.* CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION, 439 U. S. 463;

No. 78–5290. EZZELL *v.* LOS ANGELES COUNTY DEPARTMENT OF ADOPTIONS, 439 U. S. 1060; and

No. 78–5853. HUTTER *v.* FABER ET AL., 439 U. S. 1120. Petitions for rehearing denied.

No. 78–308. MOBAY CHEMICAL CORP. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, 439 U. S. 320. Petition for rehearing denied. MR. JUSTICE BLACKMUN dissents.

No. 78–5359. JONES *v.* MORRIS, WARDEN, 439 U. S. 1090. Petition for rehearing and other relief denied.

FEBRUARY 27, 1979

Appointment of Reporter of Decisions

It is ordered that Henry C. Lind be appointed Reporter of Decisions of this Court to succeed Henry Putzel, jr., effective at the commencement of business February 25, 1979, and he is charged with the duty of reporting the decisions of the present Term which have not been reported prior to February 25, 1979.

MARCH 5, 1979

Affirmed on Appeal

No. 78–683. CENTURY 21 REAL ESTATE CORP. ET AL. *v.* NEVADA REAL ESTATE ADVISORY COMMISSION ET AL. Appeal from D. C. Nev. Motion of United States Trademark Assn. for leave to file a brief as *amicus curiae* granted. Judgment affirmed. Reported below: 448 F. Supp. 1237.

No. 78–1102. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* FREIMAN ET AL. Appeal from C. A. 8th Cir. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest for appointment of counsel for children unborn and born alive denied. Judgment affirmed. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 584 F. 2d 247.

Appeals Dismissed

No. 77–1257. SCHMIER *v.* TRUSTEES OF CALIFORNIA STATE UNIVERSITY AND COLLEGES ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question. Reported below: 74 Cal. App. 3d 314, 141 Cal. Rptr. 472.

No. 78–762. KRAHAM *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would reverse the conviction. Reported below: 360 So. 2d 393.

MR. JUSTICE STEVENS, concurring.

If the Court were to note probable jurisdiction, I would vote to reverse the judgment of the Supreme Court of Florida for the reasons stated in the dissenting opinion of Justice Adkins and in my dissenting opinion in *Smith* v. *United States,* 431 U. S. 291, 311. I have not, however, voted to set the case for argument because the State Supreme Court's judgment is consistent with this Court's recent holdings.

No. 78–642. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* CASEY, TREASURER OF PENNSYLVANIA, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 480 Pa. 449, 391 A. 2d 595.

No. 78–5760. CARTER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5833. GONZALEZ *v.* NEW YORK. 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. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 64 App. Div. 2d 873, 407 N. Y. S. 2d 769.

Certiorari Granted—Reversed. (See No. 77–1659, *ante,* p. 447.)

Certiorari Granted—Vacated and Remanded

No. 77–580. PROCTOR ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Group Life & Health Insurance Co.* v. *Royal Drug Co., ante,* p. 205. Reported below: 182 U. S. App. D. C. 264, 561 F. 2d 262.

Miscellaneous Orders

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of the United States for modification of Decree of this Court entered on March 9, 1964 [376 U. S. 340], is referred to the Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter. [For earlier order herein, see, *e. g.,* 439 U. S. 419.]

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs, to the Report of the Special Master may be filed by the parties on or before May 3, 1979. Reply briefs, if any, to such exceptions may be filed on or before June 2, 1979. The Solicitor General is invited to file a brief in this case expressing the views of the United States. [For earlier order herein, see, *e. g.*, 431 U. S. 952.]

No. A–715. CLARK ET AL. *v.* O'BRIEN ET AL. Sup. Ct. N. J. Reapplication for stay, addressed to MR. JUSTICE BLACKMUN and referred to the Court, denied.

No. 77–1511. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ELLIOTT ET AL. C. A. 9th Cir. [Certiorari granted, 439 U. S. 816.] Motion of Gray Panthers for leave to file a brief as *amicus curiae* granted.

No. 77–1645. TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL. *v.* LEWIS. C. A. 9th Cir. [Certiorari granted, 439 U. S. 952.] Motion of Mary Sullivan et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for divided argument granted.

No. 77–1844. CITY OF MOBILE, ALABAMA, ET AL. *v.* BOLDEN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 815]; and

No. 78–357. WILLIAMS ET AL. *v.* BROWN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 925.] Motion of appellees to consolidate these cases for oral argument granted. Allocation of time and order of argument as set forth in the motion are approved.

No. 78–223. NATIONAL LABOR RELATIONS BOARD *v.* BAPTIST HOSPITAL, INC. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of Local 150–T, Service Employees International Union, AFL–CIO, for leave to intervene granted.

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, 439 U. S. 963.] Motion of Native American Rights Fund et al. for leave to file a brief as *amici curiae* granted.

No. 78–354. NORTH CAROLINA *v.* BUTLER. Sup. Ct. N. C. [Certiorari granted, 439 U. S. 1046.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

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. D. C. Mass. [Probable jurisdiction noted, 439 U. S. 1044.] Motion of appellant in No. 78–689 for additional time for oral argument granted, and five additional minutes allotted for that purpose. Appellees in these cases also allotted five additional minutes for oral argument.

No. 78–759. LEROY, ATTORNEY GENERAL OF IDAHO, ET AL. *v.* GREAT WESTERN UNITED CORP. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 1065.] Motion of the Solicitor General to permit the Securities and Exchange Commission to participate in oral argument as *amicus curiae* granted, and 15 additional minutes allotted for that purpose. Appellant also allotted 15 additional minutes for oral argument.

No. 78–6032. ORONOZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 78–874. ROTH ET AL. *v.* BANK OF THE COMMONWEALTH. C. A. 6th Cir. Certiorari granted. Reported below: 583 F. 2d 527.

No. 78–572. UNITED STATES PAROLE COMMISSION ET AL. *v.* GERAGHTY. C. A. 3d Cir. Certiorari granted and case set for oral argument in tandem with No. 78–904, *Deposit Guaranty National Bank* v. *Roper,* immediately *infra.* Motion to substitute members of a putative class as respondents or in the alternative to intervene is deferred to hearing of the case on the merits. Reported below: 579 F. 2d 238.

No. 78–904. DEPOSIT GUARANTY NATIONAL BANK OF JACKSON, MISSISSIPPI *v.* ROPER ET AL. C. A. 5th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Case set for oral argument in tandem with No. 78–572, *United States Parole Commission* v. *Geraghty,* immediately *supra.* Reported below: 578 F. 2d 1106.

Certiorari Denied. (See also Nos. 78–5760 and 78–5833, *supra.*)

No. 77–1444. JOHNSON *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 566 F. 2d 866.

No. 77–1517. GARRISON ET AL. *v.* GAULT. C. A. 7th Cir. Certiorari denied. Reported below: 569 F. 2d 993.

No. 78–240. PALMER *v.* TICCIONE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 576 F. 2d 459.

No. 78–486. COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE *v.* WHDH CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 580 F. 2d 9.

No. 78–845. PENOLI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–867. NORMAN *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 833.

No. 78–893. PELTIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 2d 314.

No. 78–913. Beil et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1313.

No. 78–917. Beran *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 580 F. 2d 324.

No. 78–945. Borough of Ellwood City *v.* Federal Energy Regulatory Commission et al. C. A. 3d Cir. Certiorari denied. Reported below: 583 F. 2d 642.

No. 78–974. Milwaukee County *v.* City of Milwaukee et al. C. A. 7th Cir. Certiorari denied.

No. 78–980. Grand Trunk Western Railroad Co. *v.* Barrett. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 132.

No. 78–981. Graves et ux. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. Reported below: 579 F. 2d 392.

No. 78–985. Gregory-Portland Independent School District et al. *v.* Texas Education Agency et al. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 81.

No. 78–999. Steere Tank Lines, Inc. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 279.

No. 78–1001. West et al. *v.* Harris, Secretary, Department of Housing and Urban Development. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 873.

No. 78–1025. Parker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 953.

No. 78–1087. Siverling *v.* Pennsylvania. Super Ct. Pa. Certiorari denied. Reported below: 258 Pa. Super. 632, 391 A. 2d 700.

No. 78–1101. BIANCONE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 78–1104. ADAMS ET AL. *v.* REIMER. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 621.

No. 78–1115. DAYTONA BEACH RACING AND RECREATIONAL FACILITIES DISTRICT ET AL. *v.* COUNTY OF VOLUSIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 367.

No. 78–1116. SHELL OIL CO. *v.* DEUKMEJIAN, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 34.

No. 78–1151. SAFE STOP BRAKE CORP. *v.* GENERAL MOTORS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 982.

No. 78–1171. SINGLETON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 174 Conn. 112, 384 A. 2d 334.

No. 78–1198. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1256.

No. 78–1208. CURTIS CIRCULATION CO. *v.* GOULD PAPER CORP. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 852.

No. 78–1209. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1235.

No. 78–1235. COBB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 607.

No. 78–5223. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 626.

No. 78–5610. TRANOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 835.

No. 78–5761. PRESTON *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 78–5767. MITCHELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–5777. PALMER *v.* KAPNER, JUDGE. Sup. Ct. Fla. Certiorari denied. Reported below: 364 So. 2d 889.

No. 78–5863. PILKINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 746.

No. 78–5950. HAYWOOD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 60 Ill. App. 3d 236, 376 N. E. 2d 328.

No. 78–5956. BROWN *v.* UNITED STATES. Ct. Cl. Certiorari before judgment denied.

No. 78–5965. DICKERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 392 A. 2d 516.

No. 78–6022. HAFEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 1034, 409 N. Y. S. 2d 37.

No. 78–6023. SMITH *v.* WARDEN, MENARD CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1285.

No. 78–6024. SULIE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 204, 379 N. E. 2d 455.

No. 78–6026. MAPP *v.* CLEMENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1330.

No. 78–6036. GARCIA *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 78–6046. CAMPBELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6038. WRIGHT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 272 S. C. 429, 248 S. E. 2d 587.

No. 78–6042. LUSK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 63 App. Div. 2d 919, 406 N. Y. S. 2d 62.

No. 78–6043. TIDWELL *v.* ATWOOD, COMMISSIONER OF JOHNSON COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 840.

No. 78–6047. SIMPSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–6049. ARAGON *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 78–6053. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6121. SNOW, ADMINISTRATRIX *v.* TRANSIT CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 97.

No. 78–6145. DOOLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 201.

No. 78–6156. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6162. MENDOZA-CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–774. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 192 U. S. App. D. C. 376, 593 F. 2d 1030.

No. 78–789. CLARK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 55 Ohio St. 2d 257, 379 N. E. 2d 597.

No. 78–906. OTTER TAIL POWER CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 583 F. 2d 399.

No. 78–947. NEW YORK ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari.

No. 78–956. COVEN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 581 F. 2d 1020.

No. 78–1125. FISHER, U. S. DISTRICT JUDGE *v.* COOPER TIRE & RUBBER CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari.

No. 78–5369. HUGHES *v.* TEXAS. Ct. Crim. App. Tex.;

No. 78–5454. FELDER *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 78–5862. BELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 78–5369, 563 S. W. 2d 581; No. 78–5454, 564 S. W. 2d 776; No. 78–5862, 360 So. 2d 1206.

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. 78–1140. MICHIGAN *v.* JONES. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE POWELL would grant certiorari. Reported below: 403 Mich. 527, 271 N. W. 2d 515.

Rehearing Denied

No. 77–1688. SYMM, TAX ASSESSOR-COLLECTOR OF WALLER COUNTY, TEXAS *v.* UNITED STATES ET AL., 439 U. S. 1105;

No. 78–563. AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 439 U. S. 1114;

No. 78–674. MAYER *v.* OHIO STATE BAR ASSN., 439 U. S. 1048;

No. 78–782. PIPELINE CONSTRUCTION CO., INC. *v.* JAFFEE ET AL., 439 U. S. 1115;

No. 78–5632. CALHOUN ET UX. *v.* UNITED STATES, 439 U. S. 1118; and

No. 78–5726. SOMMERVILLE *v.* ALABAMA, 439 U. S. 1118. Petitions for rehearing denied.

MARCH 19, 1979

Affirmed on Appeal

No. 78–721. QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* HERNANDEZ ET UX. Appeal from D. C. N. D. Ill. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: See 471 F. Supp. 516.

Appeals Dismissed

No. 78–421. DAHLBERG ELECTRONICS, INC., ET AL. *v.* KIEVLAN ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 78 Cal. App. 3d 951, 144 Cal. Rptr. 585.

No. 78–1091. LOVE *v.* MAYNARD. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 78–1119. FAZEKAS *v.* UNIVERSITY OF HOUSTON ET AL. Appeal from Ct. Civ. App. Tex., 1st Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 565 S. W. 2d 299.

No. 78–1285. FLOYD *v.* ARIZONA. Appeal from Ct. App. Ariz. dismissed for want of substantial federal question. Reported below: 120 Ariz. 358, 586 P. 2d 203.

No. 78–6102. ABKEN *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 258 Pa. Super. 582, 391 A. 2d 672.

No. 78–1160. SAKER ET UX. *v.* HARPSTER BANK. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–5844. FARRELL *v.* JOHNSON. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 77–1653. CHILDS *v.* CHILDS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Orr* v. *Orr, ante,* p. 268. MR. JUSTICE STEWART dissents. Reported below: 60 App. Div. 2d 639, 400 N. Y. S. 2d 356.

No. 77–1786. LOYACANO *v.* LE BLANC. Sup. Ct. La. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Orr* v. *Orr, ante,* p. 268. Reported below: 358 So. 2d 304.

Miscellaneous Orders

No. A–731 (78–6198). HUDAK *v.* CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. C. A. 8th Cir. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–757. ELIAS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–771. UNION LIGHT, HEAT & POWER CO. ET AL. *v.* RUBIN, U. S. DISTRICT JUDGE. C. A. 6th Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. A–759 (78–1277). GOLDING *v.* CITY COUNCIL OF THE CITY OF RICHMOND ET AL. Sup. Ct. Va. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D–143. IN RE DISBARMENT OF BEASLEY. Disbarment entered. [For earlier order herein, see 439 U. S. 950.]

No. D–149. IN RE DISBARMENT OF GENUA. Disbarment entered. [For earlier order herein, see 439 U. S. 1041.]

No. D–151. IN RE DISBARMENT OF HOPFL. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. D–154. IN RE DISBARMENT OF BRICKEL. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. 78–223. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* BAPTIST HOSPITAL, INC. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of National Union of Hospital & Health Care Employees, RWDSU, AFL–CIO, for leave to file a brief as *amicus curiae* granted.

No. 78–303. COLBY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. *v.* DRIVER ET AL. C. A. 1st Cir. [Certiorari granted, 439 U. S. 1113.] Motion of the Solicitor General for divided argument granted.

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, 439 U. S. 1045.] Motion of Thomas P. O'Neill, Jr., et al. for leave to participate in oral argument as *amici curiae* granted, and 15 additional minutes allotted for that purpose. Motion of Helstoski to defer oral argument denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS would grant the latter motion. MR. JUSTICE POWELL took no part in the consideration or decision of the latter motion.

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, 439 U. S. 1045.] Motions for leave to file briefs as *amici curiae* filed by the following were granted: Pacific Legal Foundation, Washington Legal Foundation, Southeastern Legal Foundation, United States Justice Foundation, and Great Plains Legal Foundation. Motion of Government Contract Employers Assn. for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 78–511. LO-JI SALES, INC. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. [Certiorari granted, 439 U. S. 978.] Motions of American Booksellers Assn., Inc., et al., and Charles H. Keating, Jr., for leave to file briefs as *amici curiae* granted.

No. 78–482. SMITH, JUDGE, ET AL. *v.* DAILY MAIL PUBLISHING CO. ET AL. Sup. Ct. App. W. Va. [Certiorari granted, 439 U. S. 963.] Motion of Paul Raymond Stone for leave to participate in oral argument as *amicus curiae* denied.

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, 439 U. S. 1066.] Motion of the Solicitor General for additional time for oral argument granted, and 15 minutes allotted for that purpose. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 78–610. COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1066.] Motions of Neighborhood School Coordinating Committee et al. and Delaware State Board of Education et al. for leave to file briefs as *amici curiae* granted.

No. 78–627. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1066.] Motions of Delaware State Board of Education et al. and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted.

No. 78–690. REITER *v.* SONOTONE CORP. ET AL. C. A. 8th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of Kennedy Smith et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for divided argument granted. Motion of the Attorney General of Minnesota for leave to participate in oral argument as *amicus curiae* granted, and 10 additional minutes allotted for that purpose. Respondents also allotted 10 additional minutes for oral argument.

No. 78–749. KENTUCKY *v.* WHORTON. Sup. Ct. Ky. [Certiorari granted, 439 U. S. 1067.] Consideration of respondent's suggestion of mootness deferred to hearing of case on the merits.

No. 78–759. LEROY, ATTORNEY GENERAL OF IDAHO, ET AL. *v.* GREAT WESTERN UNITED CORP. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 1065.] Motion of National Association of Insurance Commissioners for leave to file a brief as *amicus curiae* granted. Motions of Attorney General of New York and Attorney General of Ohio for leave to participate in oral argument as *amici curiae* denied.

No. 78–1177. WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* BRACKER ET AL. Ct. App. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–5283. JACKSON *v.* VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, 439 U. S. 1001.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 78–6096. WELCH *v.* CELEBREZZE, CHIEF JUSTICE, SUPREME COURT OF OHIO; and

No. 78–6133. MEDLEY *v.* MOULTRIE, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 77–6219. BALDASAR *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 52 Ill. App. 3d 305, 367 N. E. 2d 459.

No. 78–959. PERRIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 580 F. 2d 730.

No. 78–599. SECRETARY OF THE NAVY ET AL. *v.* HUFF ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 78–1006, *Brown* v. *Glines,* immediately *infra.* Reported below: 188 U. S. App. D. C. 26, 575 F. 2d 907.

No. 78–1006. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 78–599, *Secretary of the Navy* v. *Huff,* immediately *supra.* Reported below: 586 F. 2d 675.

No. 78–972. UNITED STATES *v.* APFELBAUM. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 584 F. 2d 1264.

No. 78–990. UNITED STATES *v.* BAILEY ET AL.; and UNITED STATES *v.* COGDELL. C. A. D. C. Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 190 U. S. App. D. C. 142, 585 F. 2d 1087 (first case); 190 U. S. App. D. C. 185, 585 F. 2d 1130 (second case).

No. 78–1183. CARBON FUEL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 582 F. 2d 1346.

Certiorari Denied. (See also No. 78–1160, *supra.*)

No. 76–6853. RANDLE ET AL. *v.* BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 551 F. 2d 2.

No. 78–221. SIERRA TERRENO ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 79 Cal. App. 3d 439, 144 Cal. Rptr. 776.

No. 78–792. Ellis Trucking Co., Inc., et al. *v.* Smart et al. C. A. 6th Cir. Certiorari denied. Reported below: 580 F. 2d 215.

No. 78–817. Donald Everett D. et al. *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–860. Wolkind *v.* Virginia. Cir. Ct., Henrico County, Va. Certiorari denied.

No. 78–905. McKenna *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 779.

No. 78–927. Gros Ventre Tribe of the Fort Belknap Indian Reservation, Montana *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 1314.

No. 78–937. Taylor *v.* Simmons et al. C. A. 10th Cir. Certiorari denied.

No. 78–948. Tinghino *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 839.

No. 78–954. Western Fuels Assn., Inc., et al. *v.* Natural Resources Defense Council, Inc., et al. C. A. D. C. Cir. Certiorari denied.

No. 78–964. Farmer *v.* Holton, Judge. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 102, 245 S. E. 2d 457.

No. 78–966. Miller *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 589 F. 2d 1117.

No. 78–977. Abney *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 388.

No. 78–988. Laurenti et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 581 F. 2d 37.

No. 78–1004. Heilman et al. *v.* Bell, Attorney General, et al. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 373.

No. 78–1017. Tug Ocean Prince, Inc., et al. *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 1151.

No. 78–1019. Swafford *v.* Avakian. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 1224.

No. 78–1022. Crowell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 1020.

No. 78–1026. Klingaman, t/a Banner Sightseeing Co., et al. *v.* Sommers. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 354 So. 2d 1219.

No. 78–1035. Pace et al. *v.* Department of the Treasury et al. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 39.

No. 78–1044. DiLuigi *v.* Kafkalas, Adjutant General of Pennsylvania. C. A. 3d Cir. Certiorari denied. Reported below: 584 F. 2d 22.

No. 78–1047. Horvat et al. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1282.

No. 78–1061. Haley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 582 F. 2d 1281.

No. 78–1062. McManus et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 583 F. 2d 443.

No. 78–1089. RKO General, Inc. *v.* Multi-State Communications, Inc. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 1, 590 F. 2d 1117.

No. 78–1090. Big Three Industrial Gas & Equipment Co., Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 304.

No. 78–1092. International Association of Machinists & Aerospace Workers, Airline District Lodge 146, et al. *v.* Air Line Employees Association International Union et al. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 567 S. W. 2d 623.

No. 78–1109. Bogle et al. *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 353 So. 2d 700.

No. 78–1121. Orr *v.* Argus-Press Co. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 1108.

No. 78–1123. Gonzalez et al. *v.* Northwest Airlines, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 586 F. 2d 834.

No. 78–1132. Waterbury Petroleum Products, Inc. *v.* John B. Hull, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 588 F. 2d 24.

No. 78–1137. Hauser *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 19 Wash. App. 506, 576 P. 2d 420.

No. 78–1141. Steelcase, Inc. *v.* Delwood Furniture Co., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 578 F. 2d 74.

No. 78–1147. Wilson *v.* Board of Governors, Washington State Bar Assn. Sup. Ct. Wash. Certiorari denied. Reported below: 90 Wash. 2d 649, 585 P. 2d 136.

No. 78–1148. New World Life Insurance Co. *v.* Georgia International Life Insurance Co. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 388.

No. 78–1149. LITTON INDUSTRIAL PRODUCTS, INC. *v.* JAMESBURY CORP. C. A. 2d Cir. Certiorari denied. Reported below: 586 F. 2d 917.

No. 78–1150. NICKOLA *v.* PETERSON, DBA KAYDEE PRODUCTS CO. C. A. 6th Cir. Certiorari denied. Reported below: 580 F. 2d 898.

No. 78–1156. MACDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 2d 1211.

No. 78–1159. HANNER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 572 S. W. 2d 702.

No. 78–1163. OHIO EDISON CO. *v.* WILLIAMS, DIRECTOR, OHIO ENVIRONMENTAL PROTECTION AGENCY. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 78–1165. CHICAGO TITLE & TRUST CO., TRUSTEE, ET AL. *v.* LISNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 582 F. 2d 1092.

No. 78–1180. ROSENTHAL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS; and

No. 78–1193. CARNOW *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 73 Ill. 2d 46, 382 N. E. 2d 257.

No. 78–1182. KLINE *v.* PITTSBURGH & LAKE ERIE RAILROAD CO. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 821.

No. 78–1187. MILLER *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 78–1189. FADDEN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, —— N. E. 2d ——.

No. 78–1199. Forest Lawn Memorial Gardens, Inc., et al. *v.* Ayres et al. Ct. App. Tenn. Certiorari denied.

No. 78–1203. Shagoury *v.* Massachusetts. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 380 N. E. 2d 708.

No. 78–1220. Ley *v.* Cats et al. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1329.

No. 78–1234. Gust *v.* Cramer. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 852.

No. 78–1242. Insurance Company of North America *v.* Filor, Bullard & Smyth. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 598.

No. 78–1244. Fredericks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 470.

No. 78–1246. Parish et al. *v.* Maryland & Virginia Milk Producers Assn., Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1350.

No. 78–1280. Werbrouck *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 589 F. 2d 273.

No. 78–5771. Burke *v.* Virginia State Penitentiary. C. A. 4th Cir. Certiorari denied. Reported below: 577 F. 2d 732.

No. 78–5796. Eby et al. *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 78–5809. Artway *v.* Klein et al. C. A. 3d Cir. Certiorari denied.

No. 78–5810. Turner et al. *v.* Jones et al. C. A. 5th Cir. Certiorari denied.

No. 78–5823. Bertolotti *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 1379.

No. 78–5831. RACHAL *v.* LOUISIANA. Sup. Ct. La. Certeriorari denied. Reported below: 362 So. 2d 737.

No. 78–5835. HUFF *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 744.

No. 78–5849. MULLINS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 571 S. W. 2d 852.

No. 78–5875. MOONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–5877. WEINRAUCH *v.* UNITED STATES SECRET SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–5887. COGDELL *v.* UNITED STATES;
No. 78–5889. WALKER *v.* UNITED STATES; and
No. 78–5904. BAILEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: No. 78–5887, 190 U. S. App. D. C. 185, 585 F. 2d 1130; Nos. 78–5889 and 78–5904, 190 U. S. App. D. C. 142, 585 F. 2d 1087.

No. 78–5921. LILES *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–5923. MASTROCOLO *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 575 F. 2d 880.

No. 78–5924. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–5936. DRUCKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1332.

No. 78–5943. DITTMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 841.

No. 78–5955. SCHERER *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 2d 170.

No. 78–5976. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 838.

No. 78–5986. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–5999. HERRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 711.

No. 78–6010. BEALS *v.* WILSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–6012. MCGRATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6057. POPE *v.* POMERLEAU ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 571 F. 2d 577.

No. 78–6059. IRONS *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1330.

No. 78–6063. STAFFORD *v.* NAA EMPLOYEES FEDERAL CREDIT UNION. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6065. LANGFORD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 76 Mich. App. 197, 256 N. W. 2d 578.

No. 78–6075. HARPER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 78–6078. SANKEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 364 So. 2d 362.

No. 78–6079. YOUNG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 78–6084. BLANKENSHIP *v.* MCCARLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 518.

No. 78–6085. THOMAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 679, 409 N. Y. S. 2d 324.

No. 78–6092. JONES *v.* MORRIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 684.

No. 78–6094. JONES *v.* CARDWELL, PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 279.

No. 78–6097. GREEN *v.* WHITE. C. A. 8th Cir. Certiorari denied.

No. 78–6110. ROSHER *v.* WAINWRIGHT, DIRECTOR, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 826.

No. 78–6111. KING *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 586 P. 2d 756.

No. 78–6112. HOLLIMAN *v.* HARGETT, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6113. DENNIS *v.* WAINWRIGHT, DIRECTOR, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 78–6114. RICHARD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 607, 382 N. E. 2d 899.

No. 78–6115. AWKARD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–6119. GALE *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 580 F. 2d 52.

No. 78–6122. MILLS *v.* OHIO. Ct. App. Ohio, Knox County. Certiorari denied.

No. 78–6123. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6128. CHUMLEY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 482 Pa. 626, 394 A. 2d 497.

No. 78–6130. LEARY *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 78–6148. FRAIRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6154. LOVALLO *v.* VETERANS' ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 821.

No. 78–6168. MANSUETO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1335.

No. 78–6178. BURKLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 294, 591 F. 2d 903.

No. 78–6186. KILBURN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 F. 2d 928.

No. 78–6202. MAGEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 636.

No. 78–6203. POOLAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 103.

No. 78–6208. WILSON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 836.

No. 78–6209. Goosby *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6219. Smith *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 78–6234. King *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6246. Orozco-Rico *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 433.

No. 78–6247. Lock *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 452.

No. 78–6251. Jones *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 78–6257. Greene *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–933. Tulley, Guardian *v.* Tulley. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 83 Cal. App. 3d 698, 146 Cal. Rptr. 266.

No. 78–1170. Attorney General of New York *v.* Mizell. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 586 F. 2d 942.

No. 78–1039. Farino *v.* Farino. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Application for stay, presented to Mr. Justice Marshall, and by him referred to the Court, denied. Reported below: 63 App. Div. 2d 691, 404 N. Y. S. 2d 890.

No. 78–1178. Director, Office Workers' Compensation Programs, U. S. Department of Labor *v.* Jacksonville Shipyards, Inc., et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 575 F. 2d 79.

No. 78–5274. SHIPPY, AKA PREWITT *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. Ct. Crim. App. Tex. Certiorari denied based on respondents' representation that "[a]s long as [petitioner] is actively pursuing his right to a writ of habeas corpus, [he] will not be executed." Brief in Opposition 3.

No. 78–1049. ALIQUIPPA & SOUTHERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 78–1069. BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 583 F. 2d 678.

No. 78–5535. BODDE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 568 S. W. 2d 344.

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. 77–1567. BUCK *v.* HUNTER ET AL., 439 U. S. 1059;

No. 78–730. AMERICAN EXPORT LINES, INC., ET AL. *v.* METAL TRADERS, INC., 439 U. S. 1128;

No. 78–786. MCDANNALD *v.* HILL, ATTORNEY GENERAL OF TEXAS, ET AL., 439 U. S. 1128;

No. 78–5784. GIBSON *v.* MISSOURI PACIFIC RAILROAD CO. ET AL., *ante,* p. 921; and

No. 78–5819. ALERS *v.* TOLEDO ET AL., 439 U. S. 1131. Petitions for rehearing denied.

No. 78–5824. SILO *v.* PENNSYLVANIA, 439 U. S. 1132; and

No. 78–5830. JETER *v.* UNITED STATES, 439 U. S. 1120. Petitions for rehearing denied.

No. 78–454. PAVLECKA ET AL. *v.* BANNER, COMMISSIONER OF PATENTS AND TRADEMARKS, 439 U. S. 1046. Motion for leave to file petition for rehearing denied.

MARCH 26, 1979*

Appeal Dismissed

No. 78–1126. HOAGLAND ET AL. *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 270 N. W. 2d 778.

Vacated and Remanded on Appeal

No. 78–846. FIRST OF OMAHA SERVICE CORP., DBA BANKAMERICARD, ET AL. *v.* IOWA EX REL. TURNER, ATTORNEY GENERAL OF IOWA. Appeal from Sup. Ct. Iowa. Judgment vacated and case remanded for further consideration in light of *Marquette National Bank* v. *First of Omaha Service Corp.*, 439 U. S. 299 (1979). Reported below: 269 N. W. 2d 409.

Miscellaneous Orders

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, 439 U. S. 1045.] Motion of Affirmative Action Coordinating Center et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.†

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*MR. JUSTICE POWELL took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

†See also note, *supra*.

No. 78–156. UNITED STATES *v.* ADDONIZIO ET AL. C. A. 3d Cir. [Certiorari granted, 439 U. S. 1045.] Motion of respondents for divided argument granted.

No. 78–437. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WESTCOTT ET AL.; and

No. 78–689. PRATT, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS *v.* WESTCOTT ET AL. D. C. Mass. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. A–778 (78–1359). GUNDUY *v.* UNITED STATES. C. A. 2d Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 78–5981. FERRI *v.* ACKERMAN. Sup. Ct. Pa. [Certiorari granted, *ante,* p. 907.] Motion of petitioner for appointment of counsel granted, and it is ordered that Julian N. Eule, Esquire, of Philadelphia, Pa., be appointed to serve as counsel for petitioner in this case.

No. 78–6299. SATTERLEE *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 78–6135. BURY *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 78–1143. VANCE, SECRETARY OF STATE *v.* TERRAZAS. Appeal from C. A. 7th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 577 F. 2d 7.

No. 78–5937. YBARRA *v.* ILLINOIS. Appeal from App. Ct. Ill., 2d Dist. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 58 Ill. App. 3d 57, 373 N. E. 2d 1013.

Certiorari Denied

No. 78–907. CAIN *v.* MAZURKIEWICZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1273.

No. 78–930. JACKSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 33 Ore. App. 139, 575 P. 2d 1001.

No. 78–1055. FAIRCHILD INDUSTRIES, INC. *v.* HARVEY, U. S. DISTRICT JUDGE (UNITED STATES, REAL PARTY IN INTEREST). C. A. 4th Cir. Certiorari denied. Reported below: 581 F. 2d 1103.

No. 78–1063. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* MCI COMMUNICATIONS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 594.

No. 78–1082. CONZEMIUS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 97.

No. 78–1112. BROTHERS ET AL. *v.* SCHIMKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 78–1154. MILWAUKEE NEWSPAPER & GRAPHIC COMMUNICATIONS UNION, LOCAL 23 *v.* NEWSPAPERS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 2d 19.

No. 78–1157. DUPAS *v.* CITY OF NEW ORLEANS ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 361 So. 2d 911.

No. 78–1181. BATT *v.* MARION HEIGHTS, INC., ET AL.; and No. 78–6131. MUSSO *v.* SURIANO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 2d 59.

No. 78–1186. WHARTON *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1353.

No. 78–1188. SPICKLER *v.* BRENGELMANN ET UX. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 393 A. 2d 174.

No. 78–1195. TOKHEIM ET AL. *v.* BLUME. Ct. App. Iowa. Certiorari denied.

No. 78–1197. MCGRATH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 12, 385 N. E. 2d 541.

No. 78–1215. BALL *v.* BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 684.

No. 78–1232. COLLIER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 78–1269. MEADOWS *v.* O'BRIEN. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 78–1294. BONAMO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 560.

No. 78–1307. KING ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 209.

No. 78–1320. WHITTEN *v.* UNITED STATES; and
No. 78–6245. BRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 504.

No. 78–1326. LA DUCA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 587 F. 2d 144.

No. 78–1330. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 451.

No. 78–1332. LYLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 593 F. 2d 182.

No. 78–1340. JONAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–1352. MATTHEWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 442.

No. 78–1353. KING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 253.

No. 78–5857. GOLDBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 582 F. 2d 483.

No. 78–5918. DIXON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 557, 374 N. E. 2d 900.

No. 78–5919. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 784, 374 N. E. 2d 1285.

No. 78–5947. YOUNG *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 60 Ill. App. 3d 49, 376 N. E. 2d 712.

No. 78–5972. WISEBAKER ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 1.

No. 78–5977. OSBORNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 2d 413.

No. 78–6019. WATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–6025. JENKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–6028. GEOGHEGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–6031. BARNETTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6035. HERNANDEZ *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 78–6109. JACKSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6132. WHITE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 363 So. 2d 886.

No. 78–6134. NORSWORTHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 78–6138. SMITH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6142. HUBBARD *v.* HATRAK, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 414.

No. 78–6143. JAWA *v.* FAYETTEVILLE STATE UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 976.

No. 78–6147. CROSS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 838.

No. 78–6151. CRONNON *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 246.

No. 78–6157. COOPER *v.* FITZHARRIS. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 1325.

No. 78–6158. CLIFTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 78–6159. GREEN *v.* GORDON TRANSPORTATION, INC. C. A. 6th Cir. Certiorari denied.

No. 78–6164. SMITH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 482 Pa. 172, 393 A. 2d 435.

No. 78–6169. HOHENSEE *v.* SPADINE. Sup. Ct. Pa. Certiorari denied.

No. 78–6172. CAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 678.

No. 78–6189. TROWERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6207. BRIGGS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6215. MANNING *v.* SOLOMON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1330.

No. 78–6224. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 157.

No. 78–6249. DOERSCHLAG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 843.

No. 78–6261. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6263. PESCE, AKA PIERCE *v.* UNITED STATES; and
No. 78–6272. CORCIONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 111.

No. 78–6265. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 593 F. 2d 182.

No. 78–6266. ALLSBERRY *v.* WILKINSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 975.

No. 78–6270. PAULSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6280. MAESTAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6284. WHEAT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 798.

No. 78–6290. ROWAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 355.

No. 78–6292. HOWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 590 F. 2d 564.

No. 78–953. HOBBS ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 59 Ill. App. 3d 793, 375 N. E. 2d 1367.

No. 78–983. IDAHO ASSOCIATION OF NATUROPATHIC PHYSICIANS, INC., ET AL. *v.* UNITED STATES FOOD AND DRUG ADMINISTRATION ET AL. C. A. 4th Cir. Motion of Northwest Academy of Preventive Medicine for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 582 F. 2d 849.

No. 78–1227. ELLIS NATIONAL BANK OF TALLAHASSEE *v.* DAVIS ET UX. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 359 So. 2d 466.

No. 78–6048. SPENKELINK *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Motions of Association of the Bar of the City of New York and American Baptist Churches in the U. S. A. et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 578 F. 2d 582.

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. 78–5969. RYAN *v.* MONTANA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 580 F. 2d 988.

Rehearing Denied

No. 78–926. JACKSON *v.* UNITED STATES, *ante*, p. 913;

No. 78–5762. LUCK *v.* JACKSON, CORRECTIONS DIRECTOR, ET AL., *ante*, p. 920;

No. 78–5906. WARDEN *v.* WYRICK, WARDEN, *ante*, p. 924;

No. 78–5954. TEPLITSKY *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL., *ante*, p. 937; and

No. 78–6056. GORDON *v.* UNITED STATES, *ante*, p. 928. Petitions for rehearing denied.

MARCH 29, 1979

Dismissal Under Rule 60

No. 78–1257. GOODE *v.* HORIZONS TOWNE HOUSE, LTD., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60.

APRIL 2, 1979*

Appeals Dismissed

No. 77–1833. SUN OIL COMPANY OF PENNSYLVANIA *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF PENNSYLVANIA ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 476 Pa. 589, 383 A. 2d 519.

No. 78–1243. WERNET *v.* MINNESOTA. Appeal from Dist. Ct. Minn., 4th Jud. Dist., dismissed for want of substantial federal question.

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*MR. JUSTICE POWELL took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

No. 78–1225. ETKES *v.* BARTELL MEDIA CORP. ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1255. HELMSLEY ET AL. *v.* BOROUGH OF FORT LEE ET AL. Appeal from Sup. Ct. N. J. Motions of National Association of Realtors and National Apartment Assn. for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 78 N. J. 200, 394 A. 2d 65.

Certiorari Granted—Vacated and Remanded

No. 78–558. KRETCHMAR *v.* NEBRASKA. Sup. Ct. Neb. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Delaware v. Prouse, ante,* p. 648. Reported below: 201 Neb. 308, 267 N. W. 2d 740.

Miscellaneous Orders

No. A–800 (78–1443). STROUSE ET AL. *v.* WINTER. Sup. Ct. Okla. Application of petitioners for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–842 (78–1369). COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* REGAN, COMPTROLLER OF NEW YORK, ET AL. D. C. S. D. N. Y. Application of petitioners for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 77–1465. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR *v.* RASMUSSEN ET AL.; and

No. 77–1491. GEO CONTROL, INC., ET AL. *v.* RASMUSSEN ET AL., *ante,* p. 29. Motion of respondents for award of attorney's fees denied.

No. 78–1102. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* FREIMAN ET AL., *ante,* p. 941. Motion of appellees for award of attorney's fees and costs denied.

No. 78–223. National Labor Relations Board et al. *v.* Baptist Hospital, Inc. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of Local 150–T, Service Employees International Union, AFL–CIO, for divided argument granted.

No. 78–605. United States et al. *v.* Rutherford et al. C. A. 10th Cir. [Certiorari granted, 439 U. S. 1127.] Motion of National Health Federation for leave to file a brief as *amicus curiae* granted.

No. 78–711. Southeastern Community College *v.* Davis. C. A. 4th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of Board of Governors of the University of North Carolina for leave to file a brief as *amicus curiae* granted.

No. 78–753. Great American Federal Savings & Loan Assn. et al. *v.* Novotny. C. A. 3rd Cir. [Certiorari granted, 439 U. S. 1066.] Joint motion of the Solicitor General as *amicus curiae* and respondent for divided argument granted.

No. 78–6089. Blanton *v.* Engle, Correctional Superintendent, et al. Motion for leave to file petition for writ of habeas corpus denied.

No. 78–1254. Edmond *v.* Barlow, Chief Judge, U. S. District Court. Motion for leave to file petition for writ of prohibition denied.

Certiorari Denied. (See also No. 78–1225, *supra.*)

No. 77–1625. Image Carrier Corp. et al. *v.* Koch, Mayor of New York City, et al. C. A. 2d Cir. Motions for leave to file briefs as *amici curiae,* filed by the following, were granted: Associated Builders & Contractors, Inc., National Right to Work Legal Defense Foundation, Center on National Labor Policy, and National Association of Manufacturers. Certiorari denied. Reported below: 567 F. 2d 1197.

No. 78–179. Johnson et al. *v.* Ryder Truck Lines, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 575 F. 2d 471.

No. 78–880. Local Union No. 373, International Association of Bridge, Structural, & Ornamental Ironworkers, AFL–CIO, et al. *v.* Mundy et al. Super. Ct. N. J. Certiorari denied. Reported below: See 78 N. J. 326, 395 A. 2d 195.

No. 78–1124. Coleman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 228.

No. 78–1130. De Borja *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–1133. Chour *v.* Ferro, District Director, Immigration and Naturalization Service, et al.; and Der-Rong Chour *v.* Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1329 (first case); 578 F. 2d 464 (second case).

No. 78–1134. Rainone et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 2d 1132.

No. 78–1138. Barker et al. *v.* Commodity Futures Trading Commission. C. A. 5th Cir. Certiorari denied.

No. 78–1142. Reamer *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 589 F. 2d 769.

No. 78–1145. Conaway *v.* Alexander, Secretary of the Army, et al. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 540.

No. 78–1146. Raven *v.* Panama Canal Company/Canal Zone Government. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 169.

No. 78–1153. Angus *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–1158. Shipp et al. *v.* Memphis Area Office, Department of Employment Security of Tennessee, et al. C. A. 6th Cir. Certiorari denied. Reported below: 581 F. 2d 1167.

No. 78–1161. HAAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 216.

No. 78–1162. JORDAN ET AL. *v.* UNIVERSITY OF TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–1168. WALLACE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 586 F. 2d 241.

No. 78–1173. DAVIS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 2d 807.

No. 78–1185. SLEDGE ET AL. *v.* J. P. STEVENS & Co., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 2d 625.

No. 78–1205. FULTON *v.* HECHT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 1243.

No. 78–1207. FROST ET AL. *v.* EXECUTORS OF ESTATE OF MORRISON. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 652.

No. 78–1216. BRITISH AIRWAYS BOARD *v.* BOEING CO. C. A. 9th Cir. Certiorari denied. Reported below: 585 F. 2d 946.

No. 78–1224. LUKEFAHR *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 363 So. 2d 661.

No. 78–1236. ARNOLD ET UX. *v.* JOHNSON ET AL. Sup. Ct. Ky. Certiorari denied.

No. 78–1241. PEPI, INC., ET AL. *v.* PITCHFORD SCIENTIFIC INSTRUMENTS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1275.

No. 78–1250. BRAZIL *v.* SAMBO'S RESTAURANTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 834.

No. 78–1251. RENARD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 94 Nev. 368, 580 P. 2d 470.

No. 78–1252. LUPIA *v.* STELLA D'ORO BISCUIT CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 2d 1163.

No. 78–1256. WALLER *v.* MISSISSIPPI STATE HIGHWAY COMMISSION. Sup. Ct. Miss. Certiorari denied. Reported below: 361 So. 2d 988.

No. 78–1292. BENGEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1336. BUCKLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 498.

No. 78–1363. MILLER *v.* UNITED STATES; and DAVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1030 (first case); 588 F. 2d 1041 (second case).

No. 78–1377. BLAIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 481.

No. 78–5812. WOODALL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–5860. BRIGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–5893. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–5942. TROY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 78–5948. Woods *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 277, 248 S. E. 2d 612.

No. 78–5974. McClendon *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 384.

No. 78–5983. Figueroa *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–5991. Krotec *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–6040. Bradley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6041. Stanford et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 589 F. 2d 285.

No. 78–6051. Greer *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 1151.

No. 78–6054. Williams *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 825.

No. 78–6061. Ware *v.* United States; and
No. 78–6062. D'Andrea *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 2d 1351.

No. 78–6082. Thornton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 827.

No. 78–6105. Youngman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–6152. Lyon et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied.

No. 78–6155. Goodwyn *v.* Defenders Association of Philadelphia et al. C. A. 3d Cir. Certiorari denied.

No. 78–6160. Estep *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 196 Colo. 340, 583 P. 2d 927.

No. 78–6170. GIVENS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–6171. VALENTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 519.

No. 78–6174. BURNS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 518.

No. 78–6175. MASON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 295 N. C. 584, 248 S. E. 2d 241.

No. 78–6180. PENNINGTON *v.* LOUISVILLE GAS & ELECTRIC CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1224.

No. 78–6184. RUTH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 581 P. 2d 919.

No. 78–6185. BURKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6188. CUDJO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6190. DELESPINE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–6191. COONAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 578, 382 N. E. 2d 157.

No. 78–6192. WOOD *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6193. SEDILLO *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–6195. KESSINGER *v.* HESS, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6198. HUDAK *v.* CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 105.

No. 78–6199. FREDERICK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 20 Wash. App. 175, 579 P. 2d 390.

No. 78–6200. SCOTT ET AL. *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 78–6201. LATENDER *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 584 F. 2d 817.

No. 78–6210. O'NEILL v. BRUNN. C. A. 9th Cir. Certiorari denied. Reported below: 584 F. 2d 980.

No. 78–6217. STAFFORD *v.* WEBER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6262. DAIRSAW *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 739, 386 N. E. 2d 249.

No. 78–6298. MCGEE *v.* UNITED STATES; and
No. 78–6303. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 961.

No. 78–6302. GOODMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 705.

No. 78–6317. CORCIONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 111.

No. 78–6321. BRACKENRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 810.

No. 78–1253. BECKERS ET AL. *v.* INTERNATIONAL SNOWMOBILE INDUSTRY ASSN. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 581 F. 2d 1308.

No. 78–5932. RETZ *v.* RETZ. Ct. App. Ohio, Montgomery County. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 78–6166. BANKS *v.* GLASS, SHERIFF. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 518, 250 S. E. 2d 431.

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. 78–6196. SHOWKER *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: 146 Ga. App. 862, 247 S. E. 2d 515.

Rehearing Denied

No. 78–5871. YAMINE *v.* FORD MOTOR CO., *ante,* p. 923;

No. 78–5883. LEDESMA *v.* COLEMAN, U. S. CIRCUIT JUDGE, ET AL., 439 U. S. 1132; and

No. 78–5962. DAVIS ET AL. *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante,* p. 925. Petitions for rehearing denied.

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*See also note, *supra,* p. 977.

APRIL 13, 1979

Miscellaneous Order

No. A–868. EVANS *v.* BENNETT, CORRECTIONAL COMMISSIONER, ET AL. Application for stay of execution, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. MR. JUSTICE POWELL took no part in the consideration or decision of this application.

MR. JUSTICE BRENNAN, concurring.

It should be noted that the applicant has filed a letter with the Clerk of the Court stating in part:

> "1. On April 11, 1979, John Louis Evans, applicant's son, signed and verified a petition for writ of *habeas corpus* and stay of execution for filing with the United States District Court for the Southern District of Alabama.
>
> "2. Also, on April 11, 1979, that verified petition was mailed for filing to the clerk of that court.
>
> "3. As of April 11, 1979, the Alabama Supreme Court had not yet set a new execution date for John Louis Evans."

The above-stated facts may make it unnecessary for the Court to rule on her application for a stay at its conference on Friday, April 13. Should the District Court grant her son's application for a stay of execution, the application for a stay before this Court would become moot. Applicant is aware that the temporary stay granted in this action expires at 5 p. m. on April 13, 1979. No harm will come to applicant by the expiration of the temporary stay since the Alabama Supreme Court has not yet set a new execution date for her son and, until such date is set, her son cannot be executed.

In view of the foregoing, it is apparent that there is now no need to grant the application.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 987 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS ON APRIL 5 AND APRIL 6, 1979

EVANS *v.* BENNETT, CORRECTIONAL COMMISSIONER, ET AL.

ON APPLICATION FOR STAY OF EXECUTION

No. A–868. Decided April 5, 1979

A mother's application for stay of her condemned murderer son's execution scheduled by the Alabama Supreme Court for April 6, 1979, based on the son's alleged incompetency, is granted, pending further consideration by the Circuit Justice, or by the full Court if the application is referred thereto by the Circuit Justice, of submissions of a response to the application by respondent Commissioner of the Alabama Correctional System and an explanation by applicant's counsel as to why applicant had waited until April 2 to seek habeas corpus relief in Federal District Court.

MR. JUSTICE REHNQUIST, Circuit Justice.

This application for stay has come to me by reason of the unavailability of MR. JUSTICE POWELL. Applicant is the mother of John Louis Evans; her son was tried and convicted of robbery-murder and was sentenced to death pursuant to Alabama law by an Alabama trial court in April 1977. Evans did not contest his guilt at trial. Instead, he took the stand, confessed to the crime, and requested the jury to find him guilty so that he could receive the death penalty. His conviction and sentence were appealed (according to the application, against his will) under the Alabama automatic appeal statute, and the judgment and sentence were affirmed by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama. *Evans* v. *State,* 361 So. 2d 654 (Ala. Crim. App. 1977); *Evans* v. *State,* 361 So. 2d 666 (Ala. 1978). With his

approval, a petition for writ of certiorari seeking review of the sentence imposed upon him was filed in this Court in November 1978. On February 3, 1979, Evans' counsel, at Evans' insistence, filed a formal request for withdrawal of his petition for writ of certiorari, but both the petition for withdrawal and the petition for writ of certiorari were denied by this Court on February 21, 1979. *Evans* v. *Alabama, ante,* p. 930. Following that action by this Court, the Supreme Court of Alabama set an execution date of April 6, 1979.

According to the application for stay, John Louis Evans has refused to undertake any further appeals on his behalf and has repeatedly expressed his desire to die. On April 2, 1979—nearly six weeks after this Court had denied the petition for certiorari, and only four days before the execution date set by the Supreme Court of Alabama—applicant, the mother of the condemned killer, filed a petition for a writ of habeas corpus in the United States District Court in the Southern District of Alabama. That court heard oral argument on April 3, and following that argument dismissed the petition on the grounds that "the reason forwarded by petitioner for the inmate's failure to verify the petition, *i. e.,* incompetency is not supported by credible evidence, that Betty Evans is not entitled to next friend status by reason thereof, that accordingly, this Court has no jurisdiction over the action and the action must therefore be DISMISSED and the stay DENIED."

A timely notice of appeal was filed and the District Court issued a certificate of probable cause. On April 4, the applicant moved for a stay of execution in the Court of Appeals for the Fifth Circuit. That court likewise denied the application for a stay, reciting in its order:

> "A majority of the Court concludes that a factual issue justifying standing in a next friend has not been made.
>
> "Judge Hill would grant the stay in order to ascertain whether or not a mental deficiency short of incompetency would authorize proceedings by a next friend."

If I were casting my vote on this application for a stay as a Member of the full Court, I would vote to deny the stay. Evans has been found guilty of an atrocious crime, sentenced to be put to death in accordance with Alabama law, and has had his conviction and sentence reviewed both by the Alabama Court of Criminal Appeals and by the Supreme Court of Alabama. His petition for certiorari to review the judgments of those courts affirming his conviction and sentence was denied by this Court. A Federal District Court has denied a stay and dismissed the petition for habeas corpus filed by Evans' mother on his behalf, and a panel of the Court of Appeals for the Fifth Circuit also has denied a stay. There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, when the legal issues in the case have been sufficiently litigated and relitigated that the law must be allowed to run its course. If the holdings of our Court in *Proffitt* v. *Florida,* 428 U. S. 242 (1976), *Jurek* v. *Texas,* 428 U. S. 262 (1976), and *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), are to be anything but dead letters, capital punishment when imposed pursuant to the standards laid down in those cases is constitutional; and when the standards expounded in those cases and in subsequent decisions of this Court bearing on those procedures have been complied with, the State is entitled to carry out the death sentence. Indeed, just as the rule of law entitles a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed it and upheld it, should be carried out.

There is not the slightest doubt in my mind that the United States District Court made every effort to resolve doubts as to legal issues in favor of granting a stay, but was nonetheless

unable to find legal authority for granting the stay. My conclusion in this regard is supported by the following language from the opinion of that court:

> "Having concluded that next friend applications are permissible in habeas corpus cases, it remains for the Court to determine whether this is such a case that a next friend petition ought to be allowed. Both *Funaro* [*United States ex rel. Funaro* v. *Watchorn,* 164 F. 152 (CA2 1908)] and *Preiser* [*United States ex rel. Sero* v. *Preiser,* 506 F. 2d 1115 (CA2 1974)] limited the use of such applications to incidents of infancy, incompetency, or lack of time, and the Court is unpersuaded that any other grounds are permissible. In the instant case the inmate is over the age of majority and adequate time exists for him to verify his own petition, so the petitioner must fail unless the inmate is incompetent.
>
> "The only evidence presented to the Court in support of John Evans' incompetency is a sworn affidavit of a staff psychiatrist at the Mobile Mental Health Center. The psychiatrist, who has not personally interviewed or otherwise examined John Evans, concludes from conversations with other individuals that John Evans is 'not able to deal rationally with his situation and . . . probably need[s] someone else to make legal decisions affecting his life for him.' The affidavit further reveals that the doctor tried to arrange an interview between John Evans, himself, and a psychologist, but Evans refused to be evaluated. The evidence in rebuttal to the allegation of incompetency is quite strong. John Evans was evaluated prior to his murder trial and was determined fit to stand trial, and there is no indication of any intervening physical or mental disability arising between the time of trial and the filing of the petition in the instant case. Clearly one who is competent to stand trial is competent to make decisions as to the course of his future. At no time prior

to the filing of this petition, as far as the Court can ascertain, has John Evans' competency been questioned. The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his debts on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed, in view of the allegations in the case of *Jacobs* v. *Locke,* the death row conditions of confinement case presently pending in this Court, it may well be that John Evans has made the more rational choice. In any event, this Court is not persuaded that John Evans is incompetent merely from a professional opinion rendered on hearsay information.[1]"

"[1] Evans' attorney stated during the hearing that he had observed no change in Evans' mental condition in the past two years, but of course, this counsel is without any training in psychiatry."

The application for stay cites a number of decisions relating to mental competency, none of which seem to me to bear directly on the issue in this case. The application states (p. 7):

"The criticism of the trial judge that the affidavit is based on hearsay is due solely to the fact that John Louis Evans refused to see the psychiatrist. Clearly Evans should not be allowed to control his mother's standing to raise issues on his behalf."

To my mind, this argument stands the question on its head: It is not Betty Evans, the applicant, who has been sentenced to death, but her son, and the fact that her son refuses to see a psychiatrist and has expressed a preference for electrocution rather than serving the remainder of his life in a penitentiary cannot confer standing upon her as "next friend" which she would not have under recognized legal principles.

Nonetheless, since this matter is not before the full Court, but simply before me as a Circuit Justice, I must act as surrogate for the full Court. The most closely analogous case to come before us in this posture is that of *Gilmore* v. *Utah*, 429 U. S. 1012 (1976). There, a majority of the Court denied an application for a stay of execution over the dissents of MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, *id.*, at 1017, and of MR. JUSTICE MARSHALL, *id.*, at 1019, and MR. JUSTICE BLACKMUN, *id.*, at 1020. As I understand the dissent of MR. JUSTICE WHITE, its linchpin was the absence of any consideration or decision as to the constitutionality of the Utah statute providing for the imposition of the death penalty by the Utah courts. MR. JUSTICE MARSHALL'S dissent, as I read it, was based upon what he regarded as the inadequacy of the procedures provided by the State to determine the competency of the waiver by Gilmore of his right to appeal from the sentence imposed by the Utah trial court. MR. JUSTICE BLACKMUN'S dissent expressed the view that the question of the standing of Gilmore's mother to raise constitutional claims on behalf of her son was not insubstantial, and should receive a plenary hearing from this Court.

Were this a case involving an issue other than the death penalty, I think I would be justified in concluding that because the Alabama Court of Criminal Appeals and the Alabama Supreme Court have fully reviewed Evans' conviction and sentence, the same considerations which led four Members of this Court to disagree with our denial of a stay of execution in Gilmore's case would not necessarily lead all of them to do so here. But because of the obviously irreversible nature of the death penalty, and because of my obligation as Circuit Justice to act as surrogate for the Court, I do not feel justified in denying the stay on that assumption.

I have therefore decided to grant a stay of the execution ordered by the Supreme Court of Alabama to be carried out at 12:01 a. m. on April 6, 1979, pending further consideration

by me, or by the full Court at its Conference scheduled for Friday, April 13, in the event that I should refer the application to that Conference, of the following submissions:

(a) a response by respondent Larry Bennett, Commissioner of the Alabama Correctional System, to this application for stay;

(b) a detailed explanation by counsel for applicant as to why, in a matter of this importance, she waited from February 21, 1979, the date upon which this Court denied John Louis Evans' petition for certiorari seeking to review the judgment of the Supreme Court of Alabama, until April 2, 1979, to file a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama. There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last-minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession. Such an explanation is not a condition of the granting of this or any further stay, but the absence of it will be taken into consideration by me.

The parties are required to file the foregoing submissions by 12 noon, e. s. t., on Tuesday, April 10, 1979. Unless otherwise ordered by me or by the Court, this stay shall expire at 5 p. m., e. s. t., on Friday, April 13, 1979.

The application for a stay is granted on the terms and conditions set forth in this opinion, and an order will issue accordingly.

HANER *v.* UNITED STATES

ON APPLICATION FOR RECALL OF MANDATE AND STAY

No. A–864 (78–6468). Decided April 6, 1979

An application for stay, pending consideration of a petition for certiorari, of the Court of Appeals' order committing applicant, the president of a corporation under investigation by a federal grand jury for involvement in an allegedly fraudulent funding scheme, for civil contempt for refusing on the basis of his privilege against self-incrimination to answer questions before the grand jury regarding records maintained by the corporation, is denied where the inquiry was of a very general nature—a description of the type of records kept by the corporation.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that I stay, pending consideration of his petition for writ of certiorari, the order of the United States Court of Appeals for the Ninth Circuit committing him for civil contempt. This petition arises out of a grand jury investigation currently being conducted in the District of Oregon. According to the petition, the grand jury is investigating an allegedly fraudulent funding scheme involving Allstates Funding, Inc., of which applicant is president. Pursuant to a subpoena *duces tecum,* applicant appeared before the grand jury and refused to answer questions regarding corporate records maintained by Allstates Funding on the ground that he might incriminate himself. The United States District Court for the District of Oregon ruled that applicant could not invoke his Fifth Amendment privilege against self-incrimination with regard to the nature of records that were maintained by Allstates Funding. A unanimous Court of Appeals panel affirmed, noting that "[t]he privilege against compulsory self-incrimination protects against real dangers, not remote and speculative possibilities."

Applicant claims that if he testifies regarding the existence

of corporate records he confronts a Hobson's choice which will inevitably result in self-incrimination.

> "[I]f the Government learns from the testimony of Petitioner in response to question number seven, and its various subparts, that no corporate records were ever maintained in the first instance, the Petitioner will have provided the government with very strong circumstantial evidence of criminal intent and wrongdoing in his connection with the corporation. By the same token, if the Petitioner testifies that certain records that have not been produced under subpena were in fact maintained, the Petitioner will have provided the government with equally strong circumstantial evidence of criminal intent and consciousness of criminal wrongdoing by their likely destruction or surrepticious [*sic*] transfer to third parties." Pet. for Cert. 8–9.

Applicant places his principal reliance on *Curcio* v. *United States,* 354 U. S. 118 (1957). In *Curcio* this Court held that the contempt sanction cannot be used to compel a custodian of records to disclose the whereabouts of books and records which he has failed to produce if he claims that disclosure of their location will incriminate him. The *Curcio* Court recognized that the privilege does not extend to all oral testimony about the records. Certainly the custodian can be compelled to "identify documents already produced," *id.,* at 125, for the touchstone for evaluating the appropriateness of the privilege must be the "incriminating tendency of the disclosure." *Wilson* v. *United States,* 221 U. S. 361, 379 (1911). The Ninth Circuit relied on *Zicarelli* v. *New Jersey Investigation Comm'n,* 406 U. S. 472, 478 (1972), for the proposition that the self-incrimination privilege "protects against real dangers, not remote and speculative possibilities." A court contemplating a contempt citation must look to circumstances and context and gauge whether there is a real possibility that a responsive answer will incriminate the witness.

Given the very general nature of the inquiry in this case—a description of the type of records kept by the corporation*—I think that the courts below properly struck the balance and that it is accordingly unlikely that four Members of this Court will vote to grant certiorari. The application for stay of the order of commitment is denied.

*The petition does not relate the precise wording of the question and to that extent is deficient under this Court's Rule 23.

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Public access to fishing and hunting areas—Railroad lands—Government's implied easement.—Government does not have an implied easement to build a road across lands of petitioners, successors in fee of railroad which, under Union Pacific Act of 1862, was granted "checkerboard" blocks of land surrounding railroad's right-of-way, and petitioners' unwillingness to entertain, without compensation, a road affording public access to reservoir area used by public for fishing and hunting cannot be considered a violation of Unlawful Inclosures of Public Lands Act of 1885. Leo Sheep Co. v. United States, p. 668.

EDUCATIONAL USE OF CABLE TELEVISION SYSTEMS. See **Federal Communications Commission.**

ELECTIONS. See **Constitutional Law,** III, 4, 5; **Mandamus; Mootness,** 2.

ELECTRONIC SURVEILLANCE. See **Evidence.**

ELEVENTH AMENDMENT. See **Constitutional Law,** VIII; **Procedure.**

EMINENT DOMAIN. See **Constitutional Law,** II; VIII, 2; **Jurisdiction,** 4; **Public Officers and Employees.**

EMPLOYEE PSYCHOLOGICAL APTITUDE TESTS. See **National Labor Relations Board,** 1.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** III, 1; **Federal-State Relations,** 1; **Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Board.**

EQUAL PROTECTION OF THE LAWS. See **Collateral Estoppel; Constitutional Law,** III; **Evidence; Jurisdiction,** 2.

EVIDENCE. See also **Civil Rights Act of 1964.**

Admissibility—Internal Revenue Service regulations—Electronic surveillance of taxpayer's meetings with IRS agents.—Tape recordings, and testimony of IRS agents who monitored meetings between respondent taxpayer and IRS agent in connection with audit, are not required, in prosecution of respondent for bribing agent, to be excluded from evidence because of conceded violation of IRS regulations requiring Justice Department's approval of electronic surveillance between taxpayers and IRS agents, IRS not being required by either Federal Constitution or statute to adopt rules before engaging in such monitoring, and none of respondent's constitutional rights having been violated by recording or by agency's violation of its own regulations. United States v. Caceres, p. 741.

EXECUTIONS. See **Stays,** 2.

EXEMPTIONS FROM ANTITRUST LAWS. See **Antitrust Acts,** 1.

EXEMPTIONS FROM INCOME TAXES. See **Internal Revenue Code.**

EXTORTION. See **Constitutional Law,** V.

FARMERS HOME ADMINISTRATION. See **Federal-State Relations,** 2.

FEDERAL COMMERCIAL LAW. See **Federal-State Relations,** 2.

FEDERAL COMMUNICATIONS COMMISSION.

Validity of cable television rules—Access to channels.—FCC rules requiring certain cable television systems to develop specified channel

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capacity by 1986, to make available certain channels for access by public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes, are not within FCC's statutory authority, but impose common-carrier obligations on cable operators contrary to § 3 (h) of Communications Act of 1934. FCC v. Midwest Video Corp., p. 689.

FEDERAL LENDING PROGRAMS. See **Federal-State Relations**, 2.

FEDERAL-STATE RELATIONS. See also **Abortions; Bankruptcy Act; Collateral Estoppel; Constitutional Law**, VIII, 2; **Jurisdiction**, 3, 4; **Patents; Procedure; Public Officers and Employees.**

1. *Payment of unemployment compensation to strikers—Validity of state laws.*—A Federal Court of Appeals' judgment holding that National Labor Relations Act and Social Security Act do not render invalid a New York statute authorizing payment of unemployment compensation to striking employees, is affirmed. New York Tel. Co. v. New York Labor Dept., p. 519.

2. *Priority of liens—Federal lending programs—Controlling law.*—Priority of liens stemming from federal lending programs must be determined with reference to federal law, but because a national rule is unnecessary to protect federal interests underlying loan programs of Small Business Act and Consolidated Farm and Rural Development Act, relative priority of private liens and consensual Government liens arising from such programs is to be determined under nondiscriminatory state laws, absent a contrary congressional directive. United States v. Kimbell Foods, Inc., p. 715.

3. *Social Security Act—Aid to Families with Dependent Children–Foster Care program—State regulation.*—Under § 408 of Social Security Act, AFDC–FC program encompasses foster children who, pursuant to a judicial determination of neglect, have been placed in relatives' homes that meet a State's licensing requirements for foster homes operated by nonrelatives, and thus Illinois may not exclude from its AFDC–FC program foster children who reside with relatives. Miller v. Youakim, p. 125.

FIFTH AMENDMENT. See **Constitutional Law**, II; III, 2; V; VIII, 2; **Evidence; Jurisdiction**, 4; **Public Officers and Employees; Stays**, 1.

FIREMEN. See **Mootness**, 1.

FIRST AMENDMENT. See **Constitutional Law**, IV; **Mootness**, 2.

FIRST-IN-TIME DOCTRINE OF PRIORITY OF LIENS. See **Federal-State Relations**, 2.

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FOREIGN SERVICE ACT OF 1946. See **Constitutional Law**, III, 2.

FOREIGN SERVICE RETIREMENT SYSTEM. See **Constitutional Law**, III, 2.

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FOURTEENTH AMENDMENT. See **Constitutional Law**, I, III, 1, 3–7; V–VII; VIII, 2; **Jurisdiction**, 1, 2, 4; **Mootness**, 2; **Public Officers and Employees.**

FOURTH AMENDMENT. See **Constitutional Law**, VII; **Jurisdiction**, 1.

FRAUDULENT FUNDING SCHEME. See **Stays**, 1.

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FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law**, VIII, 1.

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GOVERNMENTAL USE OF CABLE TELEVISION SYSTEMS. See **Federal Communications Commission.**

GOVERNMENT LIENS. See **Federal-State Relations**, 2.

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GRAND JURY. See **Constitutional Law**, V; **Stays**, 1.

GRIEVANCE PROCEDURE. See **National Labor Relations Board**, 1.

GROSS RECEIPTS TAX ON PUBLIC CONTRACTORS. See **Collateral Estoppel.**

GUILTY PLEAS. See **Certiorari.**

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HEALTH INSURANCE. See **Antitrust Acts**, 1.

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HUNTING AREAS. See **Easements.**

HUSBAND AND WIFE. See **Constitutional Law**, III, 6; **Jurisdiction**, 2.

ILLINOIS. See **Constitutional Law**, III, 4, 5; VI; **Federal-State Relations**, 3; **Mootness**, 2; **Procedure.**

IMMUNITY OF FEDERAL GOVERNMENT FROM SUIT. See **Jurisdiction**, 3.

IMMUNITY OF PUBLIC OFFICERS FROM LIABILITY. See **Public Officers and Employees.**

IMMUNITY OF STATES FROM SUIT. See **Constitutional Law,** VIII; **Procedure.**

IMPEACHMENT OF CREDIBILITY OF WITNESSES. See **Constitutional Law,** V.

IMPLIED EASEMENTS. See **Easements.**

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INCOME TAXES. See **Evidence; Internal Revenue Code.**

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INDUCING PRICE DISCRIMINATION. See **Antitrust Acts,** 2.

INJUNCTIONS. See **Abortions.**

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INTERCEPTED CONVERSATIONS. See **Evidence.**

INTERNAL REVENUE CODE.

Income taxes—"Business league" exemption.—A trade organization for muffler dealers that confines its membership to dealers franchised by a particular corporation and its activities to that corporation's muffler business is not entitled to income tax exemption as a "business league" within meaning of § 501 (c)(6) of 1954 Code. National Muffler Dealers Assn. v. United States, p. 472.

INTERNAL REVENUE SERVICE. See **Evidence.**

"INVERSE CONDEMNATION" ACTIONS. See **Constitutional Law,** VIII, 2; **Jurisdiction,** 4; **Public Officers and Employees.**

"JOB RELATED" REGULATIONS. See **Civil Rights Act of 1964.**

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JURISDICTION. See also **Constitutional Law,** VIII, 1; **Mootness,** 1; **National Labor Relations Board,** 2; **Procedure.**

1. *State-court decision—Review by Supreme Court.*—This Court has jurisdiction to review Delaware Supreme Court decision even though that

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court held that a random stop of a vehicle by police to check driver's license and vehicle's registration not only violated Federal Constitution but also was impermissible under Delaware Constitution. Delaware v. Prouse, p. 648.

2. *Supreme Court's appellate jurisdiction—State-court judgment—Validity of alimony statute.*—This Court has jurisdiction over appeal from state court's judgment holding that Alabama alimony statutes whereby husbands but not wives may be required to pay alimony upon divorce did not violate Equal Protection Clause of Fourteenth Amendment, notwithstanding that appellant husband had failed to ask for alimony himself in divorce proceedings. Orr v. Orr, p. 268.

3. *Supreme Court's original jurisdiction—Quiet-title action by State—United States' waiver of immunity.*—Under 28 U. S. C. § 2409a (a), United States waived its sovereign immunity to suit by California invoking this Court's original jurisdiction to quiet title to certain lands against United States and Arizona, and 28 U. S. C. § 1346 (f) does not divest this Court of jurisdiction over such actions in cases otherwise within its original jurisdiction. California v. Arizona, p. 59.

4. *Tahoe Regional Planning Agency—"Inverse condemnation" action—Federal jurisdiction.*—In an "inverse condemnation" action against respondents Tahoe Regional Planning Agency and its members and executive officer by petitioner property owners who asserted that a land-use ordinance adopted by respondents destroyed value of petitioners' property in violation of Fifth and Fourteenth Amendments, petitioners stated a cause of action under 42 U. S. C. § 1983 and hence properly invoked federal jurisdiction under 28 U. S. C. § 1343, requirement of federal approval of Compact between California and Nevada which created Agency not foreclosing a finding that respondents' conduct was "under color of state law" within meaning of § 1983. Lake Country Estates v. Tahoe Regional Planning Agency, p. 391.

"JUST COMPENSATION" FOR TAKING PRIVATE PROPERTY. See **Constitutional Law**, II.

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LEASED-ACCESS USE OF CABLE TELEVISION SYSTEMS. See **Federal Communications Commission.**

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LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Death benefits—Limitation on amount.—Death benefits payable under Act are not subject to maximum limitations placed on disability payments by § 6 (b) (1) of Act. Director, Workers' Comp. Programs v. Rasmussen, p. 29.

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MANDAMUS.

Reapportionment of Mississippi Legislature—District Court plan.—Motion for leave to file petition for writ of mandamus to require District Court for Southern District of Mississippi to adopt immediately a plan reapportioning the Mississippi Legislature for 1979 session—rather than waiting to see if a plan fashioned by legislature is approved in a separate suit by State in District Court for District of Columbia under Voting Rights Act of 1965—is granted. Connor v. Coleman, p. 612.

MANDATORY RETIREMENT OF FOREIGN SERVICE EMPLOYEES. See **Constitutional Law, III, 2.**

McCARRAN-FERGUSON ACT. See **Antitrust Acts, 1.**

"MEETING COMPETITION" DEFENSE TO PRICE DISCRIMINATION. See **Antitrust Acts, 2.**

MEMBERSHIP OF STATE OPTOMETRY BOARD. See **Constitutional Law, III, 3.**

METHADONE USERS. See **Civil Rights Act of 1964; Constitutional Law, III, 1.**

MEXICAN-AMERICANS. See **Mootness, 1.**

MILK SUPPLIERS. See **Antitrust Acts, 2.**

MISCONDUCT IN OFFICE. See **Constitutional Law, V.**

MISSISSIPPI. See **Mandamus.**

MONTANA. See **Collateral Estoppel.**

MOOTNESS.

1. *County hiring procedure—Racial discrimination—Federal jurisdiction.*—In a federal-court class action where respondents, representing present and future black and Mexican-American applicants to County Fire Department, alleged that 1972 hiring procedure by which petitioners proposed to fill temporary emergency manpower needs in Fire Department violated 42 U. S. C. § 1981, jurisdiction is abated because of mootness, since there was no reasonable expectation that alleged violation would recur and interim relief and events had completely eradicated effects of alleged violation. County of Los Angeles v. Davis, p. 625.

2. *Validity of state election code—City election board's authority to settle suit.*—Court of Appeals properly dismissed as moot Illinois Elections Board's claim that Chicago Board of Election Commissioners lacked authority to conclude settlement agreement with respect to unresolved issue whether Illinois Election Code's requirement as to elections for offices of political subdivisions that new political parties and independent candidates obtain signatures equal to 5% of number of voters at previous election for such offices, coupled with filing deadline, impermissibly burdened First and Fourteenth Amendment rights, where state Board presented no evidence creating reasonable expectation that Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Illinois Elections Bd. v. Socialist Workers Party, p. 173.

MORTGAGEE'S RIGHT TO RENTS ON MORTGAGOR'S BANKRUPTCY. See **Bankruptcy Act.**

MOTHER'S APPLICATION TO STAY SON'S EXECUTION. See **Stays,** 2.

MOTORISTS AND MOTOR VEHICLES. See **Constitutional Law,** VII; **Jurisdiction,** 1.

MUFFLER DEALERS TRADE ORGANIZATION. See **Internal Revenue Code.**

MUNICIPAL OFFICIALS. See **Constitutional Law,** V.

NATIONAL BANKS.

City's commercial rent and occupancy tax—Imposition on national banks.—Under temporary provisions of Pub. L. 91–156, New York City may not impose its commercial rent and occupancy tax for period from June 1, 1970, through May 31, 1972, on national banks that lease offices and maintain their principal places of business in city. Chase Manhattan Bank v. Finance Admin., p. 447.

NATIONAL LABOR RELATIONS ACT. See **Federal-State Relations,** 1; **National Labor Relations Board.**

NATIONAL LABOR RELATIONS BOARD.

1. *Employee test results—Order directing disclosure to union—Abuse of discretion.*—Board abuses its discretion in ordering employer to turn over to union, employees' test batteries and answer sheets which union asserted were necessary for arbitration of grievance resulting from employer's rejection of certain employees for job openings because of their low test scores under employer's psychological aptitude testing program, notwithstanding that Board's order barred union from acting so as to cause tests to fall into hands of employees who had taken or were likely to take tests; and employer's willingness to disclose test scores linked with employee names only upon receipt of consents from examinees satisfied employer's obligations under § 8 (a) (5) of National Labor Relations Act. Detroit Edison Co. v. NLRB, p. 301.

2. *Jurisdiction—Church-operated schools.*—Schools operated by a church to teach both religious and secular subjects are not within Board's jurisdiction granted by National Labor Relations Act, and thus Board is without authority to issue cease-and-desist orders to require recognition of unions certified as bargaining agents for lay teachers in such schools. NLRB v. Catholic Bishop of Chicago, p. 490.

NEGROES. See **Mootness**, 1.

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NEW JERSEY. See **Constitutional Law**, V.

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OKLAHOMA. See **Constitutional Law**, I; III, 7.

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ORIGINAL JURISDICTION OF SUPREME COURT. See **Jurisdiction**, 3.

PATENTS.

Rejection of application—Enforcement of prior royalty contract—State law.—Federal patent law does not pre-empt state contract law so as to preclude enforcement of contract whereby, in return for exclusive right to make and sell keyholder designed by petitioner for which patent application was pending, respondent agreed to pay 5% royalty and if patent

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was not allowed in five years, to pay reduced royalty of 2½%—the patent not having been allowed within five years and the patent application having been subsequently rejected. Aronson v. Quick Point Pencil Co., p. 257.

PAYMENT OF UNEMPLOYMENT COMPENSATION TO STRIKERS. See **Federal-State Relations**, 1.

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POLITICAL PARTIES. See **Constitutional Law**, III, 4, 5; **Mootness**, 2.

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PRIORITY OF LIENS. See **Federal-State Relations**, 2.

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PRIVATE LIENS. See **Federal-State Relations**, 2.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, V.

PROCEDURE. See also **Mandamus.**

States' immunity from suit—Eleventh Amendment—Wrongful denial of welfare benefits—Retroactive relief.—Although 42 U. S. C. § 1983 does not abrogate Eleventh Amendment immunity of States and thus a federal court, upon holding that state officials' denial of welfare benefits was wrongful, may not award retroactive benefits to plaintiff class payable from state treasury, nevertheless federal court may properly order state officials to send notice to class members informing them that there are state administrative procedures for determining eligibility for past benefits, that their federal suit is at an end, and that federal court can provide them with no further relief. Quern v. Jordan, p. 332.

PROHIBITION OF OPTOMETRISTS' USE OF TRADE NAMES. See **Constitutional Law**, IV.

PUBLIC ACCESS TO FISHING AND HUNTING AREAS. See **Easements.**

PUBLIC CONTRACTORS. See **Collateral Estoppel.**

PUBLIC LANDS. See **Easements.**

PUBLIC OFFICERS AND EMPLOYEES. See also **Civil Rights Act of 1964; Constitutional Law, I; III, 1, 2, 7; V; Mootness, 1.**

Members and executive officer of Tahoe Regional Planning Agency—"Inverse condemnation" action—Immunity from federal damages liability.—In a federal-court "inverse condemnation" action against respondents Tahoe Regional Planning Agency and its members and executive officer by petitioner property owners who asserted that a land-use ordinance adopted by respondents destroyed value of petitioners' property in violation of Fifth and Fourteenth Amendments, individual respondents, as regional legislators, are entitled to absolute immunity from federal damages liability to extent that they were acting in a legislative capacity. Lake Country Estates v. Tahoe Regional Planning Agency, p. 391.

PUBLIC USE OF CABLE TELEVISION SYSTEMS. See **Federal Communications Commission.**

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REBUTTAL OF PRIMA FACIE CASE OF RACIAL DISCRIMINATION. See **Civil Rights Act of 1964.**

REGIONAL LEGISLATORS' IMMUNITY FROM LIABILITY. See **Public Officers and Employees.**

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REJECTION OF PATENT APPLICATION AS AFFECTING ROYALTY CONTRACT. See **Patents.**

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STATISTICAL EVIDENCE OF RACIAL DISCRIMINATION. See **Civil Rights Act of 1964.**

STAY OF EXECUTION. See **Stays,** 2.

STAYS.

1. *Contempt order.*—Application to stay Court of Appeals' order committing corporation's president for civil contempt for refusing to answer questions before a grand jury is denied. Haner v. United States (REHNQUIST, J., in chambers), p. 1308.

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2. *Death penalty.*—Mother's application to stay condemned murderer son's execution, based on son's alleged incompetency, is granted. Evans v. Bennett (REHNQUIST, J., in chambers), p. 1301.

STOPPING VEHICLE FOR CHECK OF LICENSE AND REGISTRATION. See **Constitutional Law**, VII; **Jurisdiction**, 1.

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1. Retirement of Henry Putzel, jr., as Reporter of Decisions, p. v.
2. Appointment of Henry C. Lind as Reporter of Decisions, p. 940.

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1. *"Business league."* § 501 (c)(6), Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(6). National Muffler Dealers Assn. v. United States, p. 472.

2. *"Business of insurance."* § 2 (b), McCarran-Ferguson Act, 15 U. S. C. § 1012 (b). Group Life & Health Ins. Co. v. Royal Drug Co., p. 205.

3. *"Common carrier."* § 3 (h), Communications Act of 1934, 47 U. S. C. § 153 (h). FCC v. Midwest Video Corp., p. 689.

4. *"Exclusive original jurisdiction."* 28 U. S. C. § 1346 (f). California v. Arizona, p. 59.

5. *"Foster family home."* § 408, Social Security Act, 42 U. S. C. § 608. Miller v. Youakim, p. 125.

6. *"Judicial power of the United States."* U. S. Const., Amdt. 11. Lake Country Estates v. Tahoe Regional Planning Agency, p. 391.

7. *"Prohibited by this section."* § 2 (f), Clayton Act, 15 U. S. C. § 13 (f). Great A&P Co. v. FTC, p. 69.

8. *"Tangible personal property."* Pub. L. 91–156, note following 12 U. S. C. § 548. Chase Manhattan Bank v. Finance Admin., p. 447.

9. *"Under color of state law."* 42 U. S. C. § 1983. Lake Country Estates v. Tahoe Regional Planning Agency, p. 391.

WORKMEN'S COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**